

**SOUTH AFRICAN LAW COMMISSION**

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**PROJECT 73**

**SIMPLIFICATION OF CRIMINAL PROCEDURE  
(ACCESS TO THE CRIMINAL  
JUSTICE SYSTEM)**

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## **INTRODUCTION**

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

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## **PREFACE**

This issue paper (which reflects information gathered up to the end of January 1997) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by 30 June 1997 at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr W van Vuuren. The project leader responsible for the project is The Honourable Ms Justice L van den Heever.

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## CHAPTER 1

### ORIGIN OF THE INVESTIGATION AND SOME INTRODUCTORY REMARKS

1.1 During 1989 the former Minister of Justice requested the Commission to investigate the possibility of simplifying criminal procedure, with particular reference to the following questions:

- (a) Whether the existing provisions relating to the procedure of pleading are unnecessarily cumbersome and/or whether they give rise to abuse.
- (b) Whether objections and arguments with regard to the charge, further particulars and jurisdiction, which unduly delay the commencement of the trial on the merits, could be countered or limited.
- (c) Whether the State should be given the right of appeal against sentence.
- (d) Whether the system under which an accused may proceed with an appeal only with the leave of the court should be extended at least to regional courts.
- (e) Whether the powers of presiding officers to curtail irrelevant or unduly protracted cross-examination and testimony should be extended.
- (f) Whether presiding officers should be empowered to call a pretrial conference between the State and the defence.
- (g) Whether presiding officers should be empowered to order a trial within a trial with regard to a particular fact in dispute before the actual trial proceeds.
- (h) Whether any other provisions relating to criminal procedure and the law of evidence should be amended in order to obviate unnecessary delays and abuse.

1.2 Owing to the extent of the investigation the Commission decided to publish several working papers dealing with different aspects of the investigation. In the first phase of the investigation the Commission published a working paper which addressed appeal procedures and related matters. This part of the investigation was completed and a report submitted to the Minister during 1994. In the previous year the Commission had published a working paper for general information and comment. This working paper addressed the reasons for delays in the completion of criminal trials, abuses of the process, specific provisions of the Criminal Procedure Act that cause delays and problems relating to the administration of the process. This investigation focused on a possible simplification of the process aimed at the elimination of delays in the completion of criminal trials. This report was submitted to the Minister on 16 January 1996.

1.3 However, during his budget vote speech to the National Assembly and the Senate in 1994, the Minister of Justice touched on a number of issues that should be addressed. He stated, **inter alia**, that he believed that the judicial system is in need of fundamental changes in order to make it more accessible to the public. Legal procedures should be simplified, terminology should be less technical, the judicial system should serve the community and it should also reflect the different schools of thought in the community. The Minister furthermore stated that it is absolutely necessary to involve the public in the adjudication process and that an investigation into a system of lay magistrates, similar to the British system, should be considered. The Minister also expressed concern for the unprecedented crime wave in South Africa. In this regard he stated that we needed innovative thinking and a new approach to solve the problems. He therefore requested the Commission to give urgent attention to the problems arising from the application of the Bill of Rights to criminal law, criminal procedure and sentencing.

1.4 In his address to the Senate in his budget vote in 1995 the Minister again emphasised the problem of access to justice. He stated that the key objective of the justice system in the new democratic South Africa is expressed in three words: Access to justice. He furthermore stated that the notion that all South Africa's people should have access to justice helps to determine the need and role of courts, the nature and role of other mechanisms and procedures to facilitate

justice, the role of lawyers and the legal profession, the role and place of the prosecuting authority in the system of justice, the role of paralegals and advice offices, the role of legal education, the approach to legal qualifications and the rules relating to admission as legal practitioners, the role of the public and NGO's as well as the role of modern technology. Following these further requests of the Minister the Commission redefined its investigation and decided to publish a working paper on access to justice in the next phase of its investigation. In his opening address at a Legal Forum on Access to Justice, held in Durban on 17 - 19 November 1995, the Minister of Justice referred to the proposed publication of the Commission's working paper on access to justice and the aspects the Commission intends to deal with. Furthermore, during the discussions at the Forum a number of problem areas were identified for investigation. With specific reference to the criminal justice system, this issue paper attempts to address some of the problem areas identified by the Commission as well as those identified at the Forum, to propose possible solutions and to invite comments thereon and to invite further suggestions for reform.

1.5 The Commission believes that it is of vital importance to consult with all interested parties in order to ensure the legitimacy of its recommendations. In the face of the legitimacy crisis in our criminal justice system and the crime wave that is sweeping the country, this is even more applicable to the Commission's present investigation. The Commission is therefore of the opinion that there should be deliberations on as wide a scale as possible.

1.6 It has also come to the Commission's attention that some of the aspects with which the Commission intends to deal, are currently also the subject of investigation by other agencies e.g. the question of greater community participation in the adjudication process, community involvement in the sentencing process and access to the courts. In this regard the Commission notes the Minister's reference in his budget vote speech to the investigation into a system of lay magistrates, the proposed legislation for the adoption of a juvenile justice system for South Africa which was published by the members of the Juvenile Justice Drafting Consultancy in November 1994 and the investigation of subcommittee 5 of the Constitutional Assembly into the structure of the courts and the judiciary. It is therefore necessary to outline the extent of the Commission's investigation precisely in order to prevent a duplication of work. Furthermore, if

there is clarity on the Commission's terms of reference, it would also speed up its investigation if the aspects which are currently being investigated by other agencies and the latter's identities, are brought to the Commission's attention. This would enable the Commission to facilitate co-operation between the agencies involved and to co-ordinate all aspects of the investigation to be undertaken by the Commission.

1.7 Therefore, in this issue paper the Commission attempts to define the problem areas which inhibit access to our criminal justice system and which should be investigated. The purpose is to facilitate our deliberations and to obtain the input of all interested parties. The views and conclusions contained herein are not the Commission's final views and the discussion paper attempts only to provide persons and bodies wishing to comment or make suggestions for reform of this branch of the law with some background in order to stimulate further discussion and deliberations.

## CHAPTER 2

### ACCESS TO JUSTICE - THE PROBLEM GENERALLY

#### \* **Introduction**

2.1 Although every citizen does not always come into direct contact with the justice system, it seems fair to state that a country's citizens are empowered by the knowledge that the laws and institutions that form the basis of their system uphold the rights and enforce the responsibilities of every member of their community. The certainty of this foundation should not be compromised by the cost or complexity of the system or by any other factor placing it beyond the reach of any section of the community. Justice, and the ability to enforce it, should be available equally to every member of the community, regardless of means and without discrimination.

2.2 In the context of the criminal justice system access to justice comprises many facets. The Constitution of the Republic of South Africa, Act 108 of 1996 acknowledges the right of every person to equality before the law and to equal protection of the law. Furthermore, the acknowledgment of individual rights by the Constitution implies the greatest possible access to the law and its institutions, to all available legal services and to full information about the nature and contents of the rights involved. In the criminal justice system access to justice should, therefore, not be restricted to access to the criminal courts and legal advice/representation after the alleged commission of an offence, but it should be defined so as to benefit every citizen even before the need arises to assert his or her rights. In order to address the problem of access to the criminal justice system a number of aspects should be reviewed including the law, the institutions and the ability of citizens to assert their rights.

#### \* **Legitimacy crisis**

2.3 The Commission is of the opinion that a detailed exposition of the problem is not necessary for the purpose of this discussion. It would suffice to say that the South African legal system is presently experiencing a legitimacy crisis and that law reform is uppermost in the

minds of many South African jurists. That this is true is witnessed by the Minister's request in this regard. The essence of the legitimacy crisis lies in the historical superimposition of a foreign legal system with its concomitant western jural postulates upon those of Africa. It is closely connected to the complex interaction between the dominant Western legal system and other prevalent intuitive legal systems. These latter systems include the servient indigenous African Legal systems which are accorded limited recognition.

2.4 In South Africa legal pluralism has been exploited. The dominant law was not only implemented as an agent of change and so called development by either replacing or adopting the indigenous legal systems, but also used as a political tool to subjugate the indigenous African community. Over the years a legal order was created which primarily suited the needs of that section of the community whose traditions and way of life may be classified as western capitalist. This system is inadequate to explain contemporary facts in South Africa.<sup>1</sup>

2.5 In South Africa, many of the peculiar problems facing the community stem from the largely ineffective administration of the criminal justice system in the lower courts. The lack of confidence in the system is of particular importance. Western dispute settlement procedures are regarded as not suited to solve legal problems as well as problems of social adjustment encountered by urban blacks. It is therefore natural that urban blacks resorted to self - help in the form of unofficial or folk institutions such as at first the Makgotla and later the people's courts.<sup>2</sup>

\* **Inefficiency of the criminal justice system**

2.6 The general public's perception of the administration of justice (particularly the criminal justice system) is not flattering. In recent times numerous newspaper reports emphasised and criticised the criminal justice system's inability to curtail the booming criminal industry. The following report appeared in the **Financial Mail** of 15 December 1995:<sup>3</sup>

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1 Compare G G van Niekerk "People's courts and people's justice in South Africa - New developments in community dispute resolution" 1994 **De Jure** Vol 1 19- 20.

2 G G Van Niekerk "People's Courts and People's Justice in South Africa" 1988 **De Jure** 292 at 293.

3 "Why the crooks are winning".

The message - and indeed the fact - is that crime does pay in SA. It pays because many, if not most, criminals escape capture. Many of those who are caught walk free because of poorly prepared police dockets, weak prosecutions or the failure of witnesses to appear in court.

2.7 For the purpose of this discussion the Commission deems it sufficient to state that the inability of the criminal justice system to protect our citizens inhibits access to justice and it enlarges the already existing legitimacy crisis.

\* **Legal representation**

2.8 Knowledge of rights and legal aid or legal representation is central to the achievement of access to justice, particularly in the criminal justice system. The effectiveness of our present legal aid services and the possibility of expanding the availability of legal advice and assistance in criminal cases should be considered in the light of criticism levelled against the system.

2.9 The regulation of the legal services market and of the legal profession raises issues that are of central importance to access to justice, for example, if the legal profession is regulated in a manner that impedes the freedom of lawyers to compete with each other, legal services will not be provided efficiently and users of legal services will pay the additional costs. Similarly, if the structure of the profession is such that users are required to pay for duplication of legal work the cost of legal representation will be increased and access to justice diminished. If the exclusive right of lawyers to perform legal services is framed too broadly, users are likely to be denied the chance to purchase services from providers. In South Africa there is much debate on how the structure of the legal services market inhibits access to justice. Much criticism has been levelled against problems with obtaining legal representation in criminal cases in particular.

2.10 The right to legal representation in criminal cases is a basic norm of fairness as reflected in a number of international legal instruments. The International Covenant on Civil and Political Rights states, for example, that:

14(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality:

...

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right and to have legal assistance assigned to him, in cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

2.11 The same attitude is reflected by article 6(3)(c) of the European Convention on Human Rights. In South Africa emergency legislation produced a system of criminal justice weighted significantly against the accused and the right of an accused person to legal representation was cruelly bruised as some people were detained without trial and without access to defence counsel.

2.12 The right to legal representation has been recognised in South Africa as a common law right and was entrenched by statute.<sup>4</sup> However, before 1988, the right was expressed more as a privilege than a right in that no obligation was placed upon judicial officers to inform the unrepresented accused of their right to legal representation or of the availability of legal aid. This, however, changed after the decision in **S v Radebe, S v Mbonani**.<sup>5</sup> The importance of the right to legal representation was again emphasised in a number of subsequent decisions.<sup>6</sup>

2.13 The right to legal representation is now entrenched in the Constitution. Section 35(3)(g) recognises the right of every accused to a fair trial which includes the right to a legal representative of his or her own choice or to be provided with a representative at the state's expense where the absence of a legal representative would otherwise result in an injustice.

2.14 The efficiency of our legal aid services in criminal cases should be evaluated with the aim of improving the service to all members of the community.

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4 Section 73(2) of the Criminal Procedure Act 51 of 1977.

5 1988 1 SA 191 (T).

6 **S v Khanyile** 1988 3 SA 795 (N); **S v Rudman**; **S v Johnson**; **S v Xaso**; **Xaso v Van Wyk** 1989 3 SA 368 (E); **S v Mabaso and Another** 1990 3 SA 185 (A).

\* **Conclusion**

2.15 From the exposition above it appears that there are three main problems in the criminal justice system which inhibit access to justice. These problems, however, relate to many aspects within the criminal justice system for example the structure of the courts, the composition of the bench, the efficacy of the courts, the accessibility of the courts, confidence in the system, the application of the law, legal representation, the structure of legal aid services, legal education, legal literacy, training programs etcetera.

2.16 In order to address the problem of access to justice we need a strategy geared towards resolving conflicts before they become legal problems, reforming key legal institutions and strengthening access and equity across the legal system. In his opening address at the Legal Forum on Access to Justice, held in Durban on 17-19 November 1995, the Minister of Justice stated that democracy is about empowering citizens and enabling them to take decisions about controlling their own lives. Access to justice is an essential component of empowerment and in order to increase access to justice we need to begin, not from the perspective of members of the legal profession, but from the perspective of the user of law and justice, namely the individuals and groups that form civil society. After all, it should be the primary function of the Courts to protect the rights of individuals and it is their needs and aspirations that should be considered to make justice real for them.

2.17 With this in mind the Commission has identified a number of aspects which are in need of reform in order to improve access to the criminal justice system. The purpose of this issue paper is therefore merely to stimulate deliberations and to obtain the input of the users of law and justice in order to make legitimate proposals for reform.

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## CHAPTER 3

### PROBLEMS AND POSSIBLE SOLUTIONS: ADDRESSING THE LEGITIMACY CRISIS

#### (a) The structure of the courts

3.1 Court facilities and services need to be available when and where the user requires them. In South Africa criminal cases are heard in three different courts, namely magistrates' courts, regional courts and the High Court. Since these courts have different jurisdictions and serve different geographic areas, access to these courts is affected. Most criminal cases are heard in the magistrates courts which are established for magisterial districts by the Minister of Justice. There are seven regional divisions with seats in Johannesburg, Pretoria, Bloemfontein, Durban, Kimberley, Port Elizabeth and Cape Town respectively. There are provincial divisions of the High Court with seats in Cape Town, Grahamstown, Kimberley, Pietermaritzburg, Bloemfontein and Pretoria and three local divisions of the High Court with seats in Durban Johannesburg and Port Elizabeth.

3.2 In the new constitutional dispensation the Republic is divided into nine regions. The political delimitation of regional borders was based on criteria like the rationalisation of existing structures and economic viability and it is clear that there should also be a re-evaluation of the court structures. There is clear recognition of the need to bring justice closer to society in order to restore confidence, legitimacy and credibility in the administration of justice. However, factors such as cultural and language differences and demography will make the achievement of this ideal very difficult. It must also be accepted that some regions have stronger and more developed infrastructures than others. This is a further complicating fact. For various socio-political reasons development in South Africa has always had an urban bias which caused rural communities to suffer neglect in most respects.

3.3 As a result it is claimed that there is an absence of courts in most rural areas. Communities, therefore, have to run after justice because they do not have courts in their own areas. They have to attend courts in their nearest town which is often not close to them. Because of the inadequacy of the administration of justice in a number of instances<sup>22</sup> cases are remanded regularly, witnesses have to sleep over and they suffer inconvenience due to a lack of adequate or appropriate accommodation. Not only do people have to run after justice, but in numerous instances they also have to wait for it and sometimes justice is never seen to be done.

3.4 In general the criminal jurisdiction of the High Court and the lower courts (regional and magistrates courts) is dependent on the area within which the offence was committed; the nature of the offence to be tried; and the power of the court to impose a sufficiently severe sentence. In practice the magistrates courts are the most accessible while the regional courts and High Courts are less accessible due to their geographic distribution. In order to alleviate this problem the High Courts and regional courts make use of circuit sessions. In order to reach people in the rural areas the magistrates courts also make use of periodical court sessions at various places within the magisterial district where such needs arise. It is, however, clear that the present court structures and situation do not live up to the expectations of most of our citizens and these should also be re-evaluated in the light of our new constitutional dispensation.

3.5 The Commission is of the opinion that a re-assessment of the availability of courts (both High and lower courts) is called for. The Hoexter Commission was appointed on 24 March 1995 to inquire into the rationalisation of the Provincial and Local Divisions of the High Court. Part of its terms of reference is to report on the efficacy or otherwise of the existing areas of jurisdiction, the desirability of altering court structures and/or existing areas of jurisdiction.

3.6 With regard to the lower courts the Commission concluded in its interim report on **Simplification of Criminal Procedure** that the geographic distribution of regional

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22 Compare the Commission's interim report on **Simplification of Criminal Procedure** chapter 2.

courts causes unreasonable delays in the disposition of criminal cases and proposed an amendment of the Criminal Procedure Act to speed up the transfer of cases to regional courts. The Commission did not specifically evaluate the geographic distribution of the lower courts with a view to improving access to the courts, but is of opinion that such an investigation is called for.

\* **Proposals for comment**

3.7 The Commission is of the opinion that the following proposals should be considered with a view to improving access to justice -

**(aa) A re-assessment of the structure and jurisdiction of the High Court and the lower courts. This is a long term solution and the Commission is of the opinion that the terms of reference of the Hoexter Commission should be broadened so as to include the lower courts.**

**(bb) Short term solutions might be:**

- (i) The establishment of temporary court structures or mobile courts in affected rural areas, or**
- (ii) Broadening the existing criminal court structures by giving statutory recognition and criminal jurisdiction to -**

**\*community courts;**

**\*courts of petty sessions (similar to the small claims courts in civil law) presided over by lay magistrates. (More detailed proposals on the establishment of community courts and courts of petty sessions are discussed later in this paper.)**

3.8 The Commission invites further suggestions and proposals for reform in this regard.

**(b) Access to courts and their facilities**

3.9 In South African it is a well established principle in criminal procedure that court proceedings are conducted in public. There are, however, exceptions to this principle. Criticism is levelled against the system because of the formal, oppressive and intimidating environment in which court proceedings are conducted. This problem is enlarged by the fact that illiterate accused persons are often confronted by this unfriendly environment without the assistance of a legal representative to face criminal charges conducted in procedures they do not understand.

3.10 Courts and tribunals should be accessible and buildings be designed with the needs of particular groups in mind, for example physically disabled persons. The physical facilities of existing courts in South Africa should be more user friendly.

**\* Proposals for comment**

**3.11 Access to the courts and their facilities should be improved in the following ways:**

- (aa) By evaluating existing facilities with the view to effecting changes where needed to make them more user friendly;**
- (bb) New facilities should give due consideration to a user friendly environment;**
- (cc) Every court should have an information desk where enquiries could be made;**
- (dd) Flexibility in services provision is an important feature of a more user-oriented court system. Court facilities and services need to be available when and where the user requires them.**

- (ee) Easy access to processes such as counselling and mediation is clearly most important. These processes are designed either to provide early settlement of disputes or to prevent disputes arising in the first place.**
  - (ff) Innovative use of technology also can make court facilities available to many areas without the need for expensive infrastructure. Rather than requiring people to travel great distances to access the courts, innovations such as video conferencing and greater use of telephone conferencing can bring the courts to their users.**
  - (gg) Distribution of brochures explaining the court facilities which are available and which courts should be attended in particular instances.**
  - (hh) Taking steps to make the documentation of the courts accessible.**
- (ii) Adopting practices to overcome geographical isolation.**

**3.12 The Commission invites further comments, suggestions and proposals for reform.**

**(c) Introducing community participation in the adjudication process**

3.13 The Commission has already pointed out that a large section of our population has no confidence in the legal system. Steps should be taken to address this problem, also in the criminal justice system. While there is no doubt that the idea of community or lay involvement in the judiciary is acceptable, it is necessary to give content to the idea. Creating models for future implementation is urgently needed. It is conceded that some models of lay participation in a deeply divided polity such as ours may cause extreme difficulty, but the practicability of lay participation should be assessed in order to ensure that our judicial system is accessible to all our communities.

**\* Possible solutions**

**3.14 A number of solutions should be considered:**

**(i) The jury system.**

3.15 Although not many would support this system it should not be rejected for this reason alone. The suggestion that the jury system be reintroduced has been made over the last few years and it deserves consideration notwithstanding the criticism levelled against it. It should be one of the options submitted to the public for comment. A brief discussion of the advantages and disadvantages of the system will highlight the viability of the system and its operation is accordingly set forth in some detail. The discussion is based on the Commission's report on Constitutional Models and a reference to that discussion appears to be sufficient for purposes of this discussion paper.<sup>23</sup> It should be pointed out that a legal system will not acquire legitimacy unless it reflects social reality.

3.16 The jury system was introduced in South Africa in the 19th century. Before the British occupation of the Cape in 1806 there was no institution such as a jury system at the Cape. Roman-Dutch law was applied and it did not recognise an institution such as the jury. In 1809 the legal system in Holland was replaced by the Code Napoleon and the legal system in South Africa was thereafter restricted to Roman-Dutch law as it applied in Holland before 1809. Any changes in the application of the law, especially with regard to criminal procedure and the law of evidence, were thereafter characterised by receptions from English Law. Towards the end of the rule of the Dutch East India Company a commission recommended that a court should be constituted of a judge and six members of a council. Three members of the council were to have legal qualifications and three were to be elected from the most important and most influential colonists.<sup>24</sup> The jury system was introduced at the Cape in 1828 together with the reception of the English law of evidence and rules of criminal procedure. Natal accepted the jury system in 1845, the Orange Free State in 1854 and shortly thereafter the Transvaal. Various laws dealing with the jury system were adopted.

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23 1991 1147 - 1159.

24 J A Chubb "The jury system" 1965 SALJ 195.

3.17 In 1914 provision was made for the institution of special courts that functioned without juries. These courts tried cases of a political nature. Even before Union the former colonies had such courts.<sup>25</sup>

3.18 The Criminal Procedure and Evidence Act 31 of 1917, contained extensive provisions regulating trial by jury. These included provisions that criminal trials in higher courts were to take place before one or more judges and a jury consisting of nine men. At least seven members would determine the verdict.<sup>26</sup> The Act contained extensive provisions regarding the qualifications, disqualifications and exemptions of jurors.

3.19 Section 216 of Act 31 of 1917 also provided that any person who had been notified that he was to stand trial on any charge in a local or provincial division of the Supreme Court, could, by way of a notice directed to the registrar of the court concerned, insist on being tried without a jury.<sup>27</sup> A far-reaching amendment was introduced in 1935 when the Minister of Justice was authorised to order trial without a jury in certain cases. Professor S A Strauss<sup>28</sup> has the following to say in this regard:

These were cases where the accused was charged with certain offences of a political nature, offences relating to illicit dealing in, or possession of precious metal or precious stones, or to the supply of intoxicating liquor to natives or coloured persons, to insolvency, or the commission of any offence towards, or in connection with a person of a different race. To this list was added in 1948 offences in connection with which expert knowledge of bookkeeping or accounts was necessary, in 1954 offences in connection with which expert knowledge of mineralogy and metallurgy was necessary and offences under the Suppression of Communism Act, 1950.

3.20 Since 1948 the power of the Minister of Justice to order trials without jury gradually increased. In 1958 the Minister made 35 orders, 46 in 1957, 56 in 1954 and 62 in

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25 S A Strauss "The development of the law of criminal procedure since Union" 1960 Acta Juridica 164.

26 W H Lansdown The South African Criminal Procedure and Evidence Acts 1917 - 1935.

27 W H Lansdown The South African Criminal Procedure and Evidence Acts 1917 - 1935 131 - 132.

28 S A Strauss "The development of the law of criminal procedure since Union" 1960 Acta Juridica 164 - 165  
-. See also H R Hahlo and E Kahn The Union of South Africa: the Development of its laws and Constitution Cape Town: Juta 1960 259.

1955.<sup>29</sup> Confidence in trial by jury continued to decline and in 1954 this was reflected in an amendment to the criminal code. This amendment provided, inter alia that trial without a jury would take place except where an accused (or all the accused depending on the case) otherwise elected.<sup>30</sup> However, this choice did not exist where the Minister exercised his power to order a trial without jury. In 1958, when the Supreme Court was empowered to impose the death penalty if it was found that aggravating circumstances attended a robbery (or attempted robbery) or house-breaking (or attempted house-breaking) with the intent to commit a crime, a judge, who presided at a trial without a jury, was obliged to appoint two assessors for such trial. The principle that in a case where the death penalty may be imposed, a verdict must be given by a court that consists of more than one member, was introduced for the first time in 1935. The amending Act referred to above retained this principle.<sup>31</sup>

3.21 In practice, trial by jury had already been replaced by trial by a judge and assessors before the adoption of the new Criminal Procedure Act 56 of 1955.<sup>32</sup> The Abolition of Juries Act 34 of 1969 finally did away with the jury system. Even before the abolition of the system it had, to a large extent, fallen into disuse. Various reasons have been advanced for the abolition of the jury system, including the fact that members of the public were extremely reluctant to serve on the jury; various excuses were used for not serving on a jury;<sup>33</sup> the number of persons who were exempted from jury service was so great that few competent persons remained; and the Minister of Justice had acquired such wide powers to order that certain trials be conducted without a jury that the use of trials by jury had declined in practice.

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29 H R Hahlo and E Kahn The Union of South Africa 259.

30 H R Hahlo and E Kahn The Union of South Africa 259.

31 H R Hahlo and E Kahn The Union of South Africa 259 - 260.

32 Dugard Introduction to Criminal Procedure Vol IV 39.

33 Minister of Justice Debates of the Senate of the Union of South Africa, Second Session, Twelfth Parliament 1959 1208.

3.22 One of the reasons which led to the abolition of the jury system, namely South Africa's complex race relations, is today advanced as justification for its reintroduction.<sup>34</sup>

The existing legal system has been criticised on account of an alleged lack of legitimacy. As already mentioned, it is now contended that the reintroduction of the jury system would alleviate this to a certain extent. Until the jury system was abolished it was the only means through which the public could participate in the application of criminal law. One of the reasons for the abolition of the jury system was the fear that an exclusively White jury would be prejudiced or could be perceived as being prejudiced in cases where the accused and the complainant were of different races. It is at present argued that the country's mores have advanced to such an extent that it is unthinkable that juries representing all South Africans could not be appointed. It is said that the introduction of a jury system would help to restore the legitimacy of the legal system.

3.23 Some advantages of the jury system are the fact that the jury is regarded as a counter to an oppressive government; ordinary people believe that their freedom is protected by juries; juries are frequently the starting point of the expression of a community's desire that unpopular legislation should be changed and juries involve citizens protecting the freedom of citizens. Some disadvantages are the inexperience of jurors and uncertainty as to whether they adhere to the judges' instructions; the inconvenience and financial implications attached to a jury system; the inadequate opportunity afforded to appeal because juries do not give reasons for judgment and the possibility of racial prejudices and the possibility of jurors being bribed.

3.24 Various factors have to be taken into account when considering the reintroduction of juries including the fact that in the USA statistics indicate that juries impose more severe sentences than judges; the costs involved in the reintroduction of a jury system is an important consideration because provision would have to be made for structural changes to court buildings to accommodate juries and places that are secluded and free of interruptions would have to be fitted out for jury deliberations; appointing people to

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34 Editorial August 1990 De Rebus 507. See also the newsletter of the "People for Justice - Why is the jury still out" 1 November 1990.

serve on a jury might not be welcomed by the person in the street; from a financial point of view, an entirely new infrastructure would have to be created and staff would have to be appointed to deal with the selection and appointment of jurors, applications for exemption, etcetera; provision would have to be made for both the State and the accused to object to jurors and this issue could become highly sensitive, especially when the objection is based on a juror's views concerning racial matters, political affiliation, religious convictions or lack thereof, state of health, lack of education and the qualifications of jurors are likewise no easy matter; the introduction of a jury system would require the presence of all jurors, their swearing in, dealing with objections and so forth which would definitely lead to a more protracted rather than a shorter process; it could create use of a multiplicity of translators with resultant costs; and it would invariably lead to further delays and postponements because of the absence of jurors or one of the interpreters”

\* **Proposal for comment**

**3.25 Should the jury system be reintroduced in South Africa and if so how should it operate?**

**(ii) Assessors**

3.26 The jury system in South Africa was attenuated by legislation and was eventually abolished and replaced by the use of assessors. The use of assessors was recently extended by an amendment to the Magistrate's Courts Act 32 of 1944. This solution was also addressed in the Commission's report on Constitutional Models.<sup>35</sup> Professors H R Hahlo and E Kahn<sup>36</sup> point out that "with the decline in the jury trial has come (at least up to 1959) a rise in trial by judge and assessors".

3.27 The system whereby judges have a choice of sitting with or without assessors is well established in South Africa. Section 145 of the Criminal Procedure Act 51 of 1977

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35 1159 - 1160.

36 H R Hahlo and E Kahn The Union of South Africa 262.

deals with this matter. A judge may sit alone or may appoint one or at the most two assessors at his discretion. The assessors must have experience in the administration of justice or special skill in any matter that may call for consideration during the trial.<sup>37</sup> In commercial cases an accountant may be nominated.

3.28 Prior to the new constitutional dispensation, in cases where the death penalty could be imposed, the presiding judge was obliged to appoint two assessors to assist him or her. This requirement led to complications since the judge had little material on which to make a prior decision in this regard. The judge relied heavily on the opinion of the Attorney-General or his representative, but he could not delegate this function.<sup>38</sup> Assessors could be summoned only if there was a trial and not if sentence alone was to be imposed. Assessors were required to take an oath or make an affirmation that they would give a true verdict according to the evidence. The judge alone decided upon any question of law and also decided whether any matter constituted a question of law or a question of fact. Questions of fact were decided by the majority of the court and the assessors could outvote the judge. In addition, assessors had a co-decision-making right concerning the factual admissibility of any confession or other statement by an accused. Sentencing was the function of the judge alone.<sup>39</sup> The judge could, however, discuss the sentence with the assessors.<sup>40</sup>

3.29 Provision also exists for the use of assessors in regional courts and magistrates' courts.<sup>41</sup> This section provides that the judicial officer presiding at any trial may, before any evidence has been led, with the approval of the Minister, summon to his assistance any person who has or any two persons who have, in his opinion, experience in the

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37 V G Hiemstra Suid-Afrikaanse Strafproses Durban: Butterworths 1987 316.

38 S v Dyanti 1983 (3) SA 532 (A) at 533 F-H. S v Schoba 1985 (3) SA 881 (A). See also D van Zyl Smit "The compulsory appointment of assessors" 1979 SALJ 173 and D van Zyl Smit "The compulsory appointment of assessors reassessed" 1984 SALJ 212.

39 S v Sparks 1972 (3) SA 396 (A).

40 S v Lekota 1978 (4) SA 648 (A).

41 Section 93 ter of the Magistrates' Courts Act 32 of 1944.

administration of justice or skill in any matter which may have to be considered at the trial. Such assessors are required to take an oath. Matters of law are decided by the magistrate and the magistrate also decides whether a matter for decision is a matter of fact or a matter of law. Upon all matters of fact the decision or finding of the majority of the members of the court constitutes the decision or finding of the court, except where only one assessor sits with the magistrate. In this case the decision of the judicial officer is the decision of the court. The imposition of sentence is regarded as a matter of law. Assessors are entitled to compensation unless they are public servants.

3.30 The system of assessors has been criticised because it seems that some judges often make use of the same assessors.<sup>42</sup> The fact that judges select their own assessors may create the impression that judges prefer certain individuals as assessors. The public may gain the impression that retired judicial officers who need an extra income are benefitted in this manner.

3.31 As has been stated above the use of assessors has recently been extended. In order to establish whether this is sufficient to address the problem of community involvement it is necessary to assess its working in practice, to determine its success and shortcomings and to identify problem areas. A number of proposals for the use of assessors in criminal trials were made at the Legal Forum on Access to Justice held in Durban on 17-19 November 1995 and the concept should be submitted for comments.

\* **Proposals for comment**

**3.32 The Commission invites comments and suggestions relating to the extension of the use of assessors in South African criminal law. The following proposals are submitted for comment:**

**Appointment of Assessors**

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42 Van Zyl Smit and Isakov 1985 SAJHR 230.

- (i) The judicial officer presiding in any division of the High Court or in the Lower Court may be assisted by two lay assessors at criminal proceedings in the following instances:
- (a) the trial of all offences listed in Schedules 1 and 2 of the Criminal Procedure Act, 1977 (Act No 51 of 1977);
  - (b) in the hearing any all opposed bail applications in respect of the offences mentioned in the Schedules in sub-paragraph (i)(a);
  - (c) all other criminal proceedings or opposed bail applications in any division of the High Court or Lower Court wherein the presiding officer deems it expedient or upon the request of the prosecutor, accused or District Assessors Committee. Provided that in any criminal proceedings where expert assistance with regard to any specialised or technical aspect is required, the presiding officer may for this purpose appoint an expert assessor as one of the two assessors.
- (ii) In civil matters in any division of the High Court or Lower Courts, the presiding officer may appoint two assessors, one of whom may be an expert assessor, in an advisory capacity.
- (We include (ii) only because Parliament would probably deal with the appointment of assessors sv “Courts” rather than sv the Criminal Procedure Act; although strictly speaking it falls outside the ambit of our mandate).

**Criteria for Appointment as an assessor:-**

- (i) An assessor to be appointed to assist the presiding officer on expert and/or technical aspects in any judicial proceedings, shall apart from his/her expertise, technical knowledge and experience, possess the appropriate academic or technical qualifications; or

- (ii) An expert assessor shall only be appointed in a case where his/her academic or technical expertise is relevant to the issues to be determined;**
- (iii) A person appointed as a community assessor shall qualify on the basis of his/her acceptability as an assessor by his/her community where he/she lives.**

**Presiding officer to administer an oath or affirmation:-**

**A judicial officer shall administer an oath to the person(s) when appointed as assessor(s), that he/she will give a true verdict, or a considered opinion, as the case may be, according to the evidence upon the issues to be tried or regarding the punishment, as the case may be, and thereupon they shall be a member(s) of the court for the prescribed period.**

**Composition of courts with assessors:-**

- (i) In Lower Courts the Clerk of the Court shall allocate community assessors to assist the presiding judicial officer, on a rotation basis according to a fixed roster compiled by the District Assessors Committee as prescribed by the Regulations.**
- (ii) In the High Court(s) the Registrar shall allocate community assessors on the same basis as mentioned in subparagraph (i).**
- (iii) Deviation from the roster shall only be allowed on good grounds.**
- (iv) An assessor shall recuse himself/herself on good cause shown.**

**Decisions and findings: Procedure:-**

- (1) (i) The assessors together with the presiding officer shall decide on all matters of fact;

(ii) any matter of law arising for decision at such trial, and any question arising as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judicial officer and no assessor shall have a say in any such decision;

(iii) the presiding judicial officer may adjourn the hearing for argument upon any such matter or question as is mentioned in paragraph 1(ii) and may sit alone for such hearing;

(iv) upon all matters of fact the decision or finding of the majority of the members of the court shall be the decision or finding of the court;

(v) it shall be incumbent on the court to give reasons for its decision or finding on any matter made under paragraph 1(ii) or 1(iv).
- (2) The State shall be entitled to appeal to the Provincial Division of the High Court against any decision or finding made under paragraph (1)(i), (1)(ii) or (1)(v).

**Tenure of office:-**

- (1) The appointment of a community assessor shall be valid for a period of one (1) year from his/her date of appointment.
- (2) An expert assessor (defined in paragraph (ii) under the heading “appointment of assessors”) shall only be appointed in a specific case when his/her expertise is relevant to the issues to be determined.

**Death or incapacity of assessor**

- (1) If an assessor dies or, in the opinion of the presiding officer, becomes unable to act as assessor at any time during a trial, the presiding officer may direct -

  - (a) that the trial proceed before the remaining member or members of the court; or
  - (b) that the trial start de novo, and for that purpose summons an assessor in the place of the assessor who has died or has become unable to act as assessor.
- (2) Where the presiding officer acts under subparagraph (1)(b), the plea recorded shall stand.

**Remuneration of assessors:-**

If any assessor is not a person employed in a full-time capacity in the service of the State he/she shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him/her in connection with his/her attendance at the trial, and in respect of his/her services as assessor.

**General Provisions:-**

An assessor appointed to assist a presiding judicial officer shall comply with the general rules of the court to ensure that the court decorum is at all times maintained.

**Power of Minister to make rules:-**

The Minister may make rules regulating the following matters in respect of the appointment of assessors in courts:

- (a) **The establishing of District Assessor Committees, including their functions, powers and term of office;**
- (b) **Requirements for appointment of an assessor and procedure of evaluation of applicants, including disqualifications and/or code of conduct for assessors;**
- (c) **Training of assessors;**
- (d) **Remuneration of assessors;**
- (e) **Any other matter which he may consider necessary or expedient for carrying out the abovementioned objectives.**

**(d) Community and lay participation in the criminal justice process**

**\* Introduction**

3.33 As stated in chapter 1, the Minister indicated that he already initiated an investigation into a system of lay magistrates similar to the British model. It is, however, for purposes of the Commission's current investigation, also necessary to obtain the input of all interested parties in this regard and to co-ordinate it with the investigation already initiated by the Minister. This proposal was also addressed by the Commission in its report on Constitutional Models.<sup>43</sup>

3.34 A predominantly White male bench runs the risk that it will be regarded as being out of step with the social realities within which the crimes being heard were committed. Judges may find it difficult to understand sources of evidence that originated in a social milieu that is foreign to them.

3.35 In this regard it is useful to take note of the English system of lay magistrates, lay justices and lay justices of the peace. Under this system cases in magistrates' courts are dealt with almost entirely by amateur judicial officers. In 1987 there were 27 000

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43 1162-1163.

such judicial officers, 24 000 of whom were active. Only some 55 magistrates are paid full-time professional officials.<sup>44</sup>

3.36 In South Africa unofficial dispute resolution has been the norm in black metropolitan areas as long as these areas existed and official legal institutions regarded to be of secondary importance. The people's courts, which gained prominence in the latter half of the 1970's, were the historical antecedents of the politicised people's courts that came to the fore in the mid 80's.<sup>45</sup>

3.37 The proliferation of these courts in the 1980's was attributed to the failure of the formal court structure to administer justice and to the political aim of a certain section of the black community to render state institutions inoperative by creating alternative institutions. The inability of the existing legal system to address the needs of ordinary citizens was not merely due to the content of the substantive law, but also because the structure and procedural requirements of the courts meant that many people were denied access to the courts.<sup>46</sup>

3.38 The existing courts suffered a lack of legitimacy for a number of reasons. The imposition of apartheid legislation and its enforcement by the police alienated blacks from the formal legal structures. The policies of forced removals, influx control and the Group Areas Act contributed to the alienation. The law for the blacks was consequently a source of harassment, humiliation and degradation. The law became an instrument of repression. The enforcement of the policies of apartheid by the police and their limited presence in the townships, inadequate infrastructures to facilitate proper investigation of crime and their reluctance to apprehend and successfully prosecute criminals contributed to the lack of confidence in the police as a source of protection.<sup>47</sup>

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44 J R Spencer Jackson's Machinery of Justice Cambridge: Cambridge University Press 1989 at 402.

45 G G van Niekerk "People's courts and people's justice in South Africa- New developments in community dispute resolution" 1994 De Jure Vol 1 22.

46 B Grant P Schwikkard "People's Courts?" 1991 SAJHR 304 at 305.

47 B Grant P Schwikkard "People's Courts? 1991 SAJHR 304 at 307.

3.39 Culturally alienating court proceedings were conducted in a language which caused many accused to rely on interpreters whose accuracy could not be guaranteed. Access to legal representation was near impossible and the costs of litigation was a serious inhibiting factor.

3.40 The result was that informal structures replaced the formal structures. One of the consequences of the townships rebellion has been the collapse of township based structures and the people's courts played a vital role by offering an alternative institution of government.

\* **The practice of the informal courts**

3.41 Informal courts were established by a variety of bodies, which included gangs, political parties, sports teams and groupings of concerned citizens. In some instances the officers of these courts were elected and in others self appointed. The courts generally exercised control over a limited geographical area and matters that came before them related to the purpose for which they were established. Courts without political affiliation restricted themselves to every day disputes arising within the community for example, domestic disputes between neighbours, custody and maintenance cases, allegations of witchcraft and a variety of crimes including theft and house breaking, but not serious crimes such as rape or murder. The latter cases were referred to the police. These courts were also concerned with every day life in the community and attended to street cleaning, burials and monitoring arrivals and departures within the community.

3.42 The procedures adopted in these courts varied. Many of the procedures could be linked to customary values and purported to ensure reconciliation within the community. Greater emphasis was placed on the individual and his circumstances than on the offence itself. Both parties were given the opportunity to present their cases and to cross examine one another. The court played an active role and the procedure was

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inquisitorial. In some instances these courts accepted rightly or wrongly that the accused was guilty, concentrating on the severity of sentence was the main concern.

3.43 In a number of courts the verdict was determined in accordance with majority vote and the decision as to sentence was taken in similar fashion. Sentencing practices, however, reflected a great disparity. In some instances it was possible to appeal to a higher court but in most cases there was no recourse to an appeal court.

3.44 In the post-apartheid South Africa and since the introduction of the new Constitution the revolutionary role of people's courts became obsolete. However, effective government is dependent on a legitimate legal system and popular lay courts can play a vital role in legitimation through greater popular participation in the formal legal system.

\* **Proposals for comment**

**(i) The establishment of community courts**

**3.45 The establishment of community courts represents an attempt to create an institution with roots in the community that could be useful in the resolution of disputes. It has been suggested that community courts should be established to introduce community participation in the adjudication process and that such courts should also exercise criminal jurisdiction. The Law Commission has a separate project on its programme which will address the whole question of alternative dispute resolution mechanisms. That investigation (Project 94-Arbitration) has been broadened to include alternative dispute resolution mechanisms at all levels and the establishment of structures for alternative dispute resolution will also be addressed in the course of that investigation. However, with regard to access to the criminal justice process the two investigations overlap in that the establishment of community courts, and recognition of the role of traditional courts and traditional leaders in the criminal**

justice process are also options to be considered in improving community participation in the criminal justice process. For the purpose of this investigation comments are therefore also invited on these options and there will be coordination between the project committees for the two investigations for the purpose of making final recommendations on these issues.

**3.46 The Commission invites comments and proposals for reform on the following issues:**

- (a) Should communities be involved in the fight against crime and to what extent should formal recognition be given to their involvement?**
  - (b) Should there be formal recognition of community based structures such as community courts in the adjudication of criminal justice?**
  - (c) How should community courts be composed and what functions should be performed in relation to the criminal justice process?**
  - (d) Where should community courts be located, what criminal jurisdiction should they have, what should be the nature of the proceedings, what type of sentences should be imposed, should there be a referral system, should there be an appeal system, what training should be provided, and to what extent should provision be made for administrative resources?**
  - (e) What role should traditional courts play in the criminal justice system?**
  - (f) To what extent should traditional leaders be involved in the criminal justice system?**
- (ii) The introduction of courts of petty sessions similar to the small claims court**

**3.47 The system of small claims courts was instituted in 1985 in our civil procedure in order to make the law more accessible to the man in the street. The question arises whether a similar system should not be introduced in criminal law.**

**3.48 The small claims courts have limited jurisdiction and the procedure is largely informal. The presiding officer is a commissioner who is either a practising advocate or attorney or a legal academic or any other competent person who offers his or her services free of charge. Parties to the case are not assisted by legal representatives and the commissioner's decision is final. For the purposes of execution of sentences the procedure can be transferred to the magistrates courts.**

**3.49 Questions that must be answered are whether the introduction of courts of petty sessions is a viable option, who should be appointed as presiding officers, what should the jurisdiction of such courts be, what procedure should be followed, should there be provision for appeals and review of decisions and how will the procedure in such courts be influenced by the provisions of the Bill of Rights contained in the Constitution?**

## CHAPTER 4

### PROBLEMS AND POSSIBLE SOLUTIONS: IMPROVING THE IN EFFICIENCY OF THE CRIMINAL JUSTICE SYSTEM

#### \* **Background**

4.1 The South African criminal justice system is particularly criticised for the inordinate delays that occur in the disposition of cases. The right to a speedy trial has long been part of South African procedural law. Our Constitution now specifically recognises this right. Section 35(3) provides that every accused person shall have the right to a fair trial, which shall include the right to a public trial before an ordinary court of law within a reasonable time after having been charged. However, the inability of the courts to enforce this right has caused the public to lose confidence in the criminal justice system's ability to protect our citizens against crime. Furthermore, the lack of confidence in the criminal justice system seriously affects access to justice in that citizens fail to report crime, witnesses are not interested to attend court and people tend to take the law into their own hands. This problem needs to be addressed.

#### \* **Proposals for comment**

4.2 **Improving the efficiency of the criminal justice system requires the maximum use of the resources available. In its interim report on the simplification of criminal procedure the Commission has considered a number of proposals to address the problem of delays in criminal cases (see recommendations attached in Annexure A). The Commission invites further proposals and suggestions for reform on the following aspects:**

(a) **Control over the administration of the criminal justice system**

**4.3 A major problem requiring urgent administrative (political) attention, is the fragmentation of control over the four different kinds of government employees involved in dealing with crime: the police, the courts, correctional services, and probation officers. Until there is someone at the head of these, who can integrate or co-ordinate their activities effectively, legislation aimed at ensuring that the adage “Justice delayed is justice denied” could be counterproductive. Review records illustrate that cases are postponed time and again because, for example, a particular accused has not been included in the contingent sent to that court from prison; or the police investigation has not been completed but witnesses nevertheless subpoenaed or the record of the accused’s previous convictions has not yet come to hand; or a probation officer’s report has been sought but is not yet available; or though at last available, it recommends correctional supervision which requires a report by the appropriate official in Correctional Services; or by reason of other suchlike factors beyond the control of the magistrate or judge. For decades the natural reaction of each of these groups has been to “pass the buck”, by blaming others, when witnesses and victims and others frustrated by interminable delays in the process complain. Unless the administrative aspects of the entire criminal justice system are addressed and improved, legislation aimed at compelling the courts to speed up the trial process (which has been mooted elsewhere) could be counter-productive. Accused persons guilty of appalling crime could demand to be excused from accounting for their deeds on the strength of rights recognized by the legislature but eroded by incompetence. Although this strictly speaking falls outside the present mandate, suggestions aimed at improving the administration of the criminal justice system as opposed to merely simplification of its procedure relevant to trials, would also be welcomed. The Commission invites suggestions and proposals on the steps that can be taken to improve control over the administration of the criminal justice system.**

**(b) Legislation to counteract delays**

**4.4 In the South African criminal process there are various procedures which render the system open to abuse by those who apply it (prosecutors, legal representatives and police officers as well as accused persons and witnesses) while the power of the courts to counteract the resulting delays in the completion of trials, is limited. The Commission invites suggestions and proposals to counteract delays in the criminal justice system.**

**(c) Introducing charters for criminal courts**

4.5 Clearly, the just resolution of disputes and the sound application of the law must remain the highest priority for our courts. But to fulfill this role, the courts need to offer their services in a way that is accessible. In the practices they adopt, courts should cater to the needs of all people who use them, including those for whom the court experience is an unfamiliar one. Going to court need not be confusing, intimidating or difficult. Court practices and facilities need to be assessed against criteria of user accessibility. The emphasis should be on re-orienting the courts to a greater user focus. The development of charters (or documents, by whatever name, used by the court or tribunal, that outline aims for the delivery of services) is one very useful way to achieve this goal. In 1992 a Courts Charter was published in the United Kingdom which contains a number of user orientated measures such as:

You will only be called to court when necessary. This may be, for example, as a juror, defendant or witness. If we ask you to attend court, we will send you:

- \* A map showing you where the court is.
- \* Details of public transport and car parks close to the court.
- \* The date of the hearing and the opening hours of the court building.
- \* Details of facilities such as canteens, vending machines, a children's room and special arrangements for people with disabilities. (We will also tell you if these facilities are not available.)
- \* The name and telephone number of a person at the court whom you can contact for information. They will also help if you have special needs such as a disability or wish to wait in an area separate from other people involved in your court case.

When you arrive at the court you will find:

- \* Court staff who are available 30 minutes before the first scheduled hearing.
- \* Clear signposting.
- \* Courteous and prompt service from court staff who will wear name badges.
- \* Staff who will answer your questions; for example, about court room locations.

When you go to the public counter:

- \* If you ask, we will discuss business of a confidential nature out of the hearing of other members of the public.
- \* A maximum queuing time target will be displayed. This will include average queuing times for the quiet and busy periods.

When you telephone the court we will give you:

- \* An answer to your call within 30 seconds.
- \* The name of the court.
- \* The name of the person dealing with your query.
- \* A clear, helpful response.
- \* Help and assistance if the person you want to speak to is unavailable.

When you write to the court we will:

- \* Reply to or acknowledge your correspondence (normally by second-class post), within ten working days.
- \* Send you letters which give the writer's name, section and telephone section.

#### \* **Proposals for comment**

**4.6 The UK Charter is perhaps ambitious for all but the larger centres in South Africa, and promises on paper not kept in practice may enhance instead of alleviating disenchantment with our system. The Commission therefore invites suggestions and proposals on the introduction of basic Charters capable of implementation for criminal courts. In particular, the charters should focus on services provided to the community. They should publicly state objectives and plans in areas such as:**

- **physical facilities available in the court or tribunal;**

- **information made available by the court or tribunal;**
- **timeliness and efficiency in delivery of services;**
- **courtesy towards court and tribunal users;**
- **access to courts and tribunals; and**
- **responsiveness to user's views on service delivery.**

**(d) Case management**

4.7 Criminal cases should be finalised as soon as possible and steps should be taken to expedite the disposition of cases. Overburdened court rolls should be eliminated and the structure of the courts should be reviewed in order to address this problem.

**\* Proposals for comment**

**4.8 The Commission invites comments and suggestions for a case management system for criminal cases.**

**(e) Benchmarking**

4.9 Benchmarking is the comparison of an organisation's service delivery processes with similar processes elsewhere. We need a continuous and systematic evaluation of the performance of our criminal justice system in order to improve its performance against what are recognised as the best practices to follow.

**\* Proposals for comment**

**4.10 The Commission invites suggestions and proposals on steps that can be taken to improve the efficiency of our criminal courts and their performance.**

**(f) Emphasising the role of tribunal members**

4.11 Judges and magistrates are of pivotal importance to the proper functioning of our courts. They are responsible for administering the primary functions of those bodies. People are interested in judicial decisions, they have a special interest in the appointment of judges and magistrates and they need to feel confident that the process by which they are appointed is designed to find the best people for that important role. Our system should be evaluated to establish whether it satisfies this requirement.

\* **Proposals for comment**

**4.12 The Commission invites suggestions and proposals on steps that can be taken to improve the criminal justice system in this regard.**

**(g) Professional development programs**

4.13 The provision of professional development programs is an important means by which the quality of decision making may be enhanced and it should be reviewed.

\* **Proposals for comment**

**4.14 The Commission invites proposals and suggestions for improving the quality of the personnel involved in administering the criminal justice process.**

**(h) Better understanding of the role of courts**

4.15 With very few and easily understandable exceptions, all court proceedings should be conducted in public. The public has a right to be present in court or to receive reports on court proceedings. In this regard the debate about whether that openness should extend to the televising or radio broadcasting of court proceedings should be considered. Although broadcasting is widespread in a number of overseas countries, notably the United States, it is rare that television cameras appear in our courtrooms.

Even radio broadcasting of cases does not occur. The value of this option should be reviewed to assess its contribution to improve access to justice.

\* **Proposals for comment**

**4.16 The Commission invites suggestions and proposals for reform of our criminal justice system in this regard.**

**(i) Interpreters**

4.17 The Constitution recognises 11 official languages. In the past the majority of the people were linguistically disenfranchised and therefore the justice system was not really accessible to them. The right to use one's own language is now entrenched in the Constitution Steps should be taken to comply with the requirements of the Constitution.

4.18 The complexity entailed in a legal discourse in a courtroom depends very much on the flow and quality of communication between all the role players as facilitated by the interpreter. Furthermore, the language proficiency and skills of the interpreter depend largely on the quality of his or her training. The urgency of solutions to the language problem is emphasised by the fact that at present most accused persons are illiterate, they are faced with court procedures which are unfamiliar and the outcome of criminal trial may have serious consequences for an accused.

\* **Proposals for comment**

**4.19 The Commission invites comments and suggestions on the following issues:**

- (i) Interpreting in our courts should be professionalised.**
- (ii) The status of interpreters should be elevated by conducting upgrading courses. Consideration should be given to formal training courses in**

**interpreting and translating. Accreditation by a central or national accreditation board could be considered.**

- (j) An accessible and intelligible criminal procedure**

4.20 Laws that are easier to understand and easier to find help to improve community access to justice. Persons drawn into the criminal justice system must be in a position to readily approach and gain access to the system. The rules of our criminal procedure are complicated and in essence they are rules written by professionals to be applied by professionals. Vast numbers of accused persons, however, appear in our courts daily and for the majority of them it is their first encounter with the criminal justice system. They are confronted with complicated rules of procedure in an unfriendly and intimidating environment and more often than not they also do not have legal representation.

4.21 In essence a criminal trial is a reconstruction of a crime committed and it takes place according to rules of criminal procedure, criminal law and the law of evidence. These rules were designed by professionals for professionals and accused persons and witnesses are lay participants in the proceedings. Although their rights are explained to them throughout the proceedings it can safely be said that such explanations are more often than not ineffective. The entitlement to rights is meaningless if one cannot exercise those rights. There is therefore clearly a need to make criminal proceedings more accessible.

\* **Proposals for comment**

**4.22 The Commission invites comments and proposals for reform on:**

- (i) Encouraging community consultation in the development of laws to ensure that they are well understood and responsive to community needs.**
- (ii) Supplying the public with booklets or brochures, informing them of their rights and the relevant procedures.**
- (iii) Use of technology (videos) to overcome problems of illiteracy.**
- (iv) Introducing a program for simplifying and improving legislation so that people are able to determine when their rights and obligations are affected without needing to rely on the legal profession.**

- (v) Creating uniformity in the laws that apply equally to all South Africans regardless of where they live.**
- (vi) Providing facilities for accessing legislation so that ordinary citizens are able to locate easily the laws that affect them.**
- (vii) Expanding community education programs to increase community understanding of the laws and provide people with the knowledge that will enable them to more easily resolve their legal problems.**
- (viii) Supplying legal representation to all accused persons appearing in court.**

## CHAPTER 5

### PROBLEMS AND POSSIBLE SOLUTIONS: IMPROVING LEGAL REPRESENTATION IN CRIMINAL CASES

#### \* **Introduction**

5.1 Legal aid/representation for accused persons has been problematic in South Africa for a number of years. It is estimated that on average more than 80% of all accused persons appear in our lower courts without legal representation. Section 35(3)(g) of our Constitution recognises the right of every accused to a fair trial which includes the right to a legal representative of his or her own choice or to be provided with a representative at the state's expense where the absence of a legal representative would otherwise result in an injustice.

5.2 The concept "fair trial" should not, however, only imply a fair trial in the minds of the professionals adjudicating the question, but the accused who is afforded the right must at least perceive his trial to be a fair one. The well known principle "justice must be seen to be done" in particular, is applicable as far as the general public is concerned. Against this background legal aid and legal representation in criminal cases is of critical importance.

5.3 At the Consultative Legal Forum on Access to Justice held in November 1995 in Durban, Nadel made a number of proposals for reform which are the basis for proposals on improved legal representation in criminal cases. These include:

**(a) Restructuring of the legal aid board to improve the service it provides in criminal cases**

5.4 It is essential that the Legal Aid Board be restructured to improve its role in regard to access to justice in criminal cases. There is a clear need for restructuring of the services it provides in regard to criminal cases.

\* **Proposal for comment**

**5.5 How should the Legal Aid Board be restructured to improve legal representation and the quality of representation in criminal cases?**

**(b) The need to assess the demand for legal services in criminal cases**

5.6 While we know that the majority of criminal defendants go unrepresented and that a vast number of civil claims are prejudiced by the lack of legal representation, there are no standardised data available to indicate the nature and extent of the demand for legal aid. Such information will make an evaluation possible of how equitably and effectively the system is working.

\* **Proposal for comment**

**5.7 An accurate system for collecting information on the demand for legal aid should be developed in order to evaluate the effectiveness of the legal aid system.**

**(c) The need to identify the resources available**

5.8 A comprehensive assessment must be made of all the human resources available, including paralegal's, candidate attorneys, law students, legal practitioners and ADR practitioners with a view to developing an integrated system incorporating primary and secondary, formal and informal legal services. We need a survey of all existing service providers, an objective evaluation of their role and definition of the role that different service providers should play, in particular with reference to the services provided in criminal cases.

\* **Proposal for comment**

**5.9 A comprehensive assessment of human resources available should be made and the role of different service providers in the criminal justice field should be identified.**

**(d) The role of the legal profession in expanding legal services in criminal cases**

5.10 We currently lack the sheer number of lawyers needed to service our community. We have the anomalous situation that although universities are providing twice as many law graduates as can be accommodated by the profession of attorneys and advocates, we have less than 13 000 legal practitioners for more than 30 million South Africans. In respect of criminal cases in particular, there is a need to take steps to improve access to legal representation. It has been suggested that consideration should be given to a system requiring all legal practitioners to contribute either financially or by providing unpaid legal services - towards the legal aid for the indigent.

**\* Proposal for comment**

**5.11 The legal profession should take steps to improve its role and responsibilities as a service provider and develop access to the profession in accordance with the needs of our society. The question is what steps should be taken.**

**(e) Efficient and equitable use of resources**

5.12 In order to ensure efficient and equitable allocation of resources, there must be informed consideration - and, in some cases, explicit policy debate and justification - of matters of allocation policy including the economic and substantive restrictions on legal aid and the distribution of resources as between criminal and civil cases. Attention must also be given to other factors which effectively limit access to legal aid. Information is

needed about why many people who are eligible for legal aid do not apply for it. Close examination is required of the factors inhibiting legal aid applications by different groups.

\* **Proposals for comment**

**5.13 The following aspects of accessibility to legal services are submitted for comment:**

- (i) Means to improve public awareness of the availability of legal aid, its purpose and how to apply for it;**
- (ii) establishing public perceptions on the efficacy and legitimacy of the legal aid system;**
- (iii) the availability of legal aid application centres for all South Africans, urban and rural;**
- (iv) facilitation of legal aid applications by ensuring that the procedure to be followed is comprehensible, and that adequate assistance is available.**

**(f) The role of paralegals**

5.14 At the Consultative Legal Forum on Access to Justice the Paralegal National Movement submitted that their clientele have experienced difficulties in trying to gain access to justice. The mere existence of the movement is proof of inaccessibility of justice in our country. Their understanding of access to justice is being able to use legal mechanisms of reparation available or provided in the country. Every individual is entitled to these mechanisms and the interim constitution and other legislation guarantees this. However this has not been the case in reality. It was submitted that:

1. Legal information is available mainly for legal practitioners.
2. Communities are intimidated from using the legal system, because of lack of knowledge of how it works.
3. Legal representation is inadequate, discriminatory against the disadvantaged e.g. women, children, prisoners, rural people etc.

4. Legal aid has not been able to serve its intended purpose.
5. The justice system's inaccessibility has led to it being perceived as illegitimate, ineffective, unfriendly, resulting in people resorting to other means of resolving disputes whether legal or illegal.
6. Unnecessary complexities brought into access to justice and the mystifying language used.

5.15 The movement defined a paralegal as a person trained to provide primary legal service to the community and accountable to it. Primary legal service is that which none of the practising lawyers, magistrates, prosecutors have provided except by way of advice offices and public interest legal service organisations. Some of the public interest legal organisations have their own problems in accessing their services to the communities. This is the broadest, primary area where legal services are needed - but has no state budget, no private sector involvement and very few academics interested. The service provided by paralegals involves:

1. **ADVICE WORK:** general guidance, casework, counselling, referral, dispute resolution (mediation and negotiation).
2. **COMMUNITY LEGAL EDUCATION:** re constitution and bill of rights, democracy, legal rights, new legislation etc.
3. **MONITORING AND LOBBYING:** they monitor state delivery and lobby jointly with the community for improvement or changes.
4. **BRIDGING:** Providing a link between the community and the State, by informing people of State services available to them and encouraging those hesitant but in need of assistance, to apply appropriately.
5. **COMMUNITY DEVELOPMENT:** They are involved in continuous community empowerment and development programmes and projects, simplifying RDP provisions and helping communities with procedures to access the RDP.

5.16 There is diversity in primary legal service depending on the circumstance and needs of the community being assisted. The service provided by paralegals is the first tier of legal services, the first point of call. It is community based, versatile, adaptable

and flexible. Lawyers and legal graduates are not orientated towards performing this service, in spite of the street law programme experience.

\* **Proposals for comment**

- (i) **There should be a formal and legal recognition of this primary legal service currently provided by paralegals.**
- (ii) **There should be standardized and accredited training supported by all stakeholders within the legal fraternity.**
- (iii) **The state should take full responsibility for providing funding for this primary legal service.**

**(g) The establishment of community legal centres**

5.17 Community legal centres can be a responsive and flexible method of providing legal advice and assistance to the public. They can be cost effective service providers that draw upon volunteer solicitors and community representatives, as has been proved in Australia. Such centres can provide services in areas of concern to all South Africans, especially in the areas of human rights and criminal matters.

\* **Proposals for comment**

**5.18 In South Africa accessible community based legal services in rural and regional centres can go a long way towards improving access to justice. Comments are invited on the establishment of such centres.**

**(h) University and other legal aid institutions**

5.19 In South Africa the Association of University Legal Aid Institutions represents Legal Aid Clinics at 21 Universities. Some universities have more than one clinic or centre as well as mobile clinics. These clinics assist approximately 80,000 people each year with a variety of legal issues including criminal cases which represent

approximately 25% of the work done. These clinics already provide legal aid services to a great number of people but they can hardly handle the increasing workload. There is clearly a need for the expansion of these services. Such clinics can possibly form the basis of the establishment of community legal centres. At present these clinics are largely funded by non-governmental organisations.

\* **Proposals for comment**

**5.20 Comments are invited on the following proposals:**

- (i) formal recognition of the importance of these clinics;**
- (ii) what role can university legal institutions play in improving access to justice?;**
- (iii) governmental funding of these clinics;**
- (iv) the expansion of these services;**
- (v) the establishment of an umbrella body representing all interested parties to structure and regulate funding, services rendered and work done by clinics, centres, advice offices and other agencies rendering legal aid and involved with access to justice.**

**(i) A telephone legal advice service in South Africa**

5.21 A system of legal advice by telephone can provide immediate access to information, immediate delivery of advice and where appropriate immediate referral to counselling. Telephonic legal advice services already exist in South Africa and the service is offered by several companies. There is, however, uncertainty as to whether a telephonic legal advice service on a commercial basis contravenes existing legislation (Attorneys Act 53 of 1979) in the light of the structure of present legal services.

\* **Proposal for comment**

**5.22 A telephonic legal advice service, properly structured, could go a long way in making the system more accessible and affordable to the public at large. Comments are invited on the viability of such a service.**

**(j) Costs of legal services and access to justice**

5.23 All South Africans, regardless of means, should have access to quality legal services and effective dispute resolution mechanisms to protect their rights or interests. This is particularly necessary in the criminal justice system and the cost of legal services should therefore be reviewed in order to improve access to justice.

**\* Proposal for comment**

**5.24 What steps can be taken to bring down the costs of legal representation?**

**(k) Community legal education**

5.25 Community legal education can play a central role in the effort to demystify the law. It can be an important mechanism for improving access to justice. With an understanding of their legal rights and obligations, people can make informed choices. Workshops, pamphlets about the law, information provided via the media and other educational tools can assist in achieving a more complete understanding of the legal system.

**\* Proposals for comment**

**5.26 Comments are invited on the following proposals:**

**(i) Providing access to justice through legal literacy.**

**5.27 Access to the law and to justice by the greatest possible number of the members of our society, lies in the inherent potential of a general legal literacy. Therefore the broadest and most inclusive education agent, that is the primary and secondary school system, should be employed in this regard. We should develop high quality teaching resources in the education system to ensure that education on our legal system is entrenched as a fundamental and effective part of the curriculum of our schools and other learning institutions.**

**(ii) Holding of workshops.**

**(iii) Providing pamphlets about the law.**

**(iv) Using the media and all the available educational tools to assist in achieving legal literacy.**

**(I) Particular problems in the criminal justice system affecting access to justice**

**(aa) Victim compensation and witness protection**

5.28 At present the criminal justice system is under pressure to contain the increasing crime rate and the concomitant increase in the rate of victims. Victims of crime in South Africa are not only victimised by criminal offenders, they are also victims of an archaic criminal justice system. The scales of justice are weighted on the side of the offender through a large body of law and provisions in the Bill of Rights. There is, however, an international movement towards recognizing the victim as having rights alongside those of the accused. The new Promotion of National Unity and Reconciliation Act, 34 of 1995 is a victory for victims of gross violations of human rights in South Africa and it is also a manifestation of the new trend in South Africa.

5.29 One of the fundamental issues pertaining to the treatment of victims of crime is to provide adequate and effective protection for them. All too often in the past the criminal justice system has failed in its obligations to victims of crime. Professional training and professional codes of conduct of individuals and organisations working in the criminal

justice field have ignored the effects of crime on victims, and how these effects are exacerbated by insensitive comments and negligent behaviour.

5.30 Another aspect in need of reform is the protection of witnesses through the various stages of the criminal process. In this regard the provision of compulsory or voluntary detention of witnesses in terms of section 185 and 185A of the Criminal Procedure Act, 51 of 1977, as a means of protecting witnesses from intimidation or being tampered with or where their personal safety is threatened, is deemed to be inappropriate.

5.31 It is generally accepted that the law with regard to victims of crime and the protection of witnesses should be improved. To do so will improve their access to the criminal justice system.

\* **Proposals for comment**

**5.32 The following proposals are submitted for comment that:-**

- (i) the existing provisions relating to victims and witnesses be reviewed with a view to effecting adequate protection of these participants in the system;**
- (ii) such protection laws be directed towards:**
  - (aa) the direct victim;**
  - (bb) the indirect victim i.e the dependants, family members or close associates of the direct victim or any other person who suffered harm or loss as a result of intervening to assist the victim;**
  - (cc) the witnesses i.e any person who has given or has agreed to give evidence on behalf of the state or any person who has made a statement to the police pertaining to the offence committed;**
  - (dd) protecting the rights and privacy of the victims and witnesses;**
  - (ee) protecting the safety and security of the victims and witnesses in the criminal processes;**
  - (ff) establishing safe havens;**
  - (gg) special protection for vulnerable groups, i.e children, women, the aged, or disabled.**
- (iii) the general needs of victims be addressed in a holistic manner;**
- (iv) appropriate steps be taken to reduce secondary victimization;**

- (v) a specialized court that can provide special protection to victims and witnesses of serious violent crimes be considered;**
- (vi) a National Victim and Witness Protection Services Unit be established within the Office of each Attorney-General, to coordinate a victim and witness protection program and provide the necessary support to victims and witnesses;**
- (vii) the United Nations Declaration of Basic Principles of Justice for the Victims of Crime be adopted as a step towards the formal recognition of the needs of victims.**

## **CHAPTER 6**

### **THE WAY FORWARD**

6.1 It is suggested that the issues and options outlined above ought to be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of the treatment of victims of crime in the criminal justice system will be proposed. The comments of all parties who feel that they have an interest in this topic or may be affected by the type of measures discussed in this paper are therefore of vital importance to the Commission. All respondents are invited to indicate their preferences in respect of the options examined and to indicate whether there are other issues or options that must be explored. All the relevant role players and institutions that are likely to be affected by the proposed measures should therefore participate in this debate.

6.2 To facilitate a focussed debate, respondents are requested to formulate crisp submissions with the following in mind:

- What steps can be taken to improve access to the criminal justice system?
- Is it agreed that the principal issues are those set out in this paper?
- What, specifically, is proposed in relation to those issues (or any further issues) as an effective basis for reformatory legislation?

6.3 The Minister of Justice has indicated that the matter is regarded as one of great importance to restore legitimacy to the criminal justice system and to assist in the fight against crime which is sweeping the country. Interested parties are requested to consider this paper and to respond before 30 June 1997.

**ANNEXURE A**

**RECOMMENDATIONS CONTAINED  
IN THE  
INTERIM REPORT ON  
THE SIMPLIFICATION OF CRIMINAL PROCEDURE  
SUMMARY OF RECOMMENDATIONS**

**LACK OF ADMINISTRATIVE CONTROL OVER THE PROCESS AND DELAYS  
ARISING FROM THE ACTION OF THOSE WHO ADMINISTER THE PROCESS**

(Paragraphs 3.1 to 3.34)

The Commission has investigated the lack of administrative control over the process and delays in the completion of criminal trials. The Commission has concluded that the solution to the problem of numerous postponements and delays is not necessarily to be found in the elimination of shortcomings in the system, but rather in the people who apply the system. It is imperative that the administration of the process be improved and the problems relating to the persons who apply the process be addressed.

**RECOMMENDATION**

**The Commission recommends that the problems relating to the administration should be addressed as follows:**

- (a) The Department of Justice should issue administrative prescriptions which fully address the administration of the process.
- (b) An umbrella body which is representative of all the interested parties should be established for every court or district to improve the administration of the courts. If

(lv)

necessary court administrators should be appointed. This body should have the power to issue imperative prescriptions to all parties concerned.

- (c) This body should, as soon as possible and after consultation with all interested parties, draw up a court delay reduction plan to speed up the completion of cases in every court or area where required.
- (d) The areas of concern to all interested parties should be considered and the delay reduction plan must be reduced to writing as soon as it has been finalised and then be made available to all parties concerned.
- (e) The umbrella body should consult on a permanent basis in order to address new problem areas and to effect amendments to the plan when necessary.
- (f) Standards and time schedules for the completion of cases should be established and firm guide-lines and principles for the completion of cases (similar to those in the USA) should be included in the programme.
- (g) Prescriptions to all interested parties should be issued in consultation with the relevant principals or organizations in control.
- (h) The Department of Justice should take the initiative in this regard and legislation should be adopted if necessary to ensure the involvement of all interested parties.
- (i) The completion of cases should be monitored on a continuous basis and statistics should be kept on all relevant aspects.
- (j) There should be an exchange of information between the courts on all the measures taken and on the success thereof.

(lvi)

- (k) The success or otherwise of the measures should be made available to the Head Office of the Department of Justice for further action if necessary.

## **UNREASONABLE DELAYS ARISING FROM ABUSE OF THE PROCESS BY THE PERSONS WHO APPLY IT**

(Paragraphs 4.1 to 4.134 and section 342 A of the proposed Draft Bill in Annexure B)

In the South African criminal process there are various procedures which render the system open to abuse by those who apply it (prosecutors, legal representatives and police officers as well as accused persons and witnesses) while the power of the courts to counteract the resulting delays in the completion of trials, is limited. The Commission has come to the conclusion that there is a need for a statutory provision which will extend the court's power to eliminate delays resulting from abuse and give effect to the right to trial within a reasonable time.

## **RECOMMENDATION**

**The Commission recommends that legislation be introduced to make provision for the following:**

- (a) criminal proceedings pending before a court must be completed within a reasonable time;**
- (b) a court before which criminal proceedings are pending must be competent and obliged to investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the accused or to his or her legal representative or to the State or a witness;**

(lvii)

- (c) **if the presiding judicial officer has reason to suspect that the proceedings are being delayed unreasonably, he may summarily investigate the circumstances and hear such evidence as he deems necessary;**
- (d) **in considering the question whether any delay is unreasonable as contemplated in paragraph (b), the court should consider the following factors:**

  - (i) **the duration of the delay;**
  - (ii) **the reasons advanced for the delay;**
  - (iii) **the blame which attaches to any person regarding the cause of the delay;**
  - (iv) **the effect of the delay on the personal circumstances of the accused and witnesses;**
  - (v) **the seriousness, extent or complexity of the charge(s);**
  - (vi) **actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;**
  - (vii) **the effect of the delay on the image of the administration of justice;**
  - (viii) **any other factor which in the opinion of the court ought to be considered.**
- (e) **if a court before which criminal proceedings are pending, finds that the completion of the proceedings is being delayed unreasonably, the court may**

(lviii)

**issue the order it deems fit in order to eliminate the delay and any prejudice arising from it, including an order-**

**(i) refusing further postponement of the proceedings or granting a postponement subject to conditions imposed by the court;**

**(ii) that the prosecution be stopped and -**

**(aa) where the accused has not yet pleaded, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written consent of the attorney-general; or**

**(bb) where the accused has pleaded, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;**

**(iii) that any costs caused by unreasonable delay on the part of an officer employed by the State or the accused or his legal representative, be paid by the State or the accused or the legal representative concerned, as the case may be;**

**(iv) that an administrative investigation with a view to disciplinary action be instituted regarding the responsibility of any person in respect of the delay;**

**(f) the power contemplated in paragraph (e) (ii) (aa) should not be exercised by a lower court other than the lower court seized with the adjudication of the proceedings concerned;**

**(g) if, on notice of motion, it appears to a superior court that the institution or continuance of criminal proceedings is being delayed unreasonably in any**

(lix)

**court, that superior court may, in regard to such proceedings, institute an investigation contemplated in paragraphs (c) and (d) and issue any order contemplated in paragraph (e).**

## **THE RIGHT TO LEGAL REPRESENTATION AND DELAYS RESULTING FROM THE APPLICATION OF THE PROVISIONS OF THE CRIMINAL PROCEDURE ACT AND THE GUIDE-LINES LAID DOWN BY THE COURTS**

(Paragraphs 5.1 to 5.38 and sections 73 and 342A of the proposed Draft Bill in Annex ure B)

The conduct of legal representatives frequently results in delays in disposing of trials. Since the denial of a legal representative may result in the setting aside of a conviction and in the light of the constitutional provisions on the right to legal representation, there is a need for a statutory provision which will, on the one hand, address delays arising from the conduct of legal representatives and, on the other hand, be compatible with the constitutional provisions regarding legal representation.

### **RECOMMENDATION**

The Commission recommends that legislation be introduced to make provision for the following:

- (a) every unrepresented accused must at the time of his arrest or when he is served with a summons in terms of section 54(1) and (2) or when a written notice is handed to him in terms of section 56 or when an indictment is served on him in terms of section 144(4)(a) or at his first appearance in court, as the case may be, be informed of his right to be represented at his own expense by a legal representative of his own choice and if he cannot afford legal representation, that he may apply for legal aid and of the possible institutions which he may approach for legal assistance;

(lx)

- (b) every accused person must be given a reasonable opportunity to obtain legal assistance;
- (c) if an accused person fails to appoint a legal representative of his own choice within a reasonable time and the proceedings are consequently delayed unreasonably, the court may apart from any order which it may make in terms of Section 342A-
  - (i) order that the trial proceed without legal representation for the accused if the court is of the opinion that this would not result in substantial injustice; or
  - (ii) appoint a legal representative for the accused at the expense of the State: Provided that the court may order that the costs of such representation be recovered from the accused.

## **ABUSE OF CROSS-EXAMINATION**

(Paragraphs 6.1 to 6.36 and sections 342A and 166 of the proposed Draft Bill Annexure B)

Cross-examination is regarded as an indispensable method to ensure a fair trial while it is also criticised as an important source of delays in criminal trials. There is a need to address this problem by a statutory amendment.

## **RECOMMENDATION**

**The Commission recommends that legislation be introduced to make provision that:**

- (a) **if it appears to a court that the cross-examination of a witness is being protracted unreasonably causing the proceedings to be delayed unreasonably, the court may request the cross-examiner to disclose the relevancy of any**

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**particular line of examination and may impose reasonable limits on the examination regarding its duration or any particular line of examination;**

- (b) the court may order that any submission regarding the relevancy of the cross-examination be heard in the absence of the witness.**

### **ABUSE ARISING FROM OBJECTIONS TO CHARGE SHEETS OR INDICTMENTS, FURTHER PARTICULARS AND JURISDICTION**

(Paragraphs 7.1 to 7.31 and section 342 A of the Draft Bill in Annexure B)

The Commission considered submissions that the above-mentioned aspects contribute to delays.

### **RECOMMENDATION**

**Except for the proposed provision on the elimination of delays the Commission does not recommend any further changes. The Commission also holds the view that the guide-lines laid down by the courts in this regard are sufficient.**

### **PARTICULAR PROVISIONS OF THE CRIMINAL PROCEDURE ACT THAT LEAD TO DELAYS**

- (a) THE PROVISIONS OF SECTION 115 OF THE CRIMINAL PROCEDURE ACT**

(Paragraphs 8.1 to 8.42)

The view is held that the provisions of section 115 do not satisfy the aims for which it was intended. It is argued that delays in trials would be eliminated if the issues in dispute are

determined timeously and the Commission considered proposals that an accused should be obliged to disclose the basis of his defence or that a prejudicial inference should be drawn from silence during plea proceedings.

## **RECOMMENDATION**

**Section 25 (3)(c) of the Constitution provides that every accused shall have the right to a fair trial which shall include the right to be presumed innocent and to remain silent during plea proceedings or the trial and not to testify during trial. Consequently the Commission is of the opinion that the proposals in the working paper are in conflict with this section and the proposals will also not be justifiable limitations in terms of section 33 of the Constitution. Therefore the Commission recommends that the provisions of section 115 be retained unchanged.**

### **(b) MISUSE OF THE PROVISIONS OF THE CRIMINAL PROCEDURE ACT IN PLEA PROCEEDINGS - SECTIONS 115(3), 115 (2) (b) AND 113**

(Paragraphs 8.44 to 8.47)

The Commission considered whether the provisions of sections 115(3), 115(2)(b) and 113 should not be amended in order to eliminate unnecessary delays and duplication.

#### **(i) SECTION 115(3) OF THE CRIMINAL PROCEDURE ACT**

## **RECOMMENDATION**

**The Commission recommends no amendments.**

#### **(ii) CONSENT OF ADMISSIONS IN TERMS OF SECTION 115(2)(b) OF THE CRIMINAL PROCEDURE ACT**

(Paragraphs 8.49 to 8.55 )

**RECOMMENDATION**

**The Commission recommends no amendments.**

**(iii) SECTION 113 OF THE CRIMINAL PROCEDURE ACT**

(Paragraphs 8.57 to 8.66 and section 113 of the proposed Draft Bill in Annexure B)

**RECOMMENDATION**

**The Commission recommends that subsection (1) of section 113 be replaced by the following subsection:**

**"(1) If the court at any stage of the proceedings under section 112(1)(a) or (b) and before sentence is passed, is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or if it is claimed or it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is for any other reason of the opinion that the accused's plea of guilty should not be maintained, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than the allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation."**

**(c) SECTION 116 OF THE CRIMINAL PROCEDURE ACT**

(Paragraphs 8.68 to 8.71 and section 116 of the proposed Draft Bill in Annexure)

The fact that a regional court magistrate charged with the imposition of sentence in respect of cases tried in the district court cannot request the trial magistrate to give reasons for the conviction, is often cited as a reason for delays in criminal trials. A legislative amendment which will address this problem appears to be necessary.

## **RECOMMENDATION**

**The Commission recommends that section 116(3)(a) be amended to provide that a regional court magistrate may request the trial magistrate in the district court to provide him with reasons for the conviction.**

### **(d) JURISDICTION OF MAGISTRATES' COURTS**

(Paragraph 8.73)

It is argued that the completion of cases would be expedited if the jurisdiction of magistrates' courts is extended.

## **RECOMMENDATION**

**In view of the recent amendments to the law in this regard the Commission makes no further recommendations.**

### **(e) SECTION 220 OF THE CRIMINAL PROCEDURE ACT**

(Paragraphs 8.74 to 8.78 and section 220 of the proposed Draft Bill in Annexure B)

The Commission considered an amendment to section 220 in an attempt to expedite the proceedings.

## **RECOMMENDATION**

**The Commission proposes that section 220 be amended so as to enable the State also to make admissions which will promote the case of the accused.**

### **(f) SECTION 212(4) OF THE CRIMINAL PROCEDURE ACT.**

(Paragraphs 8.80 to 8.89 and section 212(4) of the proposed Draft Bill in Annexure B)

One of the problems in our criminal procedure is that too much reliance is placed upon **viva voce** evidence. The Commission considered a proposal that the proof of facts by means of affidavits should be extended. In order to address this problem the Commission recommends amendments to sections 212(4)(a) and 158 as well as the introduction of a new section to provide for the proof of undisputed facts by means of affidavits.

## **RECOMMENDATION**

**The Commission recommends that section 212(4)(a) be amended as follows:**

**"(4)(a) Whenever any fact established by any examination or process requiring any skill in biology, chemistry, physics, astronomy, geography, anatomy, human behavioural sciences, any branch of pathology or in toxicology or in the identification of finger-prints, or palm-prints, is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is in the service of the State or of a provincial administration or is in the service of or is attached to the South African Institute for Medical Research or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the Gazette, and that he has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be prima facie proof of such fact: Provided that the person who may make such an affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall mutatis mutandis apply with reference to such certificate: Provided further that if an affidavit or certificate contains an opinion, such opinion shall be prima facie proof of that opinion if-**

- (i) the expertise of the witness can be determined from the affidavit; and**

- (ii) **the grounds on which the opinion is based are explained."**
  
- (g) **THE PROVISIONS OF SECTION 213**

(Paragraphs 8.91 to 8.122 and section 212 B of the proposed Draft Bill in Annexure B)

## **RECOMMENDATION**

**The Commission recommends:**

- (a) **that the provisions of section 213 be retained unchanged;**
  
- (b) **that a new section be introduced to provide for the proof of undisputed facts by means of an affidavit; and**
  
- (c) **that the section be worded as follows:**

**(1) If it appears to a prosecutor that a certain fact or facts to be proved in a charge against an accused are not or are not likely to be placed in issue in criminal proceedings against the accused, he may send or hand a notice to the accused, and his legal representative if he has one, setting out that fact or those facts and stating that such fact or facts will be accepted as proved at the proceedings unless written or oral notice is given in the prescribed manner that such fact or facts will be placed in issue.**

**(2) The notice contemplated in subsection (1) shall be sent by certified mail or handed to the accused and his legal representative personally at least 14 days before criminal proceedings commence against the accused: Provided that the said period may be reduced by agreement between the accused or his legal representative and the prosecutor.**

**(3) If any fact mentioned in a notice contemplated in subsection (1) is intended to be placed in issue at the proceedings, the accused or his legal representative shall within five days before the commencement of the proceedings or within such shorter period as agreed upon with the prosecutor deliver a notice in writing to that effect or give notice orally to the registrar or the clerk of the court, as the case may be, in which case the registrar or the clerk of the court shall record such notice.**

**(4) If, after receipt of a notice contemplated in subsection (1), any fact mentioned in that notice is not placed in issue as contemplated in subsection (3), the court may deem such fact or facts, subject to the provisions of subsection (6), to have been conclusively proved at the proceedings concerned.**

**(5) If a notice is sent or handed over by a prosecutor as contemplated in subsection (1), the prosecutor shall notify the court at the commencement of the proceedings of such fact and of any reaction thereto and the court shall thereupon institute an investigation into the facts which are not disputed: Provided that the implications of subsection (4) shall be explained to an undefended accused.**

**(6) The court may mero motu or at the request of the accused order oral evidence to be adduced regarding any fact contemplated in subsection (4).**

#### **(h) THE PROVISIONS OF SECTION 158**

(Paragraphs 8.124 to 8.133 and section 158 of the proposed Draft Bill in Annexure B)

#### **RECOMMENDATION**

**The Commission recommends that section 158 of the Criminal Procedure Act be amended by the insertion of the following subsections:**

**(2) If in any criminal proceedings it appears to a court that to do so would prevent unreasonable delay or save costs or that it would be convenient, the court may, if the facilities therefore are readily available or obtainable, on its own initiative or on application by the prosecutor or the accused, order that a witness or an accused, if he consents thereto, may give evidence by means of closed circuit television or similar electronic media: Provided that the court shall not issue such an order unless it is satisfied that the accused's right to question the witness and to observe the witness's reaction or to a fair trial will not be prejudiced.**

**(3) The court may make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary in order to ensure a fair and just trial.**

#### **CUMBROUS PROCEDURES**

**(a) DELAYS ARISING FROM THE DETERMINATION OF THE FORUM FOR THE TRIAL**

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(Paragraphs 9.1 to 9.33 and section 75 of the proposed Draft Bill in Annexure B)

The Commission considered the problems arising from the transfer of cases to the court having jurisdiction and is of the opinion that a statutory amendment is necessary to speed up such transfers.

## **RECOMMENDATION**

**The Commission recommends:**

- (a) that section 75 of the Criminal Procedure Act be amended to provide, in addition to the transfer of cases to the regional court in terms of sections 122 A to D, for an alternative procedure of transfer at the mere request of the prosecutor and without an accused being required to plead; and**
- (b) that the existing provisions of section 122A to D and 119 also remain unchanged.**
- (b) THE PROVISIONS OF SECTION 217- CONFESSIONS**

(Paragraphs 9.35 to 9.67 and section 217 of the proposed Draft Bill in Annexure B)

The Commission considered the admissibility of confessions made to police officers and delays arising from it. The Commission concluded that too much time is wasted in the courts in an attempt to prove such confessions admissible. At the same time the criticism voiced against such confessions discredits police officers and it brings the image of the administration of justice into disrepute.

## **RECOMMENDATION**

**The Commission recommends that the Criminal Procedure Act be amended to make provision for confessions made to police officers who are justices of the peace to be inadmis**

**sible unless it is confirmed before a magistrate and reduced to writing. The Commission does not recommend any other changes.**

**(c) ADMISSIONS OF GUILT AND SUMMONSING AS A MEANS OF BRINGING ACCUSED PERSONS TO COURT**

(Paragraphs 9.69 to 9.84 and section 57 (1) of the proposed Draft Bill in Annexure B)

Too many accused persons are summarily arrested in cases where the issuing of summonses would appear to be more appropriate. This practice unnecessarily burdens court rolls which are already overloaded. Better use of admissions of guilt can contribute to fewer cases being set for trial.

**RECOMMENDATION**

**The Commission recommends that:**

- (a) the Department of Justice promote the implementation of the better use of admissions of guilt in terms of section 57 by means of an appropriate circular to all magistrates' offices;**
- (b) greater utilization of summonses instead of arrests in appropriate cases be promoted by means of circulars by the Department of Justice in co-operation within the SA Police Services;**
- (c) section 57(1) of the Criminal Procedure Act be amended to provide for the payment of admission of guilt fines also after arrest or warning or release on bail at any stage before an accused has pleaded; and**
- (d) summonses be redesigned to provide or an annexure to the summons be designed which provides for the following information:**

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- (i) **A notice concerning the trial date which provides for the following alternatives where applicable:**

**\*that the case will not be tried on the day in question;**

**\*that the accused is entitled to legal representation and that he should make arrangements in this regard in good time and that a trial date will be determined on that day in consultation with his legal representative;**

**\*that the case has been set for trial and that the accused should be ready to proceed with the trial;**

- (ii) **a list of witnesses whom the State intends to call;**

- (iii) **particulars of the charge and copies of the statements which the State intends to use and to which the accused is entitled; and**

- (iv) **copies of documentary evidence which the State intends to use.**

## **ALTERNATIVE PROCEDURES TO SPEED UP TRIALS**

### **(a) PRE-TRIAL CONFERENCES**

(Paragraphs 10.1 to 10.20)

Long protracted trials can be reduced if the issues in dispute are determined in good time during the pre-trial phase. In this regard the Commission considered whether the holding of compulsory pre-trial conferences should not be given statutory recognition. Nothing precludes informal discussions between the State and the defence. There are, however, valid objections to the introduction of rigid rules in this regard.

## **RECOMMENDATION**

**The Commission recommends against statutory provision for pre-trial conferences.**

### **(b) PLEA AGREEMENTS**

(Paragraphs 10.22 to 10.84 and section 106 A of the proposed Draft Bill in Annexure B)

The Commission considered the question whether plea discussions and plea agreements should not be provided for in legislation in an attempt to reduce the number of cases which have to go to trial. The Commission came to the conclusion that the number of trial cases could indeed be reduced were plea discussions and the conclusion of plea agreements to be provided for in legislation.

## **RECOMMENDATION**

**The Commission recommends that legislation be adopted by means of the addition of the Criminal Procedure Act of a new section 106A as follows:**

**"106A. Plea discussions and plea agreements. - (1) The prosecutor and the accused or his legal representative may hold discussions with a view to reaching an agreement acceptable to both parties in respect of plea proceedings and the disposal of the case.**

**(2) Any agreement reached between the parties shall be reduced to writing and shall state fully the terms of the agreement and any admissions made and shall be signed by the prosecutor, the accused, the legal representative and the interpreter, as the case may be.**

**(3) The contents of such an agreement shall be proved by the mere production thereof by both parties: Provided that in the case of an agreement concluded with an**

accused who is not legally represented the court shall satisfy itself that the accused fully understands the contents thereof and entered into the agreement voluntarily and without improper influence.

(4) The judicial officer before whom criminal proceedings are pending shall not participate in the discussions contemplated in subsection (1): Provided that he may, before an agreement is reached, be approached by the parties in open court or in chambers regarding the contents of such discussions and he may inform the parties in general terms of the possible advantages of discussions, possible sentencing options or the acceptability of a proposed agreement.

(5) The judicial officer shall, before the accused is required to plead in open court or, if he has already pleaded, before judgment is given, be informed that plea discussions are being conducted or are to be conducted or that the parties have reached a plea agreement as contemplated in subsection (1).

(6) If after discussions the parties have concluded a plea agreement and the court has been informed as contemplated in subsection (3), the court shall enter such fact upon the record and order that the contents of the agreement be disclosed in open court: Provided that if the court is for any reason of the opinion that the accused cannot be convicted of the offence with which he is charged or of the offence in respect of which an agreement was reached and to which he pleaded guilty or that the agreement is in conflict with the provisions of section 25 of the Constitution of the Republic of South Africa or with justice, the court shall record a plea of not guilty in respect of such a charge and order that the trial proceed.

(7) No evidence of a plea agreement or of admissions contained therein or of statements relating to such agreement shall be admissible as proof of guilt or credibility in subsequent criminal proceedings."