

SOUTH AFRICAN LAW COMMISSION

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PROJECT 94

ALTERNATIVE DISPUTE RESOLUTION

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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 accumulated up to the end of January 1997) has been 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 relating to 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 15 July 1997 at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have.

The project leader and chairperson of the project committee responsible for the project is The Honourable Mr Justice JH Steyn. The researcher, who may be contacted for further information, is Mrs AM Louw.

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CHAPTER 1

ORIGIN OF THE INVESTIGATION AND INTRODUCTION

1.1 During the last few years many governmental and non-governmental organisations have been striving at different levels to provide affordable and appropriate dispute resolution institutions and procedures in different communities of society. This has been done in order to promote more effective access to justice for all the people of South Africa. Organisations such as the Community Dispute Resolution Trust, the Community Peace Foundation, the Assessors Coordinating Committee, the Association of Arbitrators, the Arbitration Foundation of South Africa, IMSSA and others all come to mind.

1.2 The South African Law Commission has been engaged in an investigation into arbitration since 1995. As a first step it published a draft International Arbitration Act for information and comment in December 1996. It also intends to undertake a revision of the Arbitration Act 42 of 1965. This will be done by asking interested parties by means of an appropriate Working Paper to submit comments on the 1965 Act. For this reason this issue paper does not deal with either international or domestic arbitration.

1.3 On 8 July 1996 the Minister requested the Law Commission to broaden its investigation into arbitration to include all facets of alternative dispute resolution(ADR)in order to provide a framework within which ADR could be discussed in an orderly fashion. The Minister stressed the urgency of the project, as formalised methods of ADR could relieve the overburdened court system. The Commission considered and approved the inclusion of such an investigation in its programme and a project committee for this purpose was duly appointed by the Minister of Justice with effect from 16 September 1996. Work commenced on 26 October 1996.

1.4 Community involvement is regarded as being of paramount importance in this investigation. The Commission has therefore decided to compile this issue paper to initiate, facilitate and encourage focused consideration and response by all interested parties. As an issue

paper, this document intends to state possible questions, or lines of inquiry, which seem to present themselves as relevant to the investigation, rather than to suggest answers. The manner in which this investigation will further progress will primarily depend on the response received to this paper. It is contemplated that, in light of the response and consequent work of the Project Committee, a Discussion Paper, and should it in future be deemed necessary, draft legislation, will be prepared and published for general information and comment.

CHAPTER 2

THE PROBLEM

a) What is ADR

2.1 ADR is the generally accepted acronym for alternative dispute resolution. Most simply put, ADR denotes all forms of dispute resolution other than litigation or adjudication through the courts. This definition of ADR, however, makes no mention of a vital consideration. This is that ADR provides an opportunity to resolve disputes and conflict through the utilisation of a process that is best suited to the particular dispute or conflict. For this reason many ADR practitioners prefer to use the acronym to denote the words “appropriate dispute resolution”.

2.2 ADR thus involves not only the application of new or different methods to resolve disputes, but also the selection or design of a process which is best suited to the particular dispute and to the parties in dispute.

2.3 The field of ADR therefore covers a broad range of mechanisms and processes designed to assist parties in resolving disputes creatively and effectively. In so far as this may involve the selection or design of mechanisms and processes other than formal litigation, these mechanisms and processes are not intended to supplant court adjudication, but rather to supplement it. The most common types of ADR include negotiation, conciliation, mediation and arbitration.

b) Why ADR

2.4 There is a wide perception that the formal system of justice in the country before the commencement of the present constitutional dispensation suffered from the effective exclusion of most South Africans from the forming and execution of legislation.¹ For many, a foreign, dominant, Western legal system, was seen to be superimposed on an intuitive, indigenous legal

system.² The law was largely perceived by blacks to be an instrument of oppression.

2.5 The inability to meet the needs of the ordinary citizens was however 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.³ Many of the peculiar problems facing the black community stemmed from the largely ineffective administration of the justice system in black areas. The legal problems as well as problems of social adjustment encountered by urban blacks were not being solved. It is therefore not strange that people resorted to self-help in the form of unofficial or folk institutions. In urban areas different forms of community courts were instituted.

2.6 These courts had their philosophical background in the customary law that was being practised by traditional leaders in traditional courts in the rural areas. It could however also be seen as a particular application of the consensual principles of ADR and its non-authoritarian consensus-producing processes within the structure of a specific community and according to the culture of its prevailing moral norms and social standards.⁴

2.7 The new Constitution of South Africa⁵, with its Bill of Rights, is based on the principle that all people are equal before the law. The problem is that the equality thus achieved will be more of a facade than a reality if people are still *de facto* excluded because, due to past injustices, they do not have the economic, social or cultural ability to make use of those rights or to participate meaningfully in the administration of justice. What is therefore necessary is an attempt to add a "social" dimension to the *Rechtstaat* in terms of which even the disadvantaged and poor will be entitled to representation and information. In this setting consideration may be given to alternative remedies and processes which may make justice fair and more accessible. Community courts may therefore still have an important role to play even in the new dispensation.

1 Carpenter, G "Public opinion, the judiciary and legitimacy" (1996) 11 **SAPL** 110.

2 Van Niekerk, GJ "People's courts and people's justice in South Africa - new developments in community dispute resolution" (1994) 1 **De Jure** 19 (hereinafter referred to as Van Niekerk).

3 Grant, B & Schwikkard, P "People's Courts?" (1991) 7 **SAJHR** 304.

4 Faris, J "ADR, community dispute resolution and the court system" **Community Mediation Update** CDRT Newsletter No 10 April 1996, 7.

5 Constitution of the Republic of South Africa, Act 108 of 1996.

2.8 It is however also true that, quite apart from the problems experienced by those previously disenfranchised, or otherwise powerless, the justice system in South Africa is under constant scrutiny and criticism from various interest groups (business, labour, religious groups, cultural groups or community groups) continually looking for more speedy, more effective, less cumbersome, less expensive and often less conflicting ways of resolving disputes and problems. This is the case in most advanced countries even those with very sophisticated judicial systems.⁶

2.9 The most common general complaint about the current justice system in South Africa is that the cost of litigation is prohibitive. This prevents meaningful access to courts and even those with access are often victims of delay. For most litigants, delay means added expense and for many people justice delayed is justice denied. Delay combined with the cost of litigation has put justice beyond the reach of the ordinary citizen. The incomprehensibility and adversarial nature of the process with a resulting lack of control (parties can only participate in an indirect manner) furthermore leads to a sense of frustration and disempowerment. Courts offering only trials are furthermore limited in their response to a legal dispute. Litigation often creates winners and losers and even winners may feel like losers given the limited nature of many legal remedies imposed from a limited range of win or lose options.

2.10 In this regard it is to be noted that modern developed Western societies have in the last twenty years or so come to appreciate the necessity for access to justice through alternative dispute resolution techniques based on what can be called “co-existential justice”.⁷ This form of justice has however always been part of African and Asian traditions where conciliatory solutions were seen to be to the advantage of all and often as a *sine qua non* for survival.

2.11 Effective government is largely dependent on a respected legal system. The challenge facing the democratic state is to ensure that the justice system is acceptable and accessible to the larger community.

6 Omar, AM “AFSA: The need for alternative dispute resolution” Address delivered at the opening of Arbitration House as extracted in 1996 9 **Consultus** 126.

7 Cappelletti, M “Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement” (1993) 56 **The Modern Law Review** 287.

2.12 The Justice Ministry has already started transforming the justice system at various levels in line with democratic values. It may be that the introduction of ADR-techniques supplementing formal justice systems at different levels may help to provide South Africans with an opportunity to establish an acceptable justice system that will be swift and effective.

c) ADR today

2.13 Traditional forms of dispute resolution which, for present purposes, may be termed ADR processes, have long existed in rural South Africa. Unofficial dispute resolution has furthermore been the norm in metropolitan areas for as long as these areas have existed. The earliest unofficial people's courts were the civic associations with dispute-settlement functions which were found in 1901 in the township of Uitvlugt in the Cape Town area.⁸

2.14 In the latter part of the 1970's the people's courts were generally known as *makgotla* and should be distinguished from the politicised people's courts that could be found in the mid-1980's. In 1989 new structured people's courts emerged. They are today successfully functioning as community courts.⁹

2.15 Many different institutions, governmental and non-governmental, have over the years tried to address the question of integrating, controlling, acknowledging or formalising these institutions. The State's efforts to control these alternative institutions through the establishment of advisory boards, urban and community councils and town councils proved unsuccessful. More recently, attempts have however been made by a number of NGO's to introduce more appropriate forms of dispute resolution to communities. Examples of such initiatives are those being conducted by the Community Dispute Resolution Trust (CDRT) and the Community Peace Foundation. These initiatives have met with mixed degrees of success.

2.16 Commercial arbitration has long been part of the dispute resolution framework in South Africa and in other Western countries. It is well established in South Africa. The Alternative

8 Van Niekerk 22.

9 Op cit.

Dispute Resolution Association of South Africa (ADRASA) and more recently the Arbitration Federation of South Africa (AFSA) have been significant attempts to institutionalise private commercial arbitration and, to a much lesser extent, mediation. Similar initiatives exist in the field of engineering and construction. As stated in par 1.2 above, commercial arbitration will be discussed in a separate Working Paper.

2.17 In the 1970's the major shift that took place in industrial relations gave rise to a need for more appropriate forms of dispute resolution in the workplace. This need was filled at the time by the Independent Mediation Service of South Africa (IMSSA) which was instrumental in introducing forms of mediation and arbitration. The success of this initiative has been borne out by the extensive reliance on mediation and arbitration in the new Labour Relations Act and by the establishment of the CCMA to carry out these functions.

2.18 The introduction of alternative dispute resolution methods into the field of family disputes (divorce) has also been significant. Respondents are specifically invited to consider the successes and failures of these and similar endeavours.

d) Goals of ADR

2.19 The goals of ADR may be described as follows:

- a) to relieve court congestion, as well as prevent undue cost and delay;
- b) to enhance community involvement in the dispute resolution process;
- c) to facilitate access to justice; and
- d) to provide more effective dispute resolution.

2.20 ADR experts in the United States (where the practice of ADR is well advanced) have expressed some doubt as to whether the practice of ADR can ever relieve court congestion. Nor is there any evidence to show that this has been the case in South Africa. Undoubtedly, however, there are methods of resolving disputes which are less expensive and more expeditious than formal litigation. This is being borne out in the labour field where research has shown that dismissal disputes were generally dealt with on a less costly and more expeditious basis by

arbitration than they were in the Industrial Court.

2.21 A second goal of ADR, namely to enhance community involvement in the dispute resolution process, is of particular importance in South Africa. South Africa's recent history has served amongst other things to alienate a significant section of the population from the formal court system. The development of appropriate forms of dispute resolution which encourage and enhance community involvement and bear the stamp of legitimacy is therefore of cardinal importance to those who would see disputes and conflict effectively resolved.

2.22 The third goal of ADR, namely to facilitate access to justice, is perhaps ambitious. For example, parties, who with the assistance of a mediator, are able to resolve their dispute may not regard themselves as having received justice but may simply consider that they have attained the more modest goal of settling their dispute. Undoubtedly, dispute resolution in its broadest sense does, and will continue, to facilitate the increased resolution of dispute.

2.23 The most important goal of ADR is arguably the fourth goal stated above, namely to provide more effective dispute resolution. As already stated, it is of the essence of the study and practice of alternative dispute resolution to provide mechanisms and processes which will resolve disputes more effectively than an automatic recourse to litigation. Indeed, one of the most significant effects that dispute resolution practice has had in South Africa over the last decade is to challenge the view that adversarial litigation is the only means, apart from agreement, of resolving disputes.

e) Categories of dispute resolution

2.24 Three major categories of dispute resolution which may be considered are:

- a) Dispute resolution processes involving private decision-making by the parties themselves. This category would include negotiation and mediation;
- b) dispute resolution processes involving private adjudication by third parties. Arbitration would fall into this category; and

- c) dispute resolution processes involving adjudication by a public authority. This category would include administrative decision-making and formal litigation before the courts.

f) State control vs state support

2.25 It is essential to recognise a fundamental difference between adjudication at the hands of public authorities and ordinary forms of ADR. Arbitration, mediation and other forms of alternative dispute resolution rely for their effectiveness on the willingness of the parties to submit to the process. They do so by agreement. On the other hand, the compulsory jurisdiction conducted at the hands of the state relies for its effectiveness on the ability of one party to compel the other to submit to the jurisdiction of the state.

2.26 This distinction raises a fundamental issue **whether or to what extent ADR processes should be introduced into the formal and compulsory jurisdiction of courts administered by the State.**

2.27 The introduction of community courts utilising ADR processes would be one such example. Another example which is at present in operation is the formalisation of alternative forms of dispute resolution such as conciliation, mediation and arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA) in terms of the new Labour Relations Act. Other examples are victim-offender mediation programmes in criminal matters and mediation in divorce disputes.

2.28 Notwithstanding the public/private distinction referred to above, there are many instances of the introduction of ADR processes as adjuncts to the formal system, for example, victim-offender programmes as adjunct to the criminal courts; conciliation and arbitration under the auspices of the CCMA as adjuncts to the labour dispute resolution system; the use of mediation in family disputes; more sophisticated pre-trial procedures in the formal court system and others.

2.29 An interesting development in the United States is the introduction under the auspices of

the formal justice system of what are termed “multi-door court-houses”. These are state institutions where parties are directed to the most appropriate form of dispute resolution for their particular dispute (whether it be mediation, arbitration or adjudication), all processes being available under a single roof.

2.30 Another way to approach the introduction of ADR processes into South African Communities would be to lend state support to private initiatives in the field.

g) ADR: a solution?

2.31 The question to be addressed is therefore whether the administration of justice will be enhanced if a broader concept of dispute resolution could be accommodated within the formal legal system. The Law Commission will endeavour, with the assistance of all role players, to facilitate this investigative process. In this effort ADR will have to be evaluated with a view to improving existing ADR initiatives. The further role of ADR with regard to access to justice, juvenile justice, family law, the simplification of the criminal and civil justice system as well as in the area of customary indigenous law will have to be investigated. It is important to find alternatives capable of better accommodating the urgent demands being expressed in a time in which societal transformations are taking place at an unprecedentedly accelerated pace.

CHAPTER 3

IDENTIFYING SPECIFIC ISSUES

a) **Role for ADR in civil practice**

3.1 The Commission needs to know from interested parties essentially three things. The first is whether they consider there to be a role for ADR in civil practice. The second is what precisely (if it is considered that there is such a role) it should be. The third and - perhaps the most important aspect in determining any **practical** course of action - how should this be achieved.

3.2 In offering views in this regard, respondents may care to give some consideration to the following:

(i) **Scope of ADR**

3.3 ADR is defined in different ways. One definition covers all alternatives to litigation as a method for resolving disputes. That definition therefore includes arbitration. It is however more common to restrict ADR to non-adjudicative forms of dispute resolution, excluding both litigation and arbitration. For this reason, and in view of the fact that arbitration - international and domestic- are being dealt with separately by the Commission (see p1 above) the use of arbitral mechanisms in civil practice is not explored in this chapter.

(ii) **Conciliation and mediation**

3.4 Although there is a lack of uniformity in the use of the terms mediation and conciliation¹

1 Butler, D & Finsen E **Arbitration in South Africa - law and practice** Juta Cape Town 1993 10 (hereinafter referred to as Butler and Finsen).

both refer to a consensual means of dispute resolution where an acceptable third party is called in to facilitate the negotiation of a settlement between the parties. Even if the third party is required to recommend a solution if negotiations fail to achieve a settlement, this solution only becomes binding on the parties with their consent.

3.5 Mediation is not without its disadvantages and problems². However if successful it should offer a significantly quicker and less expensive means of resolving a dispute than either litigation or arbitration. The parties, with the assistance of the mediator, are also able to achieve a pragmatic solution based on the parties' interests, rather than one based on their legal rights.

3.6 The extent to which it is necessary or desirable to deal with mediation or conciliation in the context of international arbitration legislation is briefly considered in Discussion Paper 69 of the Law Commission.³ No additions to the UNCITRAL Model Law were recommended for this purpose. Whereas some jurisdictions, e.g. Hong Kong have included one or two provisions in the arbitration legislation to deal with specific problems (court appointment of a conciliator where the parties cannot agree on a conciliator and a provision empowering a person to act as arbitrator although that person has previously acted as conciliator in the same dispute), some other jurisdictions have endeavoured to promote the use of conciliation by a more detailed statutory framework, influenced by the UNCITRAL Conciliation Rules of 1980.⁴ These provisions only apply with the consent of the parties where they agree to resort to conciliation and are designed to facilitate successful conciliation.

3.7 Is there a need for similar legislation in South Africa? If so, what matters should be dealt with? Should it be included in the revised Arbitration Act as in India and Nigeria or should it be in a separate statute?

2 Butler & Finsen 14; Miller, J "Alternative dispute resolution ('ADR) - common problems and misconceptions" 1996 62 **Arbitration** 186.

3 South African Law Commission **Arbitration: A draft international arbitration act for South Africa** Discussion Paper 69 1996.

4 See the Nigerian Arbitration Act of 1988 ss 37-42 and the Indian Arbitration and Conciliation Act 26 of

(iii) Court-annexed forms of ADR

3.8 Another way of categorising ADR techniques which is relevant to this investigation is to distinguish between those subsidiary to the judicial process and those which are alternatives to the judicial process.⁵ Examples of "subsidiary" ADR in other jurisdictions are court-annexed mediators in Canada and court-appointed referees in Australia. In South Africa s19 bis of the Supreme Court Act 59 of 1959 provides for certain matters to be referred by the court with the consent of the parties to a referee. A recent example of this provision being used is **LTA Construction Ltd v Minister of Public Works and Land Affairs**.⁶ There is also the Short Process Courts and mediation in Certain Civil Cases Act 103 of 1991. To what extent can these existing procedures be better utilised and improved? To what extent should parties be compelled to use some form of court-annexed ADR? Lord Woolf⁷ does not believe that ADR should be compulsory "either as an alternative or as a preliminary to litigation".

3.9 ADR is nevertheless closely linked to the reform of civil procedure and arbitration procedure. Settlement by mediation or conciliation will be more easily achieved if the parties are acutely aware that failure to settle will result in an imposed solution in the very near future.⁸ Improved litigation and arbitration procedures will lead to more effective ADR, particularly mediation. It is also significant that the interest in ADR has been mainly in countries with a common-law adversarial system of civil procedure. As litigation in civil-law countries is quicker and less expensive there has been correspondingly less interest in ADR.⁹

(iv) Mini-trials and further forms of ADR

3.10 Other forms of ADR have been considered for South Africa.¹⁰ What other forms of

1996 ss 61 - 81).

5 Odams, M "The influence of commerce on the changing face of dispute resolution" (1996) 62 **Arbitration** 277.

6 1992 1 SA 837 C.

7 Right Honourable Lord Woolf **Access to Justice** Interim report to the Lord Chancellor on the civil justice system in England and Wales June 1995 136 (hereinafter referred to as Woolf report).

8 Lord Donaldson "Alternative dispute resolution" (1992) 58 **Arbitration** 102.

9 De Witt Wijnen, OLO "ADR, the civil law approach" (1995) 61 **Arbitration** 38.

10 See eg Butler & Finsen 16-19 regarding the mini-trial.

ADR are appropriate for resolving commercial and civil disputes in South Africa and what should be done to promote their use?

(v) **The use of experts**

3.11 In recent years there has been increasing dissatisfaction amongst parties to commercial contracts and certain consumer agreements with the high cost and delay associated with resolving disputes by both litigation and arbitration, particularly if the arbitral procedure is dominated by traditionally-minded lawyers resulting in the arbitration turning into "privatised litigation". This has led to increasing use of dispute-resolution clauses in contracts providing for the resolution of any dispute arising out of that contract by an expert. Depending on the nature of the dispute, the expert will be a lawyer, accountant or person from another appropriate professional discipline who is required to resolve the dispute "as an expert and not as an arbitrator". The decision of the expert is declared to be final and binding on the parties.¹¹ For a recent local decision concerning such a clause see **Chelsea West (Pty) Ltd v Roodebloem Investments (Pty) Ltd**¹².

3.12 Although this procedure will usually be quicker and cheaper than a formal arbitration and is usually subject to strict time limits, the procedure to be followed and the procedural fairness of the procedure and any hearing will largely depend on the provisions of the contract, which may leave the procedure largely in the discretion of the expert. It must be borne in mind that in a standard-form consumer contract (e.g. for the purchase of a sectional title unit) the purchaser will have no bargaining power to change the terms of the dispute-resolution clause. As the clause is not an arbitration agreement, it could also provide that each party should bear its own costs, irrespective of the outcome of the proceedings. Section 35(6) of the Arbitration Act 42 of 1965 prohibits such a provision in an arbitration agreement referring future disputes to arbitration. One justification for s 35(6) is to protect the weaker party (the consumer) against such a provision in a standard-form contract.

3.13 Because the expert is not an arbitrator, neither the powers of assistance nor the powers

11 See generally Bernstein & Wood 13-16.

12 1994 1 SA 837 C.

of supervision and interference conferred on the court by the Arbitration Act apply. The abuse of the court's powers in relation to arbitration by a party wishing to delay the making and enforcement of an award are no doubt one of the reasons for the use of "expert" dispute-resolution clauses.

3.14 However, in the event of one party failing to comply with the expert's decision, the other would have to apply the court for an order requiring the party in default to comply with its contractual obligation. The court must have some powers of supervision. What are the extent of these powers: would a refusal to enforce be limited to cases of fraud and collusion or where compliance would be contrary to public policy? As the expert is making the decision on the basis of professional expertise and arguably not performing a quasi-judicial function, would a dissatisfied party be able to sue the expert for negligence? Where the expert's own investigation has been less thorough than the party was entitled to expect, the answer could well be in the affirmative.

3.15 What are the advantages and disadvantages of using an expert as opposed to an arbitrator? Are there adequate remedies to protect a party (particularly a consumer) against the abuse of this procedure? What is the extent of the court's powers and is there any need for statutory intervention?

(vi) **Ombudsman**

3.16 The value of an Ombudsman for dispute resolution was recognised in England by both the interim report of Lord Woolf¹³ and the earlier report of Beldham LJ on ADR to the General Council of the Bar¹⁴. Lord Woolf regards the Ombudsman as part of ADR. An Ombudsman can either be appointed by statute to protect the public against administrative injustice and maladministration by a government agency or can be privately appointed and funded, particularly in service industries like insurance and banking. Ombudsmen have wide powers of investigation and their recommendations need not be limited to what is

13 Woolf report 139 paras 16-21.

14 Beldham LJ (1992) 58 **Arbitration** 178.

strictly permitted as a matter of law.¹⁵ Their services are usually free to the consumer who does not need legal advice. The consumer is not bound by the Ombudsman's recommendation and is not precluded from taking the matter to court or to arbitration. Because Ombudsmen are appointed for a specific industry or sector, they also develop considerable expertise in dealing with disputes in their field. Apart from the success achieved by Ombudsmen in dealing with individual complaints their annual reports serve to identify problem areas and to raise standards generally in respect of the industry for which they are appointed.¹⁶ Regarding the use of the Ombudsman by the insurance industry in South Africa see T Cohen.¹⁷

3.17 What are the particular advantages of the Ombudsman compared to other forms of ADR, for example small claims arbitration or mediation? What other industries in the private sector in South Africa and what entities in the public sector could usefully consider appointing an Ombudsman?

(vii) Dispute avoidance procedures in long-term contracts

3.18 Particularly in big construction projects, involving work over a number of years and with large amounts at stake, increasing use is being made of an independent Dispute Resolution Adviser (DRA) or Dispute Resolution Board.¹⁸

3.19 The DRA is usually engaged in addition to the professional employed by the employer to administer the contractor's performance of the construction contract. The DRA monitors progress and meets at regular intervals with representatives of the employer, the professional administrator, and the contractor, taking note of problems as they arise. The main function of the DRA is to promote cooperation between the parties and either to assist

15 Woolf report para 10.

16 Jefferies, R "Alternative dispute resolution and the Ombudsman" (1996) 62 **Arbitration** 67.

17 Cohen, T "The insurance ombudsman - an alternative dispute resolution forum for the insurance industry" (1996) 8 **SA Merc LJ** 252.

18 Luk, JWK & Wijedoru, B "A proposal for a more effective and efficient resolution system for international construction contracts" (1993) 59 **Arbitration** 100; Butler DW "Dispute resolution procedures" in Loots PC (ed) **Construction law and related issues** Juta 1995 1009; Luk, JWK & Wong, WT "The current practice of dispute resolution adviser(DRA) in the construction industry of Hong Kong" (1995) 61 **Arbitration** 253(hereinafter referred to as Luk & Wong).

them to avoid disputes or to resolve them before they can escalate. The DRA is particularly useful where the employer is a government agency employing an in-house professional to administer the contractor's work.

3.20 What is the potential for applying this technique in South Africa? To what extent could it ensure that public money used on large construction projects is well spent and that vast amounts of time and money are not wasted in protracted arbitrations or court cases?¹⁹ In respect of what other types of contract could the technique be usefully employed?

(viii) Labour law

3.21 A particular field respondents may wish to consider is that of labour law. The Labour Relations Act, 1995 took effect on 11 November 1996. It provides for mediation and arbitration. Does it do so adequately - or must its Commission for Mediation and Arbitration be given time before the question can be answered? Does that mechanism lend itself to wider application for other types of civil or commercial disputes?

(ix) Comparative law

3.22 In the United Kingdom the Heilbron Committee's report argued in June 1993 that there were grave defects in the workings of the civil justice system in the United Kingdom. In 1994 the Lord Chancellor responded to the profession's initiative by appointing Lord Woolf to conduct a review of civil justice. This took place against the background of a general feeling of dissatisfaction with civil justice in that country, and in particular, with delays and costs.

3.23 In his interim report (Access to Justice) published in June last year, Lord Woolf sought to identify primarily what a civil justice system should achieve; what was wrong with the present system; what new approach to justice was required; and how this was to be achieved.

3.24 Commenting on these recommendations in the journal of the Bar of England and Wales²⁰,

19 Luk & Wong 254.

20 **Counsel** Nov/Dec 1994.

Anthony Speaight warned that “[t]he harsh truth is that the spiralling cost of civil litigation is a problem of intractable complexity”. He continues:

“Over the last decade there have been many reforms of civil procedure. Some of the country’s finest brain power has shaped them. The theme of most of the innovations, such as written submissions and witness statements, has been greater use of paper procedures. The aim of all these changes has been to reduce the cost of litigation. Yet it is universally accepted that over that period the cost of civil litigation has soared. The record of arbitration, which is the private sector competitor to the courts, has in general been equally disappointing. If the solution was at all easy to find, one might have expected that arbitrators would have had the market incentive to discover it. But every commercial practitioner knows that arbitration is generally even more expensive than litigation.

These very observations ought to prompt the question whether the direction of the last decade’s reforms should be pressed any further. Indeed, the possibility should be squarely faced that today’s crisis is the very consequence of well-intentioned reforms of recent years”.

3.25 We quote this not as a reflection of any view yet formed by the Project Committee. It is not itself in any way dispositive of the questions posed above for responses. It represents however one (controversial) view in relation to the question of law reform which seeks to introduce ADR in the area of civil practice. The caution is not a new one. In Mr Justice Astbury’s adage: “Reform! Reform ! Aren’t things bad enough already?”

x) Methodology

3.26 The point to be made in the present context is that if respondents consider that there is a role for ADR in civil practice, it is essential for them to suggest in practical terms how that role is to be realised. In this regard, any implementation of ADR necessarily cannot take place in a vacuum. The point is well-illustrated by the proposed new rule 37A²¹ (of the Supreme Court

21 The principle aim of the proposed new Rule is to reduce delays in bringing matters to trial. It comprises a system whereby parties and their representatives can agree to set their own timetable but will ,in the normal

rules) which is under contemplation.

3.27 If respondents are of the view that there is a practical role for ADR in the civil justice system; and are able to delineate the manner in which it could be incorporated in current rules of court and civil practice, it would also be useful to know precisely how it is proposed that this be achieved. For example, what specific legislative amendments, or changes to the rules of court are contemplated? (It must be borne in mind in this regard that the Rules Board is aiming at achieving a single set of basic rules applicable to all courts, the essential variance in as few respects as possible). If it is suggested that ADR be incorporated as a particular phase of civil practice (in a compulsory way? how enforceable? in limited respects?) what is proposed as regards methodology?

b) Family mediation

i) Overview

3.28 In South Africa the field of family and divorce mediation has developed in a very segmented fashion as services have over the years been provided along lines of race, culture, and income level. Different initiatives were established to deal with different components of the population.²²

3.29 The different sectors of involvement that can be identified²³ in this regard are court and other state structures; private practitioners; Non-Governmental Organisations(NGO's) in conjunction with university based services and welfare institutions; and Community Based

course, have to complete their preparations for trial within a prescribed time. It includes a procedure whereby a Default Hearing before a Judge will be called by the Registrar whenever a party fails to comply with the Court's directions. The Judge will endeavour to get the parties back on track. The matter may, however, be taken out of the main stream and placed on the 'Not Ready List' until preparations for trial have reached a satisfactory stage. The Rule also provides for the exchange of witness summaries and provisions aimed at limiting time consuming and unnecessarily expensive expert evidence. When the matter is ready for trial, the Registrar will allocate a trial date and convene a Final Conference where a Judge will ensure that the matter is ready for hearing and explore the possibility of a settlement of the whole matter or some of the issues.

22 Van der Merwe, H " Overview of the South African Experience" **Community Mediation Update** Newsletter of the Community Dispute Resolution Trust April 1995(hereinafter referred to as Van der Merwe).

23 Van der Merwe 2.

Organisations(CBO's) and traditional authorities.

aa) Court and other state structures

3.30 The two court structures presently engaged in mediation are the Office of the Family Advocate and the so-called Black Divorce Courts. Social workers in provincial structures are also often involved in this arena and court referrals result in intervention requests.

3.31 The Office of the Family Advocate has been in operation since 1990 and is specifically involved in settling disputes of custody and access. It also monitors all cases involving minor children and has a large contingent of trained mediators who offer a model of compulsory mediation.

3.32 The legislation and rules outlining the functioning of the Family Advocate have been criticised for not making proper use of mediation procedures. It is being said that the intervention of the Family Advocate is not voluntary and that the process can be intimidating because of the need to establish facts. A neutral approach is furthermore impossible as judgements have to be made with regard to the parenting abilities of the parties and the mediator is put in the position of proposing solutions and making a judgement if the parties fail to agree.

3.33 In the Black Divorce Courts mediation is a limited, irregular and informal component of the settlement process.

3.34 In 1983 the Hoexter Commission recommended the establishment of a single family court for all the inhabitants of the Republic, irrespective of race, having comprehensive jurisdiction in regard to family matters. It was proposed that the court should consist of two separate components, a social component being the family court counseling service and a court component. The counselling service would include a conciliation function whereby warring spouses would be assisted to achieve constructive dialogue in order to minimise trauma for all parties concerned and resolve disputed issues by agreement.

3.35 In 1993 the Magistrate's Court Amendment Act²⁴ flowed from the recommendations of the Hoexter Commission. It did not, however, give effect to all its recommendations. It did not, for instance, make provision for a dual function for the family court by incorporating a social and a court component and omitted to envisage the existence of private family mediation services associated with the conciliation function that was to form part of the social component of the court.

3.36 The 1993 Act has never been implemented as it received much criticism on substantive issues. Implementation was also regarded as being difficult from a technical point of view. The appointment of a taskgroup to re-evaluate the Hoexter Commission report and draft legislation in order to draft a bill in terms of which a pilot project for family courts may be installed, is now being considered. In this process the 1993 Bill may be repealed. As an interim provision a bill has been considered and adopted by Cabinet to make provision for access of people of all races to the Black Divorce Courts. This will only be a temporary provision until the taskgroup completes its work.

bb) Private mediation

3.37 Private mediation is practised by a large number of individuals who have been trained in mediation techniques. The mediation movement has developed to a very sophisticated level in most city areas, for example the Gauteng region, Durban, Port Elizabeth and Cape Town. It is however felt that private mediation services have largely been available only to those who can afford the fees of professional mediators, while the majority of black communities have had to rely on dispute resolution services of advice centres, community-based structures and traditional healers only.

cc) NGO's and university- based services

3.38 The Non-governmental organisations, who are not directly government controlled, but have links with educational structures provide highly skilled services either free of charge or at minimal cost to communities that otherwise have very limited access to the law or dispute

24 Act 120 of 1993.

resolution procedures.

dd) CBO's and traditional authorities

3.39 Community-based organisations operate in close cooperation with their communities. They are seen as accessible and responsive to community concerns. Advice centres and community-based para-legals are often the only resource in the community for residents who need information about maintenance, custody and divorce. They assist parties to resolve disputes without going to court. They also play an important role in educating communities about the law, their rights and mobilising communities to lobby for change. From research conducted it appears that in the past only the Community Dispute Resolution Trust was actively involved in solving family disputes in rural areas. In this regard it can be stated that, by reason of the various legal systems and the controversy that exists in the implementation of these legal systems, the community centres have delivered an important service in matters which could not be dealt with by a specific court system. Street committees and community courts have also settled many disputes about custody and maintenance.

3.40 Both CBO's and NGO's are at present severely constrained by a lack of resources. The change in government has presented a difficult funding situation as international funders have withdrawn much of their support and the government is slow to fill the gap.

3.41 The West Rand Family Mediation Project was established during 1995. The project is a collaborative effort by a range of governmental and non-governmental organisations working in partnership to provide a centralised divorce mediation service for the poorest members of the area. It is a parastatal that has been specifically established as a pilot project to research and explore the field of family mediation on a multi-disciplinary level. It is investigating and evaluating a specific model suitable to South African circumstances. A co-mediation process is being used with the help of volunteer and professional mediators. This involves a team of two mediators, one a family lawyer and the other a person qualified and experienced in marital and family work. It is felt that there should be a move away from what is termed a Eurocentric approach to the law and a need to Africanise the approach with regard to mediation.

3.42 In the rural community different methods of mediation are used as opposed to the metropolitan areas. Various traditional structures still play a very important part in regulating and mediating family disputes. A family member is chosen by both families at the formation of the customary marriage to mediate in future family disputes. There is also the aspect of polygamy that has a direct impact on the mediation process. Rural women do not have the same access to mediation procedures as is possible for their urban counterparts.

3.43 In its response to the SALC issue paper on the harmonisation of common and customary law, the Gender Research Project of CALS stresses that it considers that people do not necessarily have one set of cultural values only.

ii) Issues to be discussed

3.44 Issues that need to be discussed are, amongst others, the following:

- * Are existing court structures making proper use of mediation procedures? If not, should this situation be rectified. If so, how?
- * Is there a place for a form of compulsory family mediation or should mediation always be voluntary?
- * Should mediation and conciliation functions be incorporated in a social component of the envisaged family court? If so, how should this be done?
- * Should a community mediation service be developed that will be specifically linked to any of the present court structures? If so, how?
- * Should community based mediation be developed within the structures of the community courts discussed below? If so, how?
- * What should the professional status and reputation of individual mediators and lay-mediators be? Is a co-mediation model a viable option?
- * The viability of the two pilot-projects (family courts and mediation centre) mentioned above?
- * What should the state's role in family mediation be?

c) Community courts

3.45 Community courts have become the contemporary term used when referring to popular justice structures such as street committees and yard, block or area committees operating outside the formal justice system in urbanised “African ” townships and informal settlements. Mncadi and Citabatwa²⁵ refer to these justice systems as being informed by African traditional law, urban popular justice practices and religious law.

3.46 In contrast to the Roman Dutch legal system based on retributive justice, where the object is to establish blame and administer punishment, the informal courts identify responsibilities to meet needs and to promote healing and enforce values by using social pressure. Restorative justice and reintegrative shaming are two of the most important tools of the enforcement process. The judicial process, approach and reasoning used are all elements which echo indigenous South African procedures. It echoes the practice of *makgotla*, *linkundla*, *ibunga* and *imbizo* where the members of the community directly participate in questions and decisions. These popular justice systems have evolved to adapt their practices to urbanised circumstances.

3.47 Community courts should be distinguished from the people’s or kangaroo courts which existed within a political context in the 1980’s, when “mob justice” was meted out by people who did not represent structures which ordinarily would deal with justice issues in those communities, and which earned popular justice an unsavoury reputation.

3.48 In most stable, organised communities there are at present street committees and civic structures that are functional. Indigenous township structures are more than merely courts. They are an integral part of the communalist world-view which inclines residents to compensate for the inadequacy and inappropriateness of state structures. This world-view is based on the principle of reciprocity. People obey because they know that they are going to need their peers at some future date. Family, tribe or village solidarity is often a *sine qua non* for survival. In addition to courts they are surrogate welfare, child care and support systems, burial societies and savings clubs, to name but a few functions. They thus form an integral part of organic township life throughout the country, be it Cape Town, Port Elizabeth, Soweto, Alexandra and stable areas in Kwa-Zulu Natal.

3.49 Community courts are a fact of life. A fundamental issue to be answered is whether, and if so, to what extent, the state should administer and regulate the courts, or lend its state support to private initiatives in the field. A hierarchy via a multi-tiered civic structure with a definite political alignment spell problems if participants do not share the same political allegiance. A solution may be for the state to create an avenue for the administration of justice within communities which will present the community with opportunities thereby empowering it to participate in the shaping of its justice system.

3.50 With the implementation of the community courts the state may hope to reclaim their space in the area of justice, regulate all forms of justice systems in the country, work towards a unitary system that will dispense justice, extend the arm of justice in order to be more effective, bring justice closer to the people on a grassroots level and make the justice system more accessible and friendly.

3.51 Seen from the viewpoint of the communities, the objectives will be to get recognition for the organic structures and popular justice concepts which had evolved in the communities over the years, to work towards having uniformity in different sections of the communities, to participate effectively in dispensing justice with a restorative perspective, to address some of the unacceptable ways the Roman Dutch system is dealing with justice, to participate actively in the policy formulation on issues of justice, to rebuild the social fabric of society, to assist in transforming the formal structures by introducing indigenous models, to strengthen popular justice further by introducing alternative dispute resolution models and to assist the State in working towards cheap and effective justice system.

3.52 The advantages of a community court system seems to be that it depends on voluntary participation, it is cheap and accessible, language is used which is understood within the community, there is an absence of legalese, it creates the opportunity of relieving the criminal justice system of certain disputes, it is based on restorative justice with its holistic approach to problem-solving, it is sensitive to local community values and background conditions, there are fewer delays, therefore swift and less formal justice which helps in the knitting of the social

fabric.

3.53 The disadvantages on the other hand seems to be that the courts are vulnerable to political pressure, the jurisdiction factor could be a problem, there is a lack of investigative capacity and representation: youth and gender inclusivity could be an issue particularly in a rural setting, it currently has parallel status with the formal system, it is not necessarily applicable in all communities in South Africa, and there is an inability to involve people if there is no voluntary participation.

3.54 A matter of major concern is that the community courts should not be regarded as poor people's justice for black people. In this regard it will be of paramount importance to ensure that minimum standards and guarantees should be maintained even in these alternative organs and procedures. The risk, of course, is that the alternative will indeed provide a second class justice. The courts should aim to uphold those safeguards of independence and training that are present in respect of ordinary judges and those formal guarantees of procedural fairness which are typical of ordinary litigation. It is however true that the present justice system cannot provide for issues of affordability, swiftness, repairing the damages caused by the offence and ensuring harmonious relations in communities (issues that are central to a restorative approach to justice) unless fundamental changes take place in the justice system. Far from being a cosmetic change, conciliatory justice may be able to produce these changes.

3.55 One of the characteristic features of the community courts have always been that civil and criminal cases flowing from the same set of facts were heard simultaneously. It is therefore accepted practice that the community courts would have jurisdiction with regard to criminal disputes. There is however great difference of opinion as to the scope thereof. Taking on criminal cases essentially means taking on the responsibility of determining guilt and innocence, an adjudicatory function which would imply extensive coercive control and would require extensive training²⁶. A great amount of regulation will be needed and there should be clear boundaries about the type of cases dealt with and limits on the types of sentencing which they are capable of imposing. Since the civil and criminal aspects of dispute resolution in community

26 Van der Merwe, H & Mbebe, M **Informal justice: The Alexandra justice centre and the future of interpersonal dispute resolution** CALS Working paper 21 Febr 1994.

courts are however so completely interlinked, it would not seem possible to discuss one aspect without the other.

3.56 The role of traditional courts and bringing them into the mainstream of a unified legal system is bedevilled by the political question with regard to the status of traditional leaders. In rural areas the traditional customary law is practised by traditional authorities. The question arises what the interaction, if any, should be between community and traditional courts.

3.57 It is important to state that any project of this kind, regardless of its informality, should adhere to the principles of the Bill of Rights of the South African Constitution. In this sense, special care should be taken to reconcile the informality and different legal approach to conflict resolution with the principles guaranteed in the Constitution.

3.58 Issues to be debated are, amongst others, the following:

- * How, where and by whom should community courts be established?
- * Should community courts be regulated and controlled -
 - by the state, being an extension of the present justice system;
 - by the community or Civic structures;
 - jointly by the state and the community;
 - by the local council or municipality;
 - by the local authorities and communities; or
 - by the Administration of Justice, Communities and the local authorities?
- *What should the functions of the community courts be ?
- *What should the jurisdiction of community courts be in so far as area, person and subject matter are concerned ?
- *What should the position with regard to officers of the community court be:
 - is a presiding officer needed, who will it be, who will appoint or chose him?
 - lay assessors: who will they be, who will appoint/choose them?
 - clerk of the court:who will appoint him or her, jurisdiction, functions?
- *Who will enforce the decisions of the court and how will it be done?
- *What procedure should be followed: mediation, arbitration, conciliation or adjudication?

- * What role should witnesses, the community, lawyers and family play?
- * Should a record of decisions be held?
- *Judgement and orders.
- *Should appeal and review be allowed and by whom?
- *What should the relationship be between community and traditional courts?
- *How can minimum standards be ensured?

d) Alternative dispute resolution and the criminal law

3.59 What role if any should ADR play with regard to criminal disputes?

3.60 It should be remembered that mediation in the criminal justice context is not the same as mediation in civil disputes. There are five major differences that should be kept in mind:²⁷

- a) The offence has already occurred and consequently there is no continuing dispute;
- b) the parties are not equal in that the offender committed the offence totally on his/her terms without regard for the victim;
- c) mediation in the criminal justice context represents a shift towards “restorative” justice, which views crime as the violation of one person’s rights by another;
- d) mediation in the criminal context contains an aspect of reparation that is not a component of mediation in the civil context;
- e) mediation in the criminal context especially when it forms part of the sentencing process involves the final agreement being publicly aired in court. This would never occur in civil mediation where the outcome is confidential and remains simply a matter between the parties.

3.61 In South Africa ADR may be relevant to criminal law in the following areas:

- i) Community courts

²⁷ Northern Territory Law Reform Committee **Mediation and the criminal justice system** Final Report No 17A March 1996.

3.62 In the community courts no distinction is made between the criminal and the civil law issues flowing from the same case. See above for discussion.

ii) Victim-offender mediation

3.63 In victim-offender mediation the primary goal is seen as compensating the victim for the loss suffered as a result of the crime by making the offender take personal responsibility for making good this loss. The traditional system does not have this personal focus in that the offender is made accountable by paying a fine or promising to be of good behaviour. These punishments do not relate to the personal loss of the victim. The programme gives the victim an opportunity to tell the offender how the crime affected him or her. The offender has the opportunity to apologise, explain his or her behaviour and make some reparation.

3.64 Victim-offender mediation is at present being investigated as part of a separate issue paper on sentencing.²⁸ Project committees will be co-ordinating their efforts.

iii) Juvenile justice programme

3.65 The juvenile justice program is a process whereby offenders are diverted away from the court system or judicial process in the first instance. By agreement, the offenders and victims meet to discuss what has happened and negotiate measures for repairing damage caused by the offence. The meeting takes place in family forums chaired by a facilitator. Family and support persons of both victim and offender are invited to attend and be involved in the discussion and outcome.

28 Project 82.

3.66 An investigation into juvenile justice²⁹ has just been included in the Commission's programme of investigation. A project committee has been appointed and the two committees will be coordinating their efforts.

iv) Family violence

3.67 Most writers do not extend the appropriateness of ADR to disputes where domestic violence is involved. The main reason for this is that ADR is a consensual process rather than coercive. A successful mediation therefore is predicated on the parties being able to negotiate as equals to seek solutions that are mutually beneficial. A relationship involving domestic violence is not characterised by negotiation as equals, but by the offender exerting control over the victim through violence that can be both physical and psychological. Mediation requires the victim to be able to negotiate effectively on his or her own behalf when previous attempts to do so may be exactly what resulted in the abuse.

3.68 However, there may be some merit in mediation as part of a deferred prosecution program in situations of family violence. Normal litigation, including the court, is not a hospitable environment for women who have been victims. If mediation is not available woman would be deprived of the choice to use it. Some authors think that it is possible to deal with the imbalance of power by insisting on strict procedural fairness, full participation of the less powerful party, addressing attempts at control by the perpetrator and supplying the less powerful party with support outside the mediation process.

3.69 In so far as family violence is concerned, an investigation³⁰ is under way. An issue paper has been published and comment is being incorporated in a discussion paper. This investigation is however primarily focussed on the question of how to get legal aid to a woman who is being battered.

3.70 As can be seen above, most of the issues regarding ADR and the criminal law are being investigated in other investigations of the Commission. The main issue to be discussed in this

29 Project 106.

30 Project 100.

investigation will be the question of the criminal jurisdiction of the community court.

CHAPTER 4

THE WAY AHEAD

4.1 It is suggested that the issues and options outlined above be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of the incorporation of alternative dispute resolution techniques on various levels and community courts specifically may be proposed. It may be necessary to initiate different inquiries as the areas of investigation defined above are diverse and may hold the possibility of more than one piece of legislation.

4.2 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 whether there are other issues or options that must be explored. To facilitate a focused debate, respondents are requested to formulate concise submissions addressing the problems raised in this issue paper.

4.3 In light of responses received, public workshops may be convened to discuss particular topics to which respondents in particular will be invited. To enable these to be focussed and of value to the investigation, your considered written response will be necessary beforehand.

4.4 The Commission has accorded this investigation one of the highest priority ratings and it is regarded as a matter of urgency. **Interested parties are accordingly requested to consider this paper and to respond before 15 July 1997.**