

*Mr President*

*We, the undersigned, appointed by you as members of the Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court, have the honour to submit to you this **Third and Final Report**.*

.....  
G.G. Hoexter (Chairman)

PRETORIA ..... December 1997

.....  
R.N. Leon (Member)

JOHANNESBURG ..... December 1997

.....  
A.N. Jappie (Member)

DURBAN ..... December 1997

.....  
G.S.S. Maluleke (Member)

KEMPTON PARK ..... December 1997

# VOLUME I

## PARTS ONE AND TWO

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# **INTRODUCTION**

## **THE SCHEME OF THE THIRD AND FINAL REPORT AND A SYNOPSIS OF THE RECOMMENDATIONS THEREIN CONTAINED**

### **I. THE SCHEME OF THE REPORT**

- (A) The Third and Final Report consists of three separate Volumes.
- (B) VOLUME I contains the Commission's findings and recommendations in regard to those matters raised in the Terms of Reference not already dealt with in the **First and Second Interim Reports**.
- (C) VOLUME II contains copies of (1) certain written submissions made by interested parties and (2) other documents relevant to the issues explored in VOLUME I.
- (D) VOLUME III contains extracts from oral submissions made by interested parties at public hearings of the Commission which submissions are relevant to the issues explored in VOLUME I.
- (E) VOLUME I comprises five separate PARTS.
- (F) PART ONE [ ACKNOWLEDGMENTS ] consists of a list of the names of the many persons who gave much assistance to the Commission in connection with the overseas fact-finding mission undertaken by it from 16 August to 9 October 1996. PART ONE is to be found in BOOK 1 of VOLUME I.

- (G) PART TWO is also to be found in BOOK 1 of VOLUME I. PART TWO contains the Commission's findings and recommendations in regard to the need for the establishment in South Africa of **a specialised Family Court of comprehensive jurisdiction**. A summary of the recommendations in regard to a Family Court are set forth in paragraph 1 of the SYNOPSIS hereunder.
- (H) PART THREE is to be found in BOOK 2 of VOLUME I. PART THREE consists respectively of SECTION (A) and SECTION (B).
- (J) SECTION (A) of PART THREE consists of the Commission's findings and recommendations in regard to a proposal that there should be established in South Africa **a specialist court for Intellectual Property Law matters**. The Commission's recommendation in regard thereto is reproduced in paragraph 2 of the SYNOPSIS hereunder.
- (K) SECTION (B) of PART THREE contains the Commission's findings and recommendations in regard to a proposal that there should be established in South Africa **a specialist insolvency court**. The Commission's recommendation in regard thereto is reproduced in paragraph 3 of the SYNOPSIS hereunder.
- (L) PART FOUR is to be found in BOOK 3 of VOLUME I. PART FOUR contains the Commission's findings and recommendations in regard to various issues pertaining to access to justice, including, *inter alia*, the need in South Africa for (1) **case management ; court-annexed Alternative Dispute Resolution ; and the exchange of witness summaries ; (2) a circuit court system for the adjudication of civil cases ; and (3) a commercial court**. A summary of the Commission's findings and recommendations on the abovementioned (and other related) issues is to be found in paragraphs 4 to 9 of the SYNOPSIS hereunder.
- (M) PART FIVE (which is also to be found in BOOK 3) contains the Commission's findings and recommendations in regard to **a possible expansion of the original civil jurisdiction of the divisions of the High Court** mooted in paragraph (1)(d) of the Terms of Reference. The Commission's recommendations in regard thereto are reproduced in paragraph 10 of the SYNOPSIS hereunder.

## II. SYNOPSIS

### 1. SUMMARY OF RECOMMENDATIONS IN REGARD TO A FAMILY COURT OF COMPREHENSIVE JURISDICTION [SEE PART TWO IN BOOK 1] :

- 1.1 The Commission unanimously recommends the establishment in South Africa of a specialist Family Court of comprehensive jurisdiction. It will be an independent Court having the status of a Superior Court.
- 1.2 As an essential first step towards the establishment of a Family Court the Mediation in Certain Divorce Matters Act, No 24 of 1987, must be repealed and replaced by statute to be styled “ **THE FAMILY ADVOCATE AND FAMILY COUNSELLING SERVICE ACT** ” [ the FAFCS Act ].
- 1.3 The FAFCS Act will, *inter alia*, give the Family Advocate *locus standi* in all divorces, irrespective of the racial groups to which the parties belong, and in customary unions and in religious marriages not recognised by the civil law. It will also give the Family Advocate *locus standi* to inquire into and to report to the Family Court in connection with any child, whether born in or out of wedlock ; and whether or not a divorce action affecting the child has been instituted.
- 1.4 The FAFCS Act will establish, as part of the Family Advocate’s office, a **FAMILY COUNSELLING SERVICE** , which will be staffed by a separate specialised Branch of Family Counsellors (within either the Department of Justice or the Department of Welfare) designed to provide experienced social welfare workers to the Office of the Family Advocate on a regular and reliable basis. This Branch should have its own budget.
- 1.5 The Family Counselling Service will be attached to the Family Court, and it will provide the social agency component in the Court. In addition the services of the Family Counselling Service will be available to members of the public, free of charge, and irrespective whether or not they are involved in divorce or other family litigation.

- 1.6 The Family Counselling Service will, *inter alia*, provide :-
- (1) the **reception process** at the reception centre of the Family Court ;
  - (2) the **conciliation process** aimed at helping estranged spouses to communicate directly with each other in order to make their parting less traumatic for them and their children ;
  - (3) a **supporting service for the court component of the Family Court**, by ensuring that any further social welfare investigation which the Court may require is promptly undertaken.
- 1.7 The passing of the FAFCS Act will be followed by the passing of a statute to be styled “**THE FAMILY COURT ACT**” to provide for the establishment of a Family Court of comprehensive jurisdiction.
- 1.8 There will ultimately be a Family Court in each provincial division of the High Court in which there is an Office of the Family Advocate. The Family Court will also proceed on circuit in rural areas. As and when a Family Court is established within the territorial area of any provincial division, then within that area the jurisdiction of the divorce courts established under section 10 of Act 9 of 1929 (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997), should be phased out.
- 1.9 The Judges in the Family Court will be designated “**FAMILY COURT JUDGES**”. The procedure for their appointment and their salaries will be the same as those of High Court Judges. Their term of office (subject to renewal) will be seven years.
- 1.10 Family Court Judges will be assisted by judicial officers called **FAMILY COURT COMMISSIONERS** who will perform certain judicial functions (such as hearing undefended divorces, maintenance cases, and interlocutory applications) and who will preside at pre-trial and mediation conferences. Family Court Commissioners will be appointed by the Minister of Justice upon the recommendation of a small Appointments Committee consisting of Family Law experts whose chairman will be a Family Court Judge. They will be appointed for a period of seven years ; and they will be paid a

salary equivalent to 75% of a Judge's salary.

- 1.11 Candidates for appointment either as a Family Court Judge or a Family Court Commissioner will be required to have : (a) an appropriate professional legal qualification ; and (b) appropriate practical experience in Family Law work ; and (c) a predilection for Family Law work in all its ramifications ; and (d) a compassionate personality.
- 1.12 Each division of the Family Court will have its own Registry and Registrar. It will also have a staff of trained clerks who will assist unrepresented litigants both at the seat of the Court and on circuit.
- 1.13 At each circuit town visited by the Family Court the clerk of the local Magistrate's Court will act on behalf of the Registrar by receiving pleadings filed by litigants whose matters will be heard at the forthcoming circuit.
- 1.14 Each division of the Family Court will have an administrative officer styled "**THE COUNSELLING CO-ORDINATOR**" who will be in charge of the Family Court's social agency component provided by the Family Counselling Service.
- 1.15 The Family Court will have jurisdiction **concurrently with the High Court** :-
  - (a) to hear those matters which are at present heard in the divorce court of the High Court and which, in addition to divorce itself, will include all matters ancillary to divorce such as the division of matrimonial assets ; maintenance for a spouse and minor children ; custody of and access to minor children ; and guardianship of minor children ; applications *pendente lite* for a contribution towards the costs of a divorce action, for maintenance and for interim custody of and access to children ; applications for maintenance as between parent and child and grandparent and grandchild ; and applications for interdicts in matrimonial matters ;
  - (b) to hear the matters at present heard by the High Court under the Age of Majority Act, 1972 ;

- (c) to grant consent to the marriage of a minor if such minor's parent or guardian refuses such consent ; which power is at present exercised by a Judge of the High Court under sec 25(4) of the Marriage Act, 1961 ;
  - (d) to hear cases in which paternity is sought to be determined and which affect the status of a woman or child.
- 1.16 The Family Court will have jurisdiction to hear matters involving disputes between a man and a women arising from a spousal union subsisting (or which earlier subsisted) between them, which union is recognised by their own customs or religious beliefs but not by our civil marriage laws.
- 1.17 The Family Court will have jurisdiction **concurrently with the Magistrates' Courts** :-  
(a) to hear the matters at present heard by the Commissioner of Child Welfare under the Child Care Act, No 74 of 1983 ; (b) to hear the matters at present heard in the Maintenance Court under the Maintenance Act, 1963 ; (c) to carry out the duties and exercise the powers assigned to Magistrates in terms of Chapter 3 (see secs 8 to 18) of the Mental Health Act, 1973 ; to investigate the accommodation or care of aged or debilitated persons under sec 6 of the Aged Persons Act, 1967, and to carry out the duties under secs 5(3) and 5(4) of that Act ; to hold enquiries under the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 1971, and commit persons to rehabilitation centres.
- 1.18 The Family Court will not exercise any criminal jurisdiction.
- 1.19. Family Courts will be launched by means of a single monitored pilot project operating in the territory falling within the jurisdiction of the Natal Provincial Division of the High Court. Such pilot Court will also undertake regular circuits to country districts within the Provincial Division.
- 1.20 From the date of the establishment of the Family Court in the province of KwaZulu-Natal no further cases will be enrolled in the divorce courts established under section 10 of Act 9 of 1929 (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997), in any district falling within the

jurisdiction of the Natal Provincial Division. Part-heard cases in these divorce courts will be completed in the divorce court concerned by the judicial officer seized of the particular case.

- 1.21 The pilot project in KwaZulu-Natal will be monitored for a period of twelve months, whereafter the Government will decide when and within the area of what other provincial divisions of the High Court in South Africa Family Courts should be established.
- 1.22 From the date of the establishment of any further Family Court within the area of any provincial division of the High Court elsewhere in South Africa :-
  - (a) no further cases will be enrolled in the divorce courts established under section 10 of Act 9 of 1929, (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997) in any district falling within the area of jurisdiction of such provincial division ;
  - (b) part-heard cases in the divorce courts mentioned in (a) above will be completed by the judicial officer seized of the particular case.
- 1.23 **The Family Court will have a very modest tariff of costs which will be based essentially on the tariff of costs in the Magistrate's Court.**
- 1.24 In the Family Court, divorce will not be granted by any system of summary dissolution of marriage under which the plaintiff's testimony will be accepted in affidavit form. The plaintiff will be required to testify in open court.
- 1.25 As far as is reasonably possible the Family Court will be housed separately from other courts ; and, where that is not possible, the Family Court should have its own separate entrance. The lay-out and appointments of the Family Court will be such as to create a relaxed and informal atmosphere with cheerful waiting-rooms equipped with playthings for children ; and comfortable offices in which interviews and conciliation sessions may be conducted. Adequate child-care facilities for infants are essential. At the reception centre an informed and sympathetic receptionist will be on duty.

- 1.26 Appeals from the judgments of the Family Court will lie to the Full Court of the High Court.

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**2. THE COMMISSION'S RECOMMENDATION IN REGARD TO A PROPOSED SPECIALIST INTELLECTUAL PROPERTY LAW COURT [ see SECTION (A) OF PART THREE in BOOK 2 ] :**

- 2.1 **The unanimous recommendation of the Commission is that a specialist intellectual property law court should NOT be established in South Africa.**

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**3. THE COMMISSION'S RECOMMENDATION IN REGARD TO A PROPOSED SPECIALIST INSOLVENCY COURT [ see SECTION (B) OF PART THREE IN BOOK 2 ] :**

- 3.1 **The unanimous recommendation of the Commission is that a specialist insolvency court should NOT be established in South Africa.**

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**4. THE COMMISSION'S FINDINGS AND RECOMMENDATIONS IN REGARD TO CASE MANAGEMENT AND COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION (ADR) [ see PART FOUR in BOOK 3 ] :**

**4.1 FINDINGS :**

- 4.1.1 The progress of defended actions through the High Court in South Africa is too

sluggish and too expensive because of unnecessary delays. The delays supervene because the court supinely allows the parties to dictate the pace of litigation.

- 4.1.2 Radical reform is essential. Case management and court-annexed ADR are urgently needed in the High Court in South Africa.
- 4.1.3 Case management involves control of the pace and manner of litigation by the court and not the parties.
- 4.1.4 The case management model best suited to South Africa is the basic model involving a routine court control which requires the parties to report to the court at a number of strategically fixed intervals or events known as “milestones”. The intervals must be just long enough to allow proper preparation by the parties and just short enough to require the parties to act briskly. There must be strict compliance with deadlines.
- 4.1.5 The form of court-annexed ADR best suited to South Africa is mediation. Judges and those members of the court’s personnel involved in case management must attend training courses in mediation. The Judges themselves, however, should not participate in mediation sessions.
- 4.1.6 The new Rule 37A [ see GN R1352 published on 10 October 1997 ], which applies only to the Cape of Good Hope Provincial Division [CPD], is to be welcomed as the first step in this country towards case management. However, its provisions do not go nearly far enough to sustain the operation of an effective case management system in the High Court.
- 4.1.7 Case management should be introduced to South Africa experimentally by means of a monitored Case Management Pilot Project. The obvious choice of a venue for the pilot project is the CPD.

## **4.2 RECOMMENDATIONS :**

- 4.2.1 As soon as is reasonably possible a case management pilot project [ CM pilot project ] should be launched in the CPD.
- 4.2.2 The launching of the CM pilot project should be preceded :-

- (a) by the installation of a **COMPUTER SYSTEM TOGETHER WITH THE APPROPRIATE SOFTWARE** in the court building of the CPD ;
- (b) by the appointment to the court personnel of the CPD (at a market-related salary) of a **CASE MANAGEMENT CONTROLLER** [CM controller ], who shall be an advocate or attorney experienced in High Court civil litigation who has practised for at least ten years ;
- (c) by the compilation by the JUDGE PRESIDENT of the CPD of a list of suitably qualified and experienced mediators within the metropolitan area of Cape Town who are prepared to preside at mediation sessions held as part of a court-annexed mediation service.

4.2.3 The CM controller will be in charge of the administration and monitoring of the CM pilot project ; and he or she will also preside at the **PROGRESS CONFERENCE**.

4.2.4 The parties will be obliged to exchange **WITNESS SUMMARIES** and to file them with the court BEFORE the Progress Conference is held. The witness summaries will be open to the scrutiny of the CM controller.

4.2.5 The Judge who makes directions pursuant to the **MINUTE** must be empowered to refer the matter to court-annexed mediation.

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**5. THE COMMISSION'S FINDINGS AND RECOMMENDATIONS IN REGARD TO A CIRCUIT SYSTEM FOR THE ADJUDICATION OF CIVIL CASES [see PART FOUR in BOOK 3 ] :**

**5.1 FINDINGS :**

5.1.1 The regular civil circuits held in the Western Cape Province function smoothly and they improve access to justice for civil litigants living in or near the circuit towns.

5.1.2 At present no civil circuits are needed in the provinces of Gauteng, Free State, KwaZulu-Natal and the Eastern Cape. No civil circuits are needed in the Northern Cape Province additional to the civil circuits about to be established by the Judge President of that province.

5.1.3 Unless and until effect is given to the Commission's recommendations in its **First Interim Report** in regard to the new provinces of Mpumalanga, the Northern Province and North West [ **the adjoining provinces** ], it may well be that access to justice for civil justice in the larger towns of the **adjoining provinces** would be enhanced if they were to receive regular visits from a civil circuit court.

## 5.2 **RECOMMENDATIONS** :

5.2.1 Until effect is given to the **First Interim Report's** recommendations in regard to the **adjoining provinces**, the relevant Judge President in Gauteng should consult with the Attorneys Association in the larger towns in the adjoining provinces (such as Nelspruit, Middelburg, Pietersburg, Potchefstroom, Klerksdorp and Rustenburg) in order to determine whether or not a need for a civil circuit in any such town exists.

5.2.2 Should a civil circuit in any of the larger towns in the adjoining provinces prove to be necessary, the Western Cape procedure of a **pre-trial conference held in the circuit town six weeks in advance of the actual circuit** should be adopted.

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## 6. **THE COMMISSION'S FINDINGS AND RECOMMENDATIONS IN REGARD TO THE COMMERCIAL COURT** [ see **PART FOUR** in **BOOK 3** ] :

### 6.1 **FINDINGS** :

6.1.1 In Johannesburg (but nowhere else in the country) there is a need for a special forum within the High Court for the resolution of complex commercial

disputes.

- 6.1.2 In order that the Johannesburg Commercial Court should function properly the designation of a case as a commercial action should not require the approval or consent of both parties.
- 6.1.3 A commercial case should not be accorded special treatment in the form of individual case management in preference to a non-commercial action whose speedy disposition, objectively viewed, is a matter of urgency for either or both parties.

## **6.2 RECOMMENDATIONS :**

- 6.2.1 The Commercial Court in Johannesburg should continue and the Supreme Court Act should be amended to give authority to the Judge President to designate an action as a commercial action upon the application of either party to the action.
- 6.2.2 The exchange of **WITNESS SUMMARIES** should be **mandatory** in all cases before the Commercial Court.

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## **7. THE COMMISSION'S FINDINGS AND RECOMMENDATIONS IN REGARD TO A DEPARTMENT FOR COURTS IN SOUTH AFRICA [ see PART FOUR in BOOK 3 ] :**

### **7.1 FINDINGS :**

- 7.1.1 The administration of the courts and the provision of adequate support services for the judiciary are highly specialised functions. In South Africa the courts are administered by the Department of Justice in an unsatisfactory fashion.
- 7.1.2 The court system would function more efficiently and productively if South Africa were to have its own Department for Courts.

### **7.2 RECOMMENDATIONS :**

- 7.2.1 The feasibility of establishing a Department for Courts in South Africa should be considered as a matter of urgency.
- 7.2.2 A small committee composed of a few senior Judges, a senior Magistrate, a senior official in the Department of Justice and a chartered accountant should undertake in New Zealand an in-depth study of the New Zealand Department for Courts. Thereafter the committee should report its findings and recommendations to the President.

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**8. THE COMMISSION'S RECOMMENDATIONS FOR IMPROVING ACCESS TO JUSTICE BY MEANS OF AN INFORMATION SERVICE TO THE PUBLIC [ see PART FOUR in BOOK 3 ] :**

- 8.1 A systematic legal information service should be devised and implemented nation-wide by the Department of Justice with due regard to the multi-lingual composition of our population.
- 8.2 The aim of the programme must be to explain to public how the courts function and from what agencies in the community a citizen may obtain basic legal advice.
- 8.3 Such information should be disseminated by means of the Internet and by means of attractive brochures couched in simple and clear language. The brochures should be freely available to the public at every magistrate's court in the country ; and bulk deliveries of them should be made to all secondary schools throughout the land.

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**9. THE COMMISSION'S RECOMMENDATION TO SPEED UP THE MOVEMENT OF CRIMINAL TRIALS THROUGH OUR COURT BY MEANS OF FAST-TRACK CRIMINAL COURTS [ see PART FOUR in BOOK 3 ] :**

Although its Terms of Reference relate to **civil** litigation in the **High Court** the Commission has decided nevertheless strongly to recommend the introduction, **in both**

**our superior and lower trial courts, of a FAST-TRACK CRIMINAL COURT** such as has been established in the District Court of Western Australia, and whose essential features are described in paragraph 2.3 in PART FOUR (see BOOK 3 of VOLUME I) of this Report.

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**10. THE COMMISSION'S RECOMMENDATIONS IN REGARD TO PARAGRAPH (1)(d) OF ITS TERMS OF REFERENCE [ see PART FIVE in BOOK 3 ] :**

- 10.1 The original civil jurisdiction of each provincial and local division of the High Court should **NOT** be extended by empowering it to entertain all causes, wherever arising, in those matters in which the defendant is an *incola* of South Africa as a whole.
- 10.2 In the light of the new constitutional dispensation and the establishment of nine provinces the whole question of the civil jurisdiction of the courts should be included as an urgent project in the South African Law Commission's programme of work.

# **THIRD AND FINAL REPORT**

## **PART ONE**

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### **ACKNOWLEDGMENTS**

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**From 16 August to 9 October 1996 the Commission and its Secretariat visited Australia, New Zealand, Canada, the USA, Scotland and England on a fact-finding mission. In the course thereof it gained much useful information and received invaluable advice. The success of the mission was due entirely to the assistance unstintingly given to the Commission, initially by those with whom the Secretariat was privileged to correspond in the planning of the mission ; and thereafter by those with whom the Commission was fortunate to meet and consult during the mission itself. The Commission is deeply indebted to all of them. The Commission would, in particular, give its warmest thanks to each of the persons hereunder mentioned :-**

- (1) His Excellency, Mr B. Absolum,  
High Commissioner for New Zealand, Harare;
- (2) His Excellency, Mr. Ian Porter,  
High Commissioner for Australia, Pretoria;
- (3) His Excellency, Dr B.G. Ranchod,  
South African High Commissioner, Canberra;

- (4) Ms M. Maree,  
First Secretary, South African High Commission, Canberra;
- (5) Mr J.M. Underriner,  
Second Secretary, Embassy of the United States of America, Pretoria;
- (6) Mr K.A. Forder,  
Second Secretary, Embassy of the United States of America, Pretoria;
- (7) Mrs J. Partridge,  
Department of Foreign Affairs, Pretoria;
- (8) Mr C. van N Scholtz,  
Department of Foreign Affairs, Pretoria;
- (9) Mr D. van Tonder,  
Department of Foreign Affairs, Pretoria;
- (10) The Hon P. Blaxell,  
Judge, District Court of Western Australia, Perth;
- (11) The Hon K. Hammond,  
Chief Judge, District Court of Western Australia, Perth;
- (12) Mr M.J. Harding,  
Principal Registrar of the District Court of Western Australia, Perth;
- (13) The Hon Justice I.W.P. McCall,  
Chief Judge, Family Court of Western Australia, Perth;
- (14) Ms J. Edwards,  
Associate to Justice I.W.P. McCall, Family Court of Western Australia,  
Perth;

- (15) The Hon Mr Justice D. Malcolm, AC,  
Chief Justice, Supreme Court of Western Australia, Perth;
- (16) Ms J. Lazberger,  
Administrator to the Chief Justice of the Supreme Court of Western  
Australia;
- (17) The Hon Mr Justice D.A. Ipp,  
Supreme Court of Western Australia, Perth;
- (18) Mrs Martin,  
Registrar of the Supreme Court of Western Australia, Perth;
- (19) The Hon Chief Justice M.E.J. Black,  
Federal Court of Australia, Melbourne;
- (20) The Hon Justice B.A. Beaumont,  
Federal Court of Australia, Sydney;
- (21) The Hon Justice W.M.C. Gummow,  
High Court of Australia, Sydney;
- (22) Mr A.C. Tidwell,  
Senior Lecturer in the Graduate School of Management at Macquarie  
University Centre for Conflict Resolution, Sydney;
- (23) Mr F. Astill,  
Macquarie University School of law, Sydney;
- (24) Mr M Noone,  
Macquarie University School of law, Sydney;

- (25) Mr A. Heys,  
Lecturer of the Graduate School of Management at Macquarie University,  
Sydney;
- (26) Mr D.J. Hammerschlag,  
Barrister-at-Law, Sydney;
- (27) Mr. K. Broadley,  
National Chairman Litigation, Freehill Hollingdale & Page, Sydney;
- (28) Mr. H. Herron,  
Senior Litigation Partner, Corrs Chambers Westgarth, Sydney;
- (29) Ms B. Hoskinson-Green,  
Partner, Atanaskovic-Hartnell, Sydney;
- (30) Mr P. McClellan, QC, Sydney;
- (31) Mr J. Stowe, QC, Sydney;
- (32) Ms M. Harrison,  
Senior Legal Adviser to the Chief Justice, Family Court of Australia,  
Melbourne;
- (33) The Hon Justice I.F. Sheppard,  
Federal Court of Australia, Sydney;
- (34) The Hon Mr Justice H.H. Nestadt,  
Supreme Court of Appeal, Bloemfontein;
- (35) The Hon Mr Justice R.H. Zulman,  
Supreme Court of Appeal, Bloemfontein;

- (36) Sir Ian Barker,  
Acting Chief Justice of the High Court, Wellington;
- (37) Miss D. Totten,  
Deputy Registrar of the High Court, Wellington;
- (38) Mr W. Bailey,  
Chief Executive, Department for Courts, New Zealand, Wellington;
- (39) Mr B. Murray  
General Manager - Case Processing, Department for Courts, New Zealand,  
Wellington;
- (40) Mr G. Turkington,  
Vice-President of the New Zealand Law Society, Wellington;
- (41) Mr K. Stone,  
President of the Wellington District Law Society;
- (42) Mrs R. Mazengarb, BA, LL.B.,  
Director, Public and Professional Relations, New Zealand Law Society,  
Wellington;
- (43) Ms N. Schaab, BA, LL.B.,  
Legal Officer, New Zealand Law Society, Wellington;
- (44) The Hon R. Young,  
Chief Judge of the District Court of New Zealand, Wellington;
- (45) Sir Ivor Richardson,  
President, Court of Appeal of New Zealand, Wellington;

- (46) Mr I. Macduff,  
Director, Institute for Dispute Research and Resolution, Senior Lecturer in  
Law, Faculty of Law, Victoria University of Wellington;
- (47) Mr J.L. Marshall,  
Barrister, Buddle Findlay, Barristers and Solicitors, Wellington;
- (48) The Hon Justice D. Baragwanath,  
President, Law Commission, Auckland;
- (49) The Hon Justice B. Robertson,  
Executive Judge, High Court of New Zealand, Auckland;
- (50) The Hon Justice S. Cartwright, DBE,  
High Court of New Zealand, Auckland;
- (51) Ms M. Neller,  
High Court Manager, High Court of New Zealand, Auckland;
- (52) The Hon P. Mahony,  
Principal Family Court Judge, Auckland District Court, Wellington;
- (53) The Hon Judge N.C. Jaine,  
Judge Administrator for the Chief Justice of New Zealand, Wellington;
- (54) The Hon Justice T. Doogue,  
High Court of New Zealand, Wellington;
- (55) Mrs G. V. Mitchell,  
Attorney at Law, San Mateo, California;
- (56) Ms K. Keating,  
Legal Systems Researcher, Vancouver;

- (57) Mr R. Gourlay, Q.C, Vancouver;
- (58) The Hon Mr Justice A. McEachern,  
Chief Justice of British Columbia, Vancouver;
- (59) The Hon Mr Justice S. Romilly,  
Supreme Court of British Columbia, Vancouver;
- (60) Madame Justice Levine,  
Family Court, Vancouver;
- (61) The Hon D. Schmidt,  
Associate Chief Judge, Provincial Court, with responsibility for the Family  
Court, Vancouver;
- (62) The Hon J. Auxier,  
Administrative Judge for British Columbia's Family Court, Vancouver;
- (63) The Hon Mr Justice J.C. Bouck,  
Supreme Court of British Columbia, Victoria;
- (64) Ms H. Neaman,  
Law Courts Education Project of British Columbia, Vancouver;
- (65) Mr R.T. Craig,  
Executive Director of the Law Courts Education Society of British  
Columbia, Vancouver;
- (66) The Hon Mr Justice D.W. Shaw,  
Supreme Court of British Columbia, Vancouver;

- (67) Mr G. McHale,  
Senior Executive Officer at the Ministry of the Attorney General  
responsible for family matters, Victoria;
- (68) Mr Daniel L. Ritchie,  
Chancellor, University of Denver, Colorado ;
- (69) Mr. S.A. Edmonds,  
Director, Office of the Chancellor, University of Denver, Colorado ;
- (70) The Hon Chief Justice A.F. Vollack,  
Supreme Court of the State of Colorado, Denver;
- (71) The Hon G.K. Scott,  
Judge, Supreme Court of the State of Colorado, Denver;
- (72) Mr. S.V. Berson,  
State Court Administrator, Colorado Judicial Department, Denver;  
Colorado ;
- (73) Dr. B. Mahoney,  
President of the Justice Management Institute, Denver, Colorado;
- (74) Mr H.E. Solomon,  
Principal of the Justice Management Institute, Denver, Colorado;
- (75) Mrs M. Solomon,  
Court Management Consultant, Denver, Colorado;
- (76) The Hon C.L. Peterson,  
Chief Judge, Second Judicial District of Denver, Colorado;

- (77) Mr D.E. Muse,  
City Attorney, Denver, Colorado;
- (78) The Hon W.E. Webb,  
Mayor, City and County of Denver, Colorado;
- (79) The Hon Diana S. Eagon,  
Judge, Hennepin County District Court, Family Division, Minneapolis,  
Minnesota;
- (80) Ms S.M. Bownes,  
Juvenile and Family Courts Manager, Hennepin County District Court,  
Minneapolis, Minnesota;
- (81) The Hon Mary L. Davidson,  
Judge, Hennepin County District Court, Minneapolis, Minnesota;
- (82) Ms S.M. Cochrane,  
Referee, Hennepin County District Court, Minneapolis, Minnesota;
- (83) The Hon W.R. Howard,  
Chief Judge of the Family Division, Hennepin County District Court,  
Minneapolis, Minnesota;
- (84) Ms K.A. Van De Steeg,  
Division Director, Family Court Services, Minneapolis, Minnesota;
- (85) Mr D.M. Dennis,  
Supervisor, Family Court Services, Minneapolis, Minnesota;
- (86) Mr M.O. Shamblin, J.D., B.A.,  
Unit Supervisor, Family Court Services, Minneapolis, Minnesota;

- (87) Ms S.C. De Vries, M.A.,  
Child Psychologist, Family Court Services, Minneapolis, Minnesota;
- (88) Ms H.L. Sorensen,  
Family Court Officer, Family Court Services, Minneapolis, Minnesota;
- (89) Ms M.S. Baumann, M.S.W. ,  
Family Counselor, Family Court Services, Minneapolis, Minnesota;
- (90) The Hon D.K. Amdahl (Retired),  
Of Counsel, Rider Bennett Egan & Arundel, Minneapolis; Former Chief  
Justice of the Supreme Court of Minnesota;
- (91) Ms T. Sheehan,  
Arbitrator and Mediator, Minneapolis, Minnesota;
- (92) Ms N.A. Welch,  
Executive Director, Mediation Center, Minneapolis, Minnesota;
- (93) Ms A.R. Gourlay, J.D.,  
Director of Training & Family ADR Services, Mediation Center,  
Minneapolis, Minnesota;
- (94) Ms J. Soderquist, LL.M (Cantab),  
Director of Training & Business ADR Services, Mediation Center,  
Minneapolis, Minnesota;
- (95) Mr J.W. Brehl,  
Attorney at Law, Maun, Hayes, Simon, Johanneson, Brehl and Odlaug,  
Saint Paul, Minneapolis, Minnesota;

- (96) Mr R. Lawson,  
Attorney, Minneapolis, Minnesota;
- (97) Mr M. McCrea,  
Attorney, Minneapolis, Minnesota;
- (98) Mr George M. Burditt,  
Partner of Burditt & Radzius, Chartered, Chicago, Illinois;
- (99) Ms B. Harrison,  
Consul General, South African Consulate General, Chicago, Illinois;
- (100) Professor Katheryn M. Dutenhaver,  
Associate Professor, College of Law, De Paul University, Chicago,  
Illinois;
- (101) Mr D. Royko,  
Clinical Director, Domestic Relations Alternative Dispute Resolution  
Program, Circuit Court of Cook County, Chicago, Illinois;
- (102) Mr G.H. Schwartz,  
Deputy Administrator, Mandatory Arbitration Program, Circuit Court of  
Cook County, Chicago, Illinois;
- (103) Professor T.D. Cavenagh, J.D.,  
Assistant Professor of Business Law, and Director, Dispute Resolution  
Center, North Central College, Naperville, Illinois;
- (104) Mr. D.C. Hilliard,  
Senior Partner, Pattishall, M<sup>c</sup>Auliffe, Newbury, Hilliard & Geraldson,  
Chicago, Illinois;

- (105) Mr. R. W. Sacoff,  
Attorney at Law, Pattishall, M<sup>c</sup>Auliffe, Newbury, Hilliard & Geraldson,  
Chicago, Illinois;
- (106) Mr. J. M. Murphy,  
Attorney at Law, Pattishall, M<sup>c</sup>Auliffe, Newbury, Hilliard & Geraldson,  
Chicago, Illinois;
- (107) Mr. M. F. Schultz,  
Attorney with Pattishall, M<sup>c</sup>Auliffe, Newbury, Hilliard & Geraldson,  
Chicago, Illinois;
- (108) The Hon J.D. Schwartz,  
Chief Judge, United States Bankruptcy Court, Chicago, Illinois;
- (109) The Hon R.E. Ginsberg,  
Judge, United States Bankruptcy Court, Chicago, Illinois;
- (110) The Hon J.B. Schmetterer,  
Judge, United States Bankruptcy Court, Chicago, Illinois;
- (111) The Hon Susan P. Sonderby,  
Judge, United States Bankruptcy Court, Chicago, Illinois;
- (112) The Hon E.R. Wedoff,  
Judge, United States Bankruptcy Court, Chicago, Illinois;
- (113) The Hon E.I. Katz,  
Judge, United States Bankruptcy Court, Chicago, Illinois;
- (114) The Hon R. Barliant,  
Judge, United States Bankruptcy Court, Chicago, Illinois;

- (115) The Hon J.H. Squires,  
Judge, United States Bankruptcy Court, Chicago, Illinois;
- (116) The Hon T. James,  
Judge, United States Bankruptcy Court, Chicago, Illinois;
- (117) The Hon R.N. DeGunther,  
Judge, United States Bankruptcy Court, Chicago, Illinois;
- (118) The Hon D.H. Coar,  
Judge, United States District Court, Chicago, Illinois;
- (119) The Hon T.C. Evans,  
Presiding Judge, Domestic Relations Division Circuit Court of Cook  
County, Chicago, Illinois;
- (120) The Hon A.F. Kaplan,  
Judge, Domestic Relations Division Circuit Court of Cook County,  
Chicago, Illinois;
- (121) The Hon M. Leikin,  
Judge, Domestic Relations Division Circuit Court of Cook County,  
Chicago, Illinois;
- (122) The Hon B. W. Lester,  
Judge, Domestic Relations Division Circuit Court of Cook County,  
Chicago, Illinois;
- (123) Mr. E.U. Notz, P.C.,  
Attorney at Law, Chicago, Illinois;

- (124) Mr. D.K. Kinsella,  
Attorney at Law, Burditt & Radzius, Chartered, Chicago, Illinois;
- (125) Mr S. Makena,  
Third Secretary, High Commission for South Africa, Ottawa, Ontario;
- (126) Mr A. Gareau,  
Director General, Policy and Corporate Services, Office of the  
Commissioner for Federal Judicial Affairs, Ottawa, Ontario;
- (127) Mr W.J. Rankin,  
Executive Editor, Federal Court Reports, Office of the Commissioner for  
Federal Judicial Affairs, Ottawa, Ontario;
- (128) Madame A. Roland,  
Registrar, Supreme Court of Canada, Ottawa, Ontario;
- (129) Ms M. Wessels,  
Consul, South African Consulate General, Toronto, Ontario;
- (130) The Hon Mr Justice J.M. Farley,  
Ontario Court of Justice, Toronto, Ontario;
- (131) Mr. Stephen L. Peterson,  
Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P., Washington  
D.C.;
- (132) Mr. G.E. Hutchinson,  
Of Counsel, Henderson, Farabow, Garret & Dunner, L.L.P., Washington  
D.C.;

- (133) Mr C.E. Good,  
Attorney at Law, Finnegan, Henderson, Farabow, Garret & Dunner,  
L.L.P., Washington D.C.;
- (134) The Hon G. L. Archer, JR,  
Chief Judge, United States Court of Appeals for the Federal Circuit,  
Washington D.C.;
- (135) The Hon R.R. Rader,  
Circuit Judge, United States Court of Appeals for the Federal Circuit  
Washington D.C.;
- (136) Mr J.R. Myers,  
Administrative Partner, Intellectual Property Group, Venable, Baetjer,  
Howard & Civiletti, LLP, Washington D.C.;
- (137) Mr G. M. Hnath,  
Partner, Labour/Litigation Division, Venable, Baetjer, Howard &  
Civiletti, LLP, Washington D.C.;
- (138) Ms L.B. Meyer,  
Attorney at Law, Venable, Baetjer, Howard & Civiletti, LLP, Washington  
D.C.;
- (139) The Hon R. McKelvie,  
Judge, United States District Court for the District of Delaware;
- (140) The Hon S. Harris,  
Administrative Law Judge, U.S. International Trade Commission,  
Washington D.C.;

- (141) Ms N. Linck,  
Solicitor, U.S. Department of Commerce, Patent and Trademark Office,  
Arlington;
- (142) Ms M.A. Capria,  
Associate Solicitor, U.S. Department of Commerce, Patent and Trademark  
Office, Arlington;
- (143) Mr. D.R. Dunner,  
Finnegan, Henderson, Farabow, Garret & Dunner; Former Chairman of  
the Advisory Committee to the United States Court of Appeals for the  
Federal Circuit, L.L.P., Washington D.C.;
- (144) The Hon Leonie M. Brinkema,  
Judge, United States District Court, Eastern District of Virginia;
- (145) Professor D.J. Meador,  
James Monroe Professor of Law, University of Virginia;
- (146) Ms A. Venter,  
South African Embassy, Washington DC;
- (147) Mr M.O. Sigal, Jr,  
Attorney, Simpson, Thacher & Bartlett;
- (148) The Hon B.R. Lifland,  
Chief Judge, Bankruptcy Appellate Panel for the 2<sup>nd</sup> Circuit, New York;
- (149) Ms C.G. Morris,  
Clerk of the Court, United States Bankruptcy Court, Southern District of  
New York;

- (150) Mr M.S. Aziz,  
Deputy Consul General, South African Consulate General, New York;
- (151) Ms M. Sutherland,  
Vice Consul, South African Consulate General, New York;
- (152) Ms A. Kühn,  
Vice Consul, South African Consulate General, New York;
- (153) Mr E. Lee,  
Director of Operations, Midtown Community Court, New York;
- (154) The Hon Rosalyn Richter,  
Judge, New York Criminal Court, New York;
- (155) The Hon Lord W.L.K. Cowie,  
Parliament House, Edinburgh;
- (156) The Hon Lord W.I.S. Allanbridge,  
Parliament House, Edinburgh;
- (157) The Right Hon the Lord Hope of Craighead,  
The Lord President, Court of Session, Edinburgh;
- (158) Jean Raeburn, MBE, M Sc,  
Children's Panel Training Unit, Centre for Continuing Education,  
University of Edinburgh;
- (159) The Right Hon The Lord Steyn, PC,  
House of Lords;
- (160) The Right Hon The Lord Woolf,  
Master of the Rolls, Royal Courts of Justice;

- (161) The Right Hon Sir Richard Scott,  
Vice Chancellor, Royal Courts of Justice;
- (162) The Right Hon Lord Justice A.H. Ward,  
Court of Appeal, Royal Courts of Justice;
- (163) The Right Hon Lord Justice M. Waller,  
Court of Appeal, Royal Courts of Justice;
- (164) The Hon Sir Anthony Colman,  
Judge in charge of the Commercial Court List, Queens Bench Division;
- (165) The Hon Mr Justice Jacob,  
Chancery Division, Royal Courts of Justice;
- (166) Mr G. Hickling,  
Principal Examiner, Policy Unit, The Insolvency Service, London;
- (167) Mr A. A. Kelsall, A.C.C.A.,  
Assistant Official Receiver, Office of the Official Receiver, The  
Insolvency Service;
- (168) Mr E. A. Murphy,  
UK Insolvency Service;
- (169) Mr N. Grove,  
Principal Registry, Family Division, Somerset House;
- (170) Mr G. Angel,  
Principal Registry, Family Division, Somerset House.

## **THIRD AND FINAL REPORT**

### **PART TWO**

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#### **THE NEED FOR THE ESTABLISHMENT IN SOUTH AFRICA OF A SPECIALIST FAMILY COURT OF COMPREHENSIVE JURISDICTION**

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### **CHAPTER ONE**

#### **1. INTRODUCTION**

- 1.1 In paragraph (1)(c) of its Terms of Reference the Commission is required to make recommendations with reference to the need for improved access to justice for civil litigants in the Supreme Court (now the High Court) through :-
- (i) the creation of specialist courts such as the Commercial Court functioning in Johannesburg ; and
  - (ii) the establishment of a Circuit Court system for the adjudication of civil cases.
- 1.2 In Chapter Nine (at pages 130 to 136) in this part of its Third and Final Report the Commission unanimously recommends the establishment in South Africa of a specialist Family Court of comprehensive jurisdiction, which will be an independent Court having the status of a Superior Court ; and which will adjudicate family cases also by means of a Circuit Court system.
- 1.3 From various interested parties the Commission has received many written responses and heard many oral representations supporting the creation of a specialist Family Court for South Africa. These interested parties include Judges, Magistrates, advocates, attorneys, legal academics specialising in the field of family law, and members of the public.

- 1.4 As part of its investigations into the issue of a possible Family Court for South Africa the Commission has examined, *inter alia*, the structure and functioning of the following :-
- 1.4.1 the Family Court of Western Australia ;
  - 1.4.2 the Family Court of New Zealand ;
  - 1.4.3 the Family Court of British Columbia ;
  - 1.4.4 the Domestic Relations Division of the District Court in Denver, Colorado ;
  - 1.4.5 the Family Division of the District Court of Hennepin County, Minnesota ;
  - 1.4.6 the Domestic Relations Division of the Circuit Court of Cook County, Illinois ;
  - 1.4.7 the Family Division of the High Court at the Royal Courts of Justice in London ; and
  - 1.4.8 the Office of the Family Advocate in each of the cities of Cape Town, Johannesburg, Pretoria, Bloemfontein, Durban and Port Elizabeth.
- 1.5 The Commission has found instructive its study of the structure and functioning of each of the different Family Courts visited by it. However, having due regard to the particular circumstances and the particular needs of our own country, the Commission in making its recommendations is influenced chiefly, and it draws its inspiration mainly, from what it observed in Western Australia and New Zealand respectively. In the opinion of the Commission these are the Family Courts on which a South African Family Court should be fairly closely modelled.

## **CHAPTER TWO**

### **EARLIER RECOMMENDATIONS FOR THE ESTABLISHMENT OF A FAMILY COURT IN SOUTH AFRICA**

#### **2.1 THE 1983 REPORT OF THE COMMISSION OF INQUIRY INTO THE STRUCTURE AND FUNCTIONING OF THE COURTS**

2.2 In paragraph (b) of its terms of Reference the Commission of Inquiry into the Structure and Functioning of the Courts under the chairmanship of Mr Justice G.G. Hoexter [“the earlier Commission”] was required to give attention to the desirability of establishing of Family Court. In PART VII of its Fifth and Final Report presented in December 1983 [“the 1983 Report”] the earlier Commission set forth its recommendations in regard to a Family Court for South Africa. In various written responses received by the current Commission of Inquiry, as well as in various publications by writers on family law, abbreviated reference is made to the earlier Commission as “the Hoexter Commission” and to the 1983 Report as “the Hoexter Report”.

2.3 In the 1983 Report the earlier 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, and functioning at the level of the Regional Court. It recommended that the Children’s Court, the Juvenile Court and the Maintenance Court be unified under one roof as a Family Court which would have jurisdiction concurrent with the Supreme Court to hear divorce actions and applications ancillary thereto. It recommended that the minimum legal qualifications for a judicial officer in the Family Court should be the LL.B. degree.

2.4 **Annexure ” i ”** [ see pages (i) to (vi) immediately after page 136 hereof ] contains a copy of CHAPTER NINE of the 1983 Report in which the earlier Commission set forth its recommendations regarding the creation of a Family Court. The structure of the Family Court recommended in the 1983 Report is described in paragraphs 9.3 and 9.4 thereof [see pages (i) to (ii) of **Annexure “ i ”**]. The recommendations of the 1983 Report as to what matters should be

included in and what matters should be excluded from the jurisdiction of the proposed Family Court were set forth in paragraph 9.6 thereof [see pages (ii) to (iii) of **Annexure “ i ”**].

2.5 In paragraph 9.4 of the 1983 Report the earlier Commission recommended [see pages (i) to (ii) of **Annexure “ i ”**] that the structure of the proposed Family Court should have the following twin components :-

2.5.1 **A SOCIAL COMPONENT** known as the **FAMILY COURT COUNSELLING SERVICE** [” FCCS ”] :

AND

2.5.2 **A COURT COMPONENT** being a court of law and a court of record in which a legally qualified officer would preside and in which the rules of procedure and evidence would apply.

2.6 In paragraph 9.4.2 of the 1983 Report the earlier Commission recommended [see pages (i) to (ii) of **Annexure “ i ”**] that the FCCS would fulfil the following three functions :-

- (a) **The reception process** at the Family Court’s reception centre, where family problems will be sifted and classified ; where both legal advice and social counselling will be available; and where the spouses in marriages that can still be saved will be referred to marriage counsellors with a view to reconciliation.
- (b) **The conciliation process**, which, in case of an irreparable rift in the marriage, is aimed at helping estranged spouses to communicate directly and to good purpose with each other to make their parting less traumatic for them as well as for their minor children; and to resolve by agreement disputed points (such as custody of and access to minor children and the division of matrimonial assets).
- (c) **The supporting service to the court**. Where the court has to adjudicate upon a family matter the counselling service will see to it that any further social welfare investigation or action that may be required by the court will be undertaken either by the counselling services staff or by the staff of some approved social agency.

2.7 One of the issues specifically dealt with in Chapter Three of the 1983 Report was how the function of conciliation in a Family Court is to be adapted to the purely juridical function of a court of law. The earlier Commission found the answer to this question in the approach of the **Report of the Royal Commission on the Courts** which was tabled in **New Zealand** in 1978 [“ the Beattie Report ”] which was the forerunner of the Family Courts established in New Zealand in 1980. In paragraph 3.4 of the 1983 Report the earlier Commission quoted with approval the following passage from the Beattie Report :-

*“ The Family Court concept demands that the Family Court should be essentially a conciliation service with court appearance as a last resort, rather than a court with a conciliation service. The emphasis is thus placed on mediation rather than adjudication. In this way, the disputing parties are encouraged to play a large part in resolving their differences under the guidance of trained staff rather than resorting to the wounding experience of litigation, unless such a course is inevitable. ”*

2.8 In paragraph 9.8.2 of the 1983 Report [ see page (iv) of **Annexure “ i ”** ] the earlier Commission recommended that simultaneously with the establishment of the Family Court there should be created for the Republic the office of a “ **CHILDREN’S FRIEND** ”. Paragraph 9.8.3 of the 1983 Report [ see page (iv) of **Annexure “ i ”** ] read as follows :-

*“ The Children’s Friend will be legally qualified and in proceedings of the Family Court he will protect the interests of minor and dependent children. Where the interests of a minor child are at stake and the Children’s Friend is of opinion that the proposed protection of the child’s interests so require, the Children’s Friend will have the power to arrange for legal representation of the child concerned at public expense. ”*

2.9 In regard to the physical location, lay-out and interior of the Family Court proposed by it the 1983 Report recommended [ see page (v) of **Annexure “ i ”** ] :-

*“ ... that the Family Court should as far as possible be housed separately from other courts, and that special attention should be given to the lay-out and interior appointments and facilities of the Family*

*Court. Well-appointed waiting-rooms, offices in which interviews may be conducted, and child-care facilities are essential at a Family Court. At the reception centre of the Family Court there should be a sympathetic and informed receptionist on duty. ”*

2.10 One of the guide-lines adopted by the earlier Commission was stated thus in paragraph 8.9.3 of the 1983 Report :-

*“ Without in any way advocating total rejection of the adversary system in the adjudication of family matters, the Commission is nevertheless of opinion that a further shift in emphasis towards more inquisitorial procedures as regards family matters would benefit the administration of justice. ”*

2.11 The earlier Commission found [in paragraph 8.9.5 of the 1983 Report] that the adversarial system often resulted in crucial differences within the family, in respect whereof the court ought to give a decision, being artificially withheld from the court’s jurisdiction; and further [ in paragraph 8.10.1 of the 1983 Report ] that both the question whether a marriage had irretrievably broken down as well as the investigation into the suitability of the provisions proposed for the care of the minor children of the marriage were considered by the court in the light of the plaintiff’s one-sided testimony.

2.12 In the opinion of the earlier Commission [see paragraph 8.10.3 of the 1983 Report] the Divorce Act, 1979 should be so amended :-

- (a) that if there are minor children of the marriage no summons in a divorce action will be issued until the plaintiff has lodged a certificate signed by an approved social agency from which it appears that the said organisation has carried out an investigation into the welfare of the minor children and the circumstances of both parties ;
- (b) that the summons in a divorce action indicates the date of the hearing and requires the defendant to attend the hearing whether or not the defendant intends to oppose the relief sought in the summons ;
- (c) that at the hearing of a divorce action a decree of divorce will be granted only after both parties have testified, unless the defendant does

not attend the hearing and the court is satisfied that there are good and sufficient reasons for the absence of the defendant ; and

- (d) that at the hearing of a divorce action in which minor children are involved a decree of divorce will be granted only if the court is satisfied, having regard to the evidence of both parties and a report submitted by the social agency referred to in (a) above, that the proposed provision for the welfare of the minor children is satisfactory or that it is the best possible provision in the circumstances.

2.13 In paragraph 8.17.9 of the 1983 Report the earlier Commission emphasised:-

*“ ... that for the proper functioning of the Family Court the calibre of its presiding judicial officers and the continuity of their tenure of office are important. Judicial officers in these courts should be experienced in, and have a predilection for the adjudication of family matters. It is equally important that the highest degree of expertise should be enlisted for the Family Court counselling service. ”*

2.14 In the 1983 Report the earlier Commission recommended [see page (v) of **Annexure “ i ”**] that the Family Court should serve the rural areas of the Republic by means of a circuit system.

2.15 The earlier Commission further recommended [see pages (v) to (vi) of **Annexure “ i ”**] that the proposed Family Court should be launched by means of **monitored pilot projects** to be undertaken in each of the four metropolitan areas [the PWV area ; Cape Town ; Durban ; and Port Elizabeth] having the largest population concentrations.

## **CHAPTER THREE**

# **AN OUTLINE OF SOUTH AFRICAN LEGAL REFORM IN REGARD TO FAMILY LAW ADJUDICATION FROM 1983 TO 1997**

### **3.1 THE FAMILY COURT BILL 62 OF 1985**

3.1.1 Some of the recommendations of the 1983 Report were embodied in the Family Court Bill 62 of 1985. In paragraph 2 of the Memorandum on the Objects of this Bill, the following was said :-

*“ The Family Court Bill, 1985, provides for both the institution of the court component and the social component. While a number of clauses of the Bill do indicate that the Family Court is distinct from other courts of law, the special nature and functioning of the Family Court will only become evident from the regulations and rules of court to be promulgated under the enabling provisions of the Bill...”*

3.1.2 The Family Court Bill of 1985 was, however, rejected by a Parliamentary sub-committee.

### **3.2 THE DIVORCE AMENDMENT BILL OF 1985**

3.2.1 Some of the recommendations of the 1983 Report for the amendment of the Divorce Act, 1979, were reflected in the Divorce Amendment Bill, 63 of 1985. These were :-

- (a) that a decree of divorce should be granted only after both parties have testified ;
- (b) that a summons in a divorce action involving minor children should not be issued unless a social welfare investigation has been made into the circumstances of both parties and the children; and

- (c) that in considering the arrangements proposed for the minor children of the marriage due regard should be had to the evidence of both parties and a report by a welfare agency.

3.2.2 Nothing came of the Divorce Amendment Bill of 1985.

### **3.3 THE MEDIATION IN CERTAIN DIVORCE MATTERS ACT, NO 24 OF 1987**

3.3.1 In terms of Act No 24 of 1987 the Minister of Justice may appoint one or more FAMILY ADVOCATES at each division of the High Court. Sec 2 of the Act provides that no person shall be appointed as a Family Advocate unless he is qualified to practise as an advocate and the Minister deems him suitable for appointment :-

*“ by reason of his involvement in or experience of the adjudication or settlement of family matters.”*

Sec 3 of the Act makes provision for the appointment of *“suitably qualified or experienced persons”* as FAMILY COUNSELLORS to assist the Family Advocate in the inquiries mentioned in sec 4(1) of the Act.

3.3.2 Sec 4 of Act No 24 of 1987 describes the powers of the Family Advocate in the following terms :-

*“ (1) The Family Advocate shall -*

- (a) after the institution of a divorce action ; or*
- (b) after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979 (Act No 70 of 1979), if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable him to furnish the court at the trial of such action or the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or*

*dependent child of the marriage concerning or regarding such matters as is referred to him by the court.*

(2) A Family Advocate may -

- (a) *after the institution of a divorce action ; or*
- (b) *after an application has been lodged for the variation, rescission or suspension of an order with regard to the custody or guardianship of, or access to, a child, made in terms of the Divorce Act, 1979.*

*if he deems it in the interest of any minor or dependent child or a marriage concerned, apply to the court concerned for an order authorizing him to institute an enquiry contemplated in subsection (1).*

(3) *Any Family Advocate may, if he deems it in the interest of any minor or dependent child of a marriage concerned, and shall, if so requested by a court, appear at the trial of any divorce action or the hearing of any application referred to in subsections (1)(b) and (2)(b) and may adduce any available evidence relevant to the action or application and cross-examine witnesses giving evidence thereat. ”*

3.3.3 Although Act 24 of 1987 was passed on 16 June 1987 it came into operation only on 1 October 1990.

#### **3.4 THE REFERENCE TO “MEDIATION” IN THE TITLE TO ACT NO 24 OF 1987 IS MISLEADING**

3.4.1 Mowatt [ *“The Family Court and Mediation”* 1992 TSAR, vol 2, 289] at p. 293 describes mediation in divorce :-

*“ ...as a process whereby the parties are encouraged, with the assistance of a neutral third party, to reach decisions on disputed issues arising out of the dissolution of marriage. It is a process of legal decision-making and should be distinguished from counselling designed to help parties adjust to the ending of the marriage and its associated*

*emotional consequences. It is of the essence of mediation, as understood in this sense, that the validity of the process stems solely from the agreement between the parties: it is not derived from the authority of the mediator. This does not mean that the mediator may not add his own proposals to those which have been volunteered by the parties. But it is important that the decision should not be imposed upon the parties. It must be genuinely agreeable to both of them.*”

3.4.2 In his doctoral thesis “An Analysis of the Theory and Principles of Alternative Dispute Resolution” [June 1995] J.A. Faris observes (at page 65) :-

*“ By no stretch of the imagination can the investigative and representative functions of the family advocate be classified as being akin to any form of the mediation process.”*

And again at p. 66 :-

*“ The prescribed process is not consensual, its scope is restricted to pursuing the best interests of minor or dependant children, intervention by the family advocate is only for the purposes of investigation or representation and not primarily to facilitate a negotiated settlement between the parties and the process is conducted in the public and adversarial setting of the courts.”*

### **3.5 A GLARING SHORTCOMING IN ACT 24 OF 1987**

3.5.1 Adv G.J. van Zyl, Head of the Office of the Family Advocate in Pretoria, has consistently campaigned for a broadening of the functions of the Family Advocate. The nature of the enlarged scope for which he pleads will be considered later. In this paragraph, however, it is necessary to focus upon one striking weakness in the present system.

3.5.2 At a meeting with the Minister of Justice in connection with the National Plan of Action for Children held on 19 November 1996, Adv van Zyl (then the Acting Chief Family Advocate) made a written presentation in the course of which he called attention to the following obvious defect in the provisions of Act 24 of 1987 :-

*“ As far as divorce work specifically is concerned, we are of course limited to act in cases where parties seek a divorce in terms of the Divorce Act in the Supreme Court. Automatically it excludes us from assisting parties in customary unions and other religious marriages. We also do not have **locus standi** in the Black Divorce Courts although we have for a long time assisted these courts on an **amicus curiae** basis. This will have to be rectified by the legislature as it necessitates amendments of the current law. This needs to be done as soon as possible. Obviously the needs of children born from customary marriages are exactly the same as those born from legal marriages, and we need to formally extend our services to them as soon as possible.”*

**3.6 DESPITE THE DEFECTS IN ACT 24 OF 1987 THE OFFICE OF THE FAMILY ADVOCATE NEVERTHELESS REPRESENTS AN IMPORTANT FIRST STEP TOWARDS THE REALISATION OF THE ULTIMATE GOAL OF A FAMILY COURT OF COMPREHENSIVE JURISDICTION**

3.6.1 Although the provisions of Act 24 of 1987 are plainly deficient, the Commission nonetheless considers that the creation of the Office of the Family Court must be seen as a significant legislative development in the right direction.

3.6.2 The importance of this legislative step was, in the opinion of the Commission, correctly assessed by the Association of Law Societies of the RSA [ “ the ALS”].

3.6.3 In a written response by the ALS to the Commission dated 23 August 1995 [a copy whereof is to be found in Appendix “ A ” at pages 1 to 20 in VOLUME II to this Report] the following is said :-

*“ The Office of Family Advocate has paved the way for the establishment of a fully-fledged family court structure in South Africa for at least the following reasons :*

(a) *It went a long way towards overcoming the resistance of many in the legal profession, both attorneys and advocates (and even the Bench), to the idea that the welfare services have an*

*important part to play in the attempted resolution of family law problems, particularly where the interests of children are concerned ;*

- (b) *it has resulted in an implied acknowledgment on the part of the judges of the Supreme Court of their inability under the former divorce procedure to discharge, in a meaningful way, their duty in terms of section 6 of the Divorce Act to ensure that the 'provisions made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances'.*

*It is only a small but vital aspect of the Hoexter Report that has been acted upon by the Legislature and the Association believes that it is upon this development (coupled with the other proposals of the Hoexter Report subject to the modifications dealt with below) that a family court should be modelled."*

- 3.6.4 Since the coming into operation of Act 24 of 1987 in October 1990 Offices of the Family Advocate have been established in Pretoria, Johannesburg, Cape Town, Durban, Bloemfontein and Port Elizabeth. In Chapter Four of this Report we consider, in relation to each of the abovementioned Offices, how well or indifferently the Family Advocate functions in practice ; how adequately or inadequately the Family Advocate's Office is staffed; and what problems it experiences.

### **3.7 THE DRAFT DIVORCE AMENDMENT BILL OF 1992**

- 3.7.1 During 1991 there was published for comment [GN513 of 1991] the Draft Divorce Amendment Bill of 1992. It made provision for the establishment of specialist divorce courts, hearing only divorce actions, and functioning within the existing structure of the Supreme Court. Its rules would incorporate the sort of features which enhance the accessibility of the Black Divorce Courts.

- 3.7.2 In a Memorandum introducing the Bill the following was said in regard to the Black Divorce Courts :-

*“ These courts enjoy concurrent jurisdiction with the Supreme Court of South Africa...At present these courts are used extensively, which is an indication that they fulfil a real need. In the light of the present constitutional development in South Africa, it is untenable to maintain a separate forum exclusively for a specific population group, and the opinion is held that all divorce actions ought to be tried in the same forum. It is recommended that such a rationalisation process ought to take place in such a way that those features of the present Black Divorce Courts which ensure accessibility, are maintained as far as possible. These features include an elementary and inexpensive procedure, speedy adjudication and the appearance of attorneys in courts. Such an adjustment will by its very nature bring about changes to the divorce procedure in the Supreme Court.”*

3.7.3 The Draft Divorce Amendment Bill of 1992 was abandoned. However, comments received in response to this Bill led to the promulgation of the Magistrates’ Courts Amendment Act, 1993.

### **3.8 THE MAGISTRATES’ COURTS AMENDMENT ACT NO 120 OF 1993**

3.8.1 The Magistrates’ Court Amendment Act No 120 of 1993 [ “Act 120 of 1993”] was assented to on 9 July 1993. It provides, *inter alia* :-

*“ for the establishment of family courts for the adjudication of divorce actions and the appointment of family magistrates for the said courts.”*

Sec 75 of Act 120 of 1993 provides that it will come into operation on a date to be fixed by the President in the Gazette. No such date has yet been proclaimed.

3.8.2 Act 120 of 1993 seeks to establish a forum for the hearing of divorce actions within the structure of the Magistrates’ Courts. By notice in the Gazette the Minister of Justice may establish family divisions of the civil court consisting of one or more districts and he may establish a family court for any family division. For every family division the Minister may appoint one or more family magistrates.

- 3.8.3 In terms of Act 120 of 1993 the family division will have jurisdiction in respect of any divorce action as defined in sec 1 of the Divorce Act, 1979. The Supreme Court's jurisdiction, however, is not excluded. Act 120 of 1993, if brought into operation, would repeal sec 10 of Act 9 of 1929, in terms whereof the President may institute Black Divorce Courts. However, sec 71 of Act 120 of 1993 provides that notwithstanding the repeal of sec 10 of Act 9 of 1929, any Black Divorce Court already established shall be deemed to be a family court; and any president of a Black Divorce Court shall be deemed to be a family magistrate.
- 3.8.4 The Mediation in Certain Divorce Matters Act, No 24 of 1987, is not applicable to divorce actions heard in a family court unless by notice in the Gazette the Minister declares its provisions to be so applicable.
- 3.8.5 In terms of sec 9 *ter* of Act 120 of 1993 an Appointments Advisory Board will advise the Minister as to the suitability of persons for appointment as family magistrates. The Chairman of the Advisory Board will be the Director-General: Justice; and its members will include the Chief Director of the Justice College, the Chief Family Advocate, an advocate and an attorney, and four Magistrates.
- 3.8.6 The persons eligible for appointment as family magistrates will be magistrates, or advocates, or attorneys who have satisfied all the requirements for the LL.B. degree.

### **3.9 ACT 120 OF 1993 HAS BEEN WIDELY CRITICISED**

- 3.9.1 In a written response by the ALS to the Commission dated 23 August 1995 [a copy whereof is to be found in Appendix " A " at pages 1 to 20 in VOLUME II of this Report] the following is said :-

*“ Whatever the true motivation behind the seemingly hasty desire to create the type of family court envisaged by the Magistrates Courts Amendment Act of 1993, it is clear that what this Act envisages constitutes a dramatic departure from the type of family court proposed by the Hoexter Report in 1983. Thus, what is now envisaged is a type of family court with a very limited jurisdiction to deal with divorce cases. ”*

and later :

*“ Divorce and family law matters should not be relegated to the attention of civil servants with little or no experience of the kind gained by attorneys of standing... ”*

3.9.2 In a paper published in May 1997 by Beth Goldblatt entitled “A Feminist Perspective of the Law Reform Process : An Evaluation of Attempts to Establish a Family Court in South Africa” the learned author remarks [ at page 11 ] of the family courts envisaged by Act 120 of 1993 :-

*“ ...the jurisdiction of these courts is much more limited than was envisaged by the 1983 Hoexter Report. This means that the multiplicity of fora for family matters will remain despite the inconvenience caused to people who, for example, must go to one court for a divorce and another for maintenance to be determined. The duplication of resources in these ‘fragmented’ courts will also continue. A third problem, is the absence of the Family Advocate in these courts for Children, and the lack of counselling or mediation machinery for family disputes. Fourthly, there is a concern that by placing these courts at Magistrate’s, albeit Regional Court level, the quality of justice will be lower than that provided in the Supreme Court. ”*

3.9.3 In a written response to the Commission on the Family Court [a copy whereof is to be found in Appendix “ B ” at pages 21 to 24 in VOLUME II of this Report] Professor Cheryl Loots, Associate Professor of Law in the University of the Witwatersrand, writes of Act 120 of 1993, ***inter alia*** :-

*“ The problem with this option is that it would be difficult for the family court to develop its own identity. Most members of the public associate the magistrates’ courts with criminal matters and the family court might well be regarded by many as being part of the criminal justice system. This might intimidate litigants or lead them to attribute fault or guilt to the parties. The atmosphere of the magistrates’ courts would not be conducive to easing the misery caused by troubled family relationships. ”*

3.9.4 In the article entitled “ Family Courts in South Africa and the Implications for Divorce Mediation” 1995 (58) THRHR 276, by Vivienne Goldberg of the

University of the Witwatersrand the learned author offers the following comments :-

*“ The introduction of a family court into the judiciary would indeed be most welcome. The question needs to be asked, however, whether that is what will occur when Act 120 of 1993 comes into operation. It seems to me that the family courts proposed in that Act are not much more than another forum for adjudicating on divorce actions. In fact this could prove to be most detrimental in post-apartheid South Africa - it is probable that affluent Whites will continue to go to the Supreme Court for their divorces, while Blacks will still avail themselves of black divorce courts (although these will now have the name of family courts, and it also appears that the services of the family advocate’s office may be extended, by proclamation, to these courts too). With respect, one wonders where the real change is considered to have been made. It seems to be that the considered opinion of the Hoexter Commission, with its emphasis on mediation services as a possible way of sensitively handling dissolution of marriage, has, in the end, largely been ignored.”*

### **3.10 A PILOT PROJECT FOR THE FAMILY COURT ENVISAGED IN ACT 120 OF 1993**

According to a Department of Justice document dated 23 January 1997 and entitled :

“PILOT PROJECT FOR ‘FAMILY COURT’ ”

a task team comprising officials of the Department of Justice, the Acting Chief Family Advocate and the Chairman of the Family Courts Committee of the Rules Board, has been appointed to take responsibility for the implementation of a pilot project in regard to the family courts mentioned in sec 2 of Act 120 of 1993.

### **3.11 THE RACIAL EXCLUSIVITY OF THE BLACK DIVORCE COURTS AND THE “ DE-RACIALISATION ” THEREOF BY THE DIVORCE COURTS AMENDMENT ACT, 1997**

3.11.1 Apart from the High Court, which has jurisdiction in divorce cases in respect of all races, the Black Divorce Courts have jurisdiction, in terms of sec 10 of Act 9 of 1929 :-

*“ To hear and determine suits of nullity, divorce and separation between Blacks domiciled within their respective areas of jurisdiction in respect of marriage and to decide any question arising therefrom...”*

3.11.2 The Black Divorce Court consists of so many divisions as the Minister of Justice may from time to time determine. At present the Black Divorce Court has the following three large divisions which are served by a circuit system sitting in the centres respectively indicated hereunder :-

- (a) The Central Divorce Court:  
Johannesburg; Klerksdorp; Vereeniging; Potchefstroom.
- (b) The North-Eastern Divorce Court :  
Pretoria; Durban; Pietermaritzburg; Vryheid; Pietersburg; Eshowe.
- (c) The Southern Divorce Court:  
Port Elizabeth; Bloemfontein; Welkom; Cape Town; Kimberley; Kroonstad; Queenstown; King William’s Town.

3.11.3 The procedure in the Black Divorce Courts is less formal and the legal costs involved therein are much cheaper than in a High Court divorce action. The court provides the services of a clerk who generally does not have a legal qualification, to assist unrepresented litigants who wish to institute or defend matrimonial actions. In the particulars of claim drawn up by the clerk the sum of maintenance claimed in respect of minor children is usually not quantified, the amount being left for determination by the maintenance court.

3.11.4 Act 9 of 1929 [ the principal Act ] was very recently amended [ see Government Gazette No 18451 of 21 November 1997 ] by the Divorce Courts Amendment Act, No 65 of 1997 [ **the Divorce Courts Amendment Act, 1997** ]. A copy of the Divorce Courts Amendment Act, 1997, is to be found in Appendix “ C1 “ at pages 25 to 28 of VOLUME II of this Report.

- 3.11.5 Sec 1(a) of the Divorce Courts Amendment Act, 1997 **extends to all persons** the jurisdiction of the divorce courts established under sec 10 of the principal Act.
- 3.11.6 Sec 1(b) of the Divorce Courts Amendment Act, 1997, provides that a division of the divorce court established under sec 10 of the principal Act shall consist of one or more presiding officers, appointed by the Minister of Justice, who shall be deemed to be magistrates of a regional division as contemplated in Act 32 of 1944.
- 3.11.7 Sec 1(g) of the Divorce Courts Amendment Act, 1997, provides that a Family Advocate or Family Counsellor appointed under Act 24 of 1987 shall be deemed to have been appointed also in respect of any divorce court having jurisdiction in the area for which he or she has been so appointed.
- 3.11.8 Sec 3 of the Divorce Courts Amendment Act, 1997, extends the application of the principal Act to the entire national territory of the Republic.
- 3.11.9 Sec 5 of the Divorce Courts Amendment Act, 1997, provides that its terms shall come into operation on a date fixed by the President by proclamation in the Gazette.
- 3.11.10 In a written notification to the President dated 28 November 1997 [ the notification ] the Commission addressed an urgent request to the President not to put the Divorce Courts Amendment Act, 1997, into operation until he has considered the Commission's recommendations for the establishment of a Family Court of comprehensive jurisdiction set forth in this Report. The reasons for the said request appear from the terms of the notification, a copy whereof is to be found in Appendix " C2 " at pages 29 to 30 in VOLUME II of this Report.

## **CHAPTER FOUR**

### **A SURVEY OF THE SERVICES TO THE COMMUNITY PERFORMED BY THE VARIOUS OFFICES OF THE FAMILY ADVOCATE IN SOUTH AFRICA AND AN ASSESSMENT OF THE CHIEF PROBLEMS EXPERIENCED BY FAMILY ADVOCATES**

- 4.1 During the period June to August 1997 the Commission visited each of the Offices of the Family Advocate respectively based in Johannesburg, Pretoria, Cape Town, Durban, Bloemfontein and Port Elizabeth. In the course of such visits the Commission had the benefit of discussions at each Office with the Family Advocates, Family Counsellors, and other members of staff there serving ; and the Commission was afforded an opportunity of inspecting the premises occupied by each Office. At the conclusion of each such visit the Commission invited the Office concerned to submit to the Commission's Secretariat a written report describing the day-to-day functioning of the Office and listing what practical problems were being encountered by it.

The Commission wishes to record its warm appreciation of the time and trouble taken by each of the Family Advocates concerned in affording the Commission every assistance in its investigations.

#### **4.2 THE CHIEF FAMILY ADVOCATE**

- 4.2.1 On Monday 18 August 1997 the Chairman and the Secretariat further had the advantage of a consultation with Adv B. Hechter who on 1 July assumed the post of the Chief Family Advocate. Adv Hechter matriculated at the Afrikaans Hoër Meisieskool in Pretoria in 1973. Having gained the degrees of B.A. and LL.B. at the University of Pretoria she joined the Department of Justice in 1979. After working as a prosecutor for eighteen months she became a member of the Pretoria Bar in August 1980. She practised as an advocate until

November 1990 when she was appointed as the Second Family Advocate at the Pretoria Office. She became the head of the Johannesburg Office of the Family Advocate in May 1991 ; and on 1 July 1997 she was appointed the country's Chief Family Advocate.

- 4.2.2 Having received the necessary training through the South African Association of Mediators [ SAAM ] Adv Hechter is a qualified mediator. Under the auspices of the English Association of Family Mediators she completed an advanced mediation course presented by Ms Lisa Parkinson and Mr Henry Brown. In 1995 Adv Hechter was appointed to the Executive Committee of SAAM.
- 4.2.3 A founder member of the Association of Family Lawyers, Adv Hechter has also acted as an advisory consultant to the Legal Resources Centre (National Office). She is a member of the Board of Trustees of STREETWISE [ an organisation which seeks to rehabilitate street-children ]. She has been actively involved in the training of black Social Workers at Baragwanath Hospital ; and latterly she has played a leading role in launching a pilot project known as the West Rand Family Mediation Centre, the purpose of which is to provide members of impoverished communities with mediation services in disputes involving divorce, custody of children, and maintenance. The Centre will provide an integrated service which will deal with all issues in one place. The project combines the resources and skills of a wide range of organisations.
- 4.2.4 Within the recent past Adv Hechter has attended the following international conferences : (1) The Hague Convention on the Civil Aspects of International Child Abduction held during March 1997 ; (2) The Second World Congress on Family law and the Rights of Children and Youth held in San Francisco in June 1997 ; and (3) The Ninth World Conference of the International Society of Family Law held in Durban during July 1997. Adv Hechter has delivered various papers (locally and overseas) on subjects such as Family Law and mediation at seminars ; and she has often addressed senior student associations.
- 4.2.5 Adv Hechter explained to the Commission that the chief problem experienced in every Office of the Family Advocate was the chronic shortage of Family Counsellors, coupled with lack of experience and the low level of training of such Family Counsellors as the Department of Social Services was able to provide to the Office of the Family Advocate. The fact that the Family

Counsellors were merely on temporary loan to the Office of the Family Advocate led to inefficiency and serious administrative problems.

4.2.6 Adv Hechter pointed out that despite the inclusion of the word “Mediation” in the title to Act No 24 of 1987, in actual fact very little mediation could be successfully undertaken by the Office of the Family Advocate. According to Adv Hechter the reasons were twofold : many Family Advocates lacked proper training in mediation ; and in any case the workload of the Office was so heavy as to preclude proper mediation.

4.2.7 A matter stressed by Adv Hechter during her interview with the Commission was the need for a multi-cultural approach to mediation in South Africa. She illustrated her point with reference to the African community, within which the family unit is generally more extensive than the nuclear family in other communities ; and in family mediation due provision has to be made for such extended family.

### **4.3 THE OFFICE OF THE FAMILY ADVOCATE IN JOHANNESBURG**

4.3.1 The Acting Head of the Office in Johannesburg is Adv P.I. Seabi. She holds the degrees of B.Proc and LL.B. As a student she served in a Legal Aid Clinic, assisting mainly with matrimonial work. After a brief stint as a candidate attorney she did duty as a prosecutor from 1 October 1990 to 30 November 1993. As her chief interest lay in family law she worked mainly in the Maintenance Court. Since 1 December to date Adv Seabi has been on the staff of the Family Advocate in Johannesburg. Studying by correspondence she is presently working towards an LL.M. degree in family law. Adv Seabi is a qualified mediator and a member of the SA Association of Mediators. Since 1995 she has been a voluntary worker at the Child Welfare Society in Atteridgeville.

4.3.2 The Johannesburg Office has four Family Advocates and two Family Counsellors. One Family Advocate’s post and two Family Counsellors’ posts are vacant. The staff complement further consists of four administrative clerks, two typists and a messenger. The office is grossly understaffed. It has a backlog of 128 files and 340 outstanding inquiries.

4.3.3 The Office’s day-to-day work involves the following tasks :-

- (a) monitoring of all divorce summonses involving minor children ;
- (b) monitoring of all applications involving minor children ;
- (c) endorsing all written settlement agreements involving minor children ;
- (d) giving legal advice to members of the public in the course of personal interviews or over the telephone ;
- (e) conducting inquiries regarding issues of :-
  - (i) custody, access, guardianship, paternity and maintenance (where a court order has been made) ;
  - (ii) custody, access and guardianship involving children born out of wedlock (where a court order has been made) ; and
  - (iii) custodial and guardianship applications by grandparents or interested third parties (where a court order has been made) ;
- (f) mediation sessions ;
- (g) undertaking inquiries, ***amicus curiae***, for the Central [Black] Divorce Court in connection with custody, access and guardianship ;
- (h) appearing in court ;
- (i) making home visits ;
- (j) monitoring access ; and
- (k) approaching High Court Judges in chambers for authorisation to undertake an inquiry ***mero motu***.

4.3.4 From the written report submitted by the Johannesburg Office to the Commission it appears that the major difficulties experienced are the following:-

“ 5. ***Our main problem is the lack of counsellors.*** *Two social workers to service the Johannesburg and Central [Black] Divorce Court is simply unrealistic. The situation is exacerbated by the fact that such social workers are in the employ of the Department*

*of Welfare and, accordingly can be, and are, called back to their departments at short notice, without adequately experienced and trained social workers being sent in their place. It is strongly recommended that the Family Counsellors should in fact be employed by the Department of Justice. This would further enable this office to have a greater input into the selection process. The shortage of Family Counsellors has direct bearing on our present backlog of our enquiries and our difficulty in dealing with urgent referrals from court timeously.*

*We require a minimum of five Family Counsellors, that is, at least one Family Counsellor for every Family Advocate, to effectively run this office. In fact, the optimum would be six Family Counsellors, to provide for the Family Counsellors' role in follow-up investigation outside the office.*

6. *Due to the metropolitan nature of the area we serve, language problems are experienced. We presently have no interpreters, and this is becoming a serious problem in the light of the flood of requests we are receiving from the Central Divorce Court. It is imperative that minor children be interviewed in their home language.*
8. *... there is a dire need to make the office ...accessible to the general public. Parties are complaining that it is costly for them to travel to Johannesburg central, and complaints are also made as to their, and their children's safety. It is suggested that satellite offices be opened.*
9. *Family Advocate Offices should be more gender representative regarding the staff. At present our office has one male Family Advocate, and no male Family Counsellors. It would be of utmost importance for administrative staff if they were afforded the opportunity to attend a course in learning a black language, particularly in the absence of an interpreter. "*

4.3.5 Although there is a gender imbalance in the Johannesburg Office its Family Advocates and Family Counsellors are representative of all population groups.

Of the four Family Advocates two are Black, one is Indian and one is White. One Family Counsellor is Indian and the other Black.

#### **4.4 THE OFFICE OF THE FAMILY ADVOCATE IN PRETORIA**

4.4.1 The Head of the Pretoria Office is Adv G.J. van Zyl. While the post of Chief Family Advocate remained vacant for a period of almost two years he was the Acting Chief Family Advocate. In this last-mentioned capacity Adv van Zyl made oral submissions to the Commission at its public hearings during April 1996 [see pages 111 to 120 in VOLUME III of this Report].

4.4.2 Adv van Zyl has had an impressive academic career and extensive exposure to the practical application of family law. He holds the degrees of Dip Iuris (***cum laude***); B. Proc (***cum laude***) and LL.B. While attending the Justice College he took the prize as the best student in 1979, 1980 and 1981. At the University of Pretoria he received academic colours in 1984. Both in 1983 and in 1984 he received achievement awards from Adams and Adams. Having served articles with the State Attorney in Pretoria he was admitted as an attorney and notary in 1989. He was a prosecutor for three years and a Magistrate (civil, criminal and Children's Court) for three years.

In March 1992 Adv van Zyl joined the Family Advocate Division as a Family Advocate. Over the years he has attended various departmental courses including one on Family Magistrates. With a view to mediation he has received specific skills training from SAAM and other NGO's. He has addressed seminars for social workers and in the field of matrimonial law he has assisted in the training of students at the University of Pretoria and the Association of Law Societies. He has written articles on family law and human rights and he is the co-author of a chapter in " *The Law of Children and Persons* " which Butterworths is about to publish.

4.4.3 The Pretoria Office has a Family Advocate who is the head of the Office (white male) ; four other Family Advocates (three white females and one black female) one post being vacant ; three Family Counsellors (two white females and one black female) two posts being vacant ; four administrative officials ; two typists ; one secretary and one messenger.

- 4.4.4 Adv van Zyl informed the Commission that the social welfare component of the Family Advocate's Division consists of eighteen full-time Family Counsellors provided by the Provincial Departments of Welfare. The Division also relies heavily on external establishments and social workers in private practice who render their services to the Division on a voluntary basis.
- 4.4.5 These outside social workers mainly assist with evaluations done elsewhere than in the main centres. The bulk of the inquiries, however, are dealt with at the Office of the Family Advocate with the assistance of full-time in-house social workers.
- 4.4.6 During the past twelve months or more, explains Adv van Zyl, the Family Advocate has experienced a steady decline in the availability of social welfare support systems, both within the Civil Service and from outside sources. Many officials have left the Civil Service and private welfare institutions have suffered financial constraints.
- 4.4.7 The consequent deterioration in the situation has throughout been brought to the attention of Head Office by means of monthly reports and memoranda ; and by means of letters addressed to the Department of Welfare. However no real improvement in the situation has resulted.
- 4.4.8 At the moment, so Adv van Zyl reports, the Family Advocate's Division is struggling against immense odds to establish a service in the former TBVC territories. The main problem remains the lack of social welfare officers to perform the functions prescribed by Act 24 of 1987.
- 4.4.9 The social workers made available to the Family Advocate's Division are not seconded to the Department of Justice, which consequently exercises no control in regard to their appointment or in connection with the number of posts available. Adv van Zyl suggests that the social welfare component be integrated with the Department of Justice so that posts on the staff establishment may be filled by the Department of Justice.
- 4.4.10 In the view of Adv van Zyl it is of paramount importance that the Minister of Justice should come out publicly in support of the Family Advocate's Division to counter the criticism sometimes levelled at the Office that it provides a service only to a privileged White group. Even under the constraints of the existing legislation there are Offices within the Division in which approximately

50% of the cases dealt with involve Blacks. In the Cape area the percentage for Coloureds is 80%; and in Durban a large portion of the cases dealt with involve the Indian segment of the population.

4.4.11 Leaving aside the social welfare component (which is financed by the Department of Welfare) and the private social welfare agencies, the Family Advocate Division runs on a shoe-string budget of some R8 million. This is a mere drop in the ocean of the Department's total expenditure.

4.4.12 Adv van Zyl stresses, on the one hand, the necessity for the Family Advocate to render services to all children of all races, but, on the other hand, the intractable problem presented in remote rural areas by the almost total lack of a social welfare infrastructure. He says:-

*“ Die oplossing lê klaarblyklik daarin dat nog meer gedoen moet word om sigbaar en effektief uit te brei na veral die swart gesinne in die plattelandse gebiede wat tot nou toe in 'n groot mate onbereikbaar was of buite ons wetlike opdrag geval het. Dit is ongelukkig in veral hierdie gebiede waar daar 'n opmerklieke gebrek aan 'n beskikbare infrastruktuur van maatskaplike werkers en gemeenskaps-gebaseerde organisasies bestaan ... ”*

4.4.13 A further strain on the already over-extended resources of the Family Advocate Division has been imposed by the recent legislative requirement that it should serve also the former TBVC states. In this connection Adv van Zyl reports as follows :-

*“ Die Gesinsadvokaatfunksie is op 1 April 1997 kragtens die Rasionaliseringswet op Justisiewette, nr 18 van 1996, uitgebrei na die voormalige TBVC-gebiede. My aanvanklike indruk was dat ons weens die relatiewe lae volume van sake, sou kon klaarkom met deelydse Gesinsadvokate en het reeds reëlings in plek om van advokate van die Prokureurs-generaal gebruik te maak in Umtata, Bisho en Thohoyandou, en van die Staatsprokureur in Mmabatho. Intussen het dit geblyk dat ek moontlik die werklading onderskat het sover dit Umtata en Mmabatho aanbetref, en het ek reeds wat Mmabatho aanbetref, 'n memorandum aan Hoofkantoor deurgestuur waarin ek vra vir 'n permanente Gesinsadvokaat. ”*

- 4.4.14 In a letter addressed by Adv van Zyl to the Commission on 2 June 1997 he concludes with the following significant paragraph :-

*“ In watter vorm die Gesinshof ookal eventueel tot stand kom, ek meen dat die Gesinsadvokaat ‘n rol daarin behoort te speel. Na my mening sou die totstandkoming van ‘n Gesinshof waarskynlik ook voorafgegaan moet word deur nuwe wetgewing, en indien dit die geval is, is dit moontlik die ideale tyd om ook opnuut te kyk na die Wet op Bemiddeling in Sekere Egskeidingsaangeleenthede, no 24 van 1987, deur dit meer in ooreenstemming te bring met die behoeftes van die Gesinshof. Na my mening behoort die Wet ideaal gesproke geskrap te word en vervang te word met ‘n meer duidelike Wet waarin die afdeling se funksies gepas uitgebrei word om meer omvattende hulp aan kinders te verleen buiten bloot dié wat in egskeidingsaksies betrokke is. ”*

#### **4.5 THE OFFICE OF THE FAMILY ADVOCATE IN CAPE TOWN**

- 4.5.1 The Head of the Cape Town Office is Adv Hester Fouchè.
- 4.5.2 Adv Fouchè gained her LL.B. degree at the University of Stellenbosch in 1966. She started her legal career as a prosecutor in the Johannesburg Magistrates’ Court. Thereafter as a member of the staff of the Attorney-General she worked as a State Advocate first in the Transvaal and later in Kimberley. From 1975 to 1991 she practised as an advocate at the Kimberley Bar.
- 4.5.3 On 1 October 1991 Adv Fouchè inaugurated the Cape Town Office of the Family Advocate. At an early stage she perceived the necessity of holding informal talks with those Cape Judges who had a real interest in family law in order to promote the work of her Office. A ‘liaison’ Judge was appointed. Adv Fouchè also established links with the Cape of Good Hope Law Society and she listened with a receptive ear to the Law Society’s criticisms and constructive suggestions.
- 4.5.4 At the same time Adv Fouchè introduced herself to both subsidised Welfare Agencies and the Department of Health and Welfare. In regard to the critically important matter of the supply of social welfare workers to the Office of the Family Advocate she made the disturbing discovery :-

*“ that there was no formal work agreement between the Department of Justice and the Department of Welfare. The only indication that the Department of Welfare was committed to this office was contained in a circular. As far as I know that is still the position. A copy of the circular is attached ... ”*

[A copy of the circular to which Adv Fouchè refers is to be found in Appendix “ D ” at pages 31 to 36 in VOLUME II of this Report.]

4.5.5 The Cape Town Office has :-

- (i) a Senior Family Advocate and Head of the Office ;
- (ii) four Family Advocates (one post being currently vacant) ;
- (iii) four administrative clerks ;
- (iv) two typists ; and
- (v) one messenger.

4.5.6 According to Adv Fouchè the Cape Town Office is required to serve the largest geographical area. She reports as follows on the infrastructure built up by her:-

4.5.6.1 *“ This office covers a big area, from the Namibian Border to Three Sisters in the Karoo to Plettenberg Bay and (originally) also Walvis Bay. To ensure that quality work was delivered both to the child of the millionaire ... here in town and to the child of the humble and illiterate shepherd on a remote farm in the country, it was necessary to build up a network covering the whole area. A source list was compiled ... ”*

4.5.6.2 *“ Voluntary workers were recruited. These ... consisted of retired Social Workers, housewives with the necessary professional qualifications and even academics. Newsletters are sent to them to keep them informed of the growth and expansion of the office; articles and judgments are discussed. ”*

4.5.6.3 *“ It seemed that the three Universities [Cape Town; Stellenbosch; and the Western Cape] could assist in various ways, namely medical (especially psychiatry), psychology and social work. As far as Social Work is concerned,*

*the Huguenot College in Wellington is also involved. This led to the utilization of their highly qualified personnel to the benefit of the poorer and less privileged members of the community. ”*

4.5.6.4 “ *Within a few weeks after this office came into operation it became clear that the services of a consultant were necessary. The voluntary services were obtained of an **emeritus** professor in psychology who is a former member of the Medical and Dental Council and a person with ample forensic experience ... He assists all the Family Advocates, the Family Counsellors, the Social Workers and the psychologists who lend their services on a voluntary basis. In complicated matters he sometimes does the evaluations and assessments himself.* ”

4.5.6.5 “ *There are the few complicated matters which need input by a psychiatrist ... The services of an **emeritus** professor in psychiatry who is a former head of the Weskoppies Hospital and a member of the Medical and Dental Council were obtained on a voluntary basis to assist the less privileged people. ”*

4.5.6.6 “ *As this office is dependent on other departments, welfare organisations, subsidized organizations, NGO's and other individual voluntary workers, it is important to keep people and organizations involved interested. This is done by way of lectures, speeches and radio talks. The functioning of this office is continually promoted through workshops. ”*

4.5.7 It is clear that in Cape Town (as is the case also in other Offices elsewhere in the country) the activities of the Family Advocate extend beyond the purview of Act 24 of 1987. In this connection Adv Fouchè reports :-

*“ This office is involved in matters which fall outside the scope of the Act (only if requested thereto by a Court, or with the consent of both parties, to avoid action being taken against this office) ... These include, **inter alia** :*

- (i) marriages between people who were not married according to civil law, especially marriages ... according to Muslim rites ...;*
- (ii) children born of parents who did not get married ;*

- (iii) *the parents were divorced, one passes away and a dispute arises between the surviving parent and relatives of the deceased parent regarding custody/access ;*
- (iv) *the parents were divorced, the custodian parent passes away and a dispute arises between a step-parent and the other relatives regarding custody/access ;*
- (v) *... matters before the Southern [Black] Divorce Court ;*
- (vi) *... maintenance questions. ”*

4.5.8 Differing in this respect from the view held by some of the Family Advocates elsewhere in the country, Adv Fouchè is opposed to the suggestion that all Court work involving Social Workers should be taken over by the Department of Justice :-

*“ It will be impossible to render services right over the country. It will also lead to frustrated Social Workers in the Department of Justice. Court work involves a lot of stress. Burned out Social Workers can now at least ask to go back to Service offices. Will there be enough promotion possibilities for them in the Department of Justice? ”*

4.5.9 The chief problem experienced in the Cape Town Office is the shortage of Family Counsellors. Adv Fouchè describes this deplorable state of affairs in the following words :-

*“ This office has in-house Social Workers (called Family Counsellors). Though this is the biggest office in the country, here was for a period of almost one year only one Family Counsellor, and only recently a second appointment was made. (Due to the absence of an agreement between the Departments?). As this Local Government has serious financial problems, the local Department of Social Services cannot provide enough Social Workers (Family Counsellors). ”*

## **4.6 THE OFFICE OF THE FAMILY ADVOCATE IN DURBAN**

4.6.1 The Head of the Durban Office is Adv Mary O’Gorman.

4.6.2 Details of her legal career and her promotion of the ideal of a comprehensive Family Court are the following. Having acquired her LL.B. at the University of Natal she was a Commissioner of Child Welfare at Durban for two years. Thereafter she served as a prosecutor specialising in child abuse and other family law issues. For a period of four years she was a State Advocate in Durban during which time she became well-known to all members of the Bench in the Natal Provincial Division; and she gained experience in litigation. At the same time she managed, by correspondence study through UNISA, to obtain the degree of LL.M. The subject of her Master's thesis was " *The Role of the Family Advocate* ". Her researches for her thesis involved extensive consultation with the pilot office of the Family Advocate in Pretoria. In January 1992 Adv O'Gorman opened the Office of the Family Advocate for Kwazulu-Natal in Durban.

4.6.3 Since the inauguration of the Durban Office its staff complement has grown steadily. At present it consists of the following :-

- (i) five Family Advocates ;
- (ii) three Family Counsellors, two posts being vacant and unlikely to be filled in the near future ;
- (iii) seven Administrative Officials ;
- (iv) three part-time Family Counsellors in Pietermaritzburg, who work on a part-time basis ; and
- (v) some nine Family Counsellors in Durban and Pietermaritzburg who undertake voluntary work for the Office one day each month on a roster basis.

4.6.4 The staff at the Durban Office also man the Pietermaritzburg Office of the Family Advocate which has no permanent staff. On two or three days each week the Durban Family Advocates and their administrative clerk travel to Pietermaritzburg to run the Office in that city. There Family Counsellors drawn from the Pietermaritzburg Office of the Department of Social Welfare provide their services on a roster basis. The Pietermaritzburg Office uses waiting-rooms in the High Court Building.

4.6.5 The Pietermaritzburg workload of 221 cases for the 1995/1996 year is, in the opinion of Adv O’Gorman, sufficient to warrant the appointment of a full-time Family Advocate in Pietermaritzburg. Judges sitting in Pietermaritzburg have complained about the lack of a permanent Family Advocate in that city. This hampers the referral of cases.

4.6.6 Adv O’Gorman proposes as a solution :-

*“ the appointment of a full-time Family Advocate and clerical assistant in Pietermaritzburg, and the expansion of the present roster of social workers from the Department of Social Welfare or NGO’s such as CWS’s or FAMSA to act as Family Counsellors. A contract would have to be entered into whereby the Department of Justice pays the Department of Social Welfare or NGO’s for such services. ”*

4.6.7 The statistics contained in the Department of Justice Report 1995/1996, so points out Adv O’Gorman, reflect that proportionately the Durban Office carries the highest annual caseload of inquiries for Family Advocates. The statistics are set forth in the table hereunder.

<b>1995/1996</b>		
<b>OFFICE</b>	<b>TOTAL NUMBER OF INQUIRIES</b>	<b>NUMBER OF INQUIRIES PER FAMILY ADVOCATE</b>
<b>PRETORIA</b>	<b>752</b>	<b>150.4</b>
<b>JOHANNESBURG</b>	<b>596</b>	<b>119.2</b>
<b>CAPE TOWN</b>	<b>1130</b>	<b>226.0</b>
<b>KWAZULU-NATAL</b>	<b>982</b>	<b>245.5</b>
<b>PORT ELIZABETH</b>	<b>379</b>	<b>189.5</b>
<b>BLOEMFONTEIN</b>	<b>437</b>	<b>218.5</b>

4.6.8 Apart from its statutory workload the Durban Office conducts inquiries into all cases involving children in the High Court , eg, extramarital children, grandparents and consents to marriage. Since 1995 the Durban Office has also served the Black Divorce Court [North-Eastern Division].

4.6.9 Adv O’Gorman reports that the chief problem of the Durban Office resides in the inability of the Department of Social Welfare to provide enough social workers to fill the posts of Family Counsellors. She comments further:-

*“ This lack of Family Counsellors is a problem experienced by every office throughout the country and has been going on for the past five years that we have been in operation. The solution proposed by this office is that the Department of Justice should pay the Department of Social Welfare to supply the required Family Counsellors to be rotated on a three-year contract basis to this office. Alternatively, that the Department of Social Welfare be directed to create new posts on their organograms specifically for Family Counsellors. ”*

4.6.10 In an attempt to overcome the problem of too few Family Counsellors the Durban Office has had to resort to various expedients, none of which is entirely satisfactory. Three of the stopgaps used are described immediately hereunder.

4.6.10.1 Increased requests to social workers in NGO’s in outlying areas to conduct inquiries on behalf of the Family Advocate (Regulation 6 procedures). This measure creates dissatisfaction on the part of the parties involved because the Family Advocate, without having seen the parties, has to rely on the report of a social worker whose competence and level of experience are unknown factors.

4.6.10.2 Inquiries conducted by the Family Advocate alone and unassisted by a social worker. Here the manifest advantage of a recommendation by a multi-discipline team is lost. Moreover, the Family Advocate should not (save in an emergency) testify as a witness in Court proceedings.

4.6.10.3 Reliance on voluntary services of social workers who are in private practice. These practitioners are unreliable in attendance and in the writing of reports; and they are reluctant to give any long-term commitment to the Office. Furthermore, private practitioners have to be paid for Court appearances.

4.6.11 The Durban Office is fortunate in having staff fluent in English, Afrikaans and Zulu. In this connection Adv O’Gorman reports:-

*“ Cases are not assigned to a Family Advocate or Family Counsellor on the basis of race as we apply multicultural-mediation. Two of our Indian Family Advocates are fluent in Afrikaans, one of these Advocates*

*is also fluent in Zulu. Our African Family Advocate is fluent in English and Zulu. Cases are therefore assigned on a language basis. ”*

4.6.12 The Durban office does not keep statistics of the race groups of the parties seen. The Commission was nevertheless interested to learn to what extent each of the race-groups in KwaZulu-Natal is presently served by the Family Advocate. In response to a request by the Commission Adv O’Gorman compiled the following statistics from the registers of the Office files for the first seven months of the year 1997:-

<b>GROUP</b>	<b>DURBAN</b>	<b>PIETERMARITZBURG</b>
Blacks	70 = 11%	17 = 10%
Coloureds	110 = 15%	20 = 12%
Indians	332 = 45%	39 = 23%
Whites	210 = 29%	93 = 55%

4.6.13 Adv O’Gorman reports that in KwaZulu-Natal Family Advocates enjoy a high profile in the community. The Durban Office has played a key role in the formation of the Durban Child Protection Community Police Forum, and in the National Plan of Action for the Implementation of the United Nations Convention on Children’s Rights.

4.6.14 A most significant contribution by the Durban Office towards the ultimate goal for a Family Court of comprehensive jurisdiction is its role in the accomplishment of a pilot project at the Durban Magistrates’ Court for a Durban Family Centre which will introduce counselling and mediation at that Court. The first phase of the project is the consolidation of all Courts directly dealing with children and family issues and the related structures at the Durban Magistrates’ Court.

4.6.15 Appended to the report submitted by the Durban Office to the Commission is the Business Plan of the Durban Family Centre compiled by the Steering Committee for the Pilot Project. A copy of the Business Plan is to be found in Appen-dix “ E ” at pages 37 to 49 in VOLUME II of this Report. The Mission Statement of the Business plan reads as follows:-

*“ An effective and comprehensive, specialist law system for all matters directly affecting family life, wherein its functionaries and other professionals, including mediators, and specialists having the empathy, ability and aptitude to adjudicate and function in family matters on an intersectorial basis. The proposed Family Centre should accommodate all existing family-related structures into an exclusive area, appropriately refurbished, and maintain a high status child and family-friendly atmosphere couched in a human rights culture. ”*

4.6.16 Adv O’Gorman’s report to the Commission concludes with the following statement:-

*“ We would like to stress that we are all committed to our function as protectors of Children’s Rights and derive a high degree of satisfaction from our career. This positive spirit should not be extinguished by the overburdening of each Family Advocate with an unbearable workload. ”*

#### **4.7 THE OFFICE OF THE FAMILY ADVOCATE IN BLOEMFONTEIN**

4.7.1 The Office in Bloemfontein was inaugurated on 1 March 1992. It serves both the Free State and (on a part-time basis) the Northern Cape.

4.7.2 The Family Advocate who heads the Office in Bloemfontein is Adv A.P. du Plooy, who has had a long and successful career in the Department of Justice. Starting in 1961 as a revenue clerk in the Magistrate’s Court at De Aar, he was appointed a prosecutor two years later. Thereafter he served successively (in De Aar, Vereeniging, Standerton and Welkom) as prosecutor, Senior Public Prosecutor, Magistrate and Senior Magistrate.

4.7.3 During the sixties he obtained first his **Diploma Iuris** and then his **Diploma Legum**. In 1989 he gained the LL.B. degree at the University of the Free State. In 1992 he was presented with a long-service award by the Minister of Justice. From 1979 to 1992 Adv du Plooy was stationed at Bloemfontein. In his first year at Bloemfontein he did relief duty as a Regional Magistrate. From 1985 to 1992 he was regional head of the Civil Magisterial District, in which capacity he was responsible, *inter alia*, for the Children’s Court. While still holding the rank of Senior Magistrate Adv du Plooy was transferred on 1

February 1992 to the Family Advocate Division. Adv du Plooy is a man of wide interests who communicates easily with others.

4.7.4 The present staff complement at the Bloemfontein Office is as follows:-

- (i) two Family Advocates (Mr du Plooy and his colleague, Mrs Sara Uys Marais);
- (ii) one Administrative Officer;
- (iii) two clerks;
- (iv) one typist;
- (v) two Social Workers on secondment from the Department of Welfare; and
- (vi) one part-time interpreter.

4.7.5 During its visit to the Bloemfontein Office the Commission consulted at length on the activities of the Office with Adv Marais. Both academically and in terms of practical experience Adv Marais is singularly well-equipped for her work as a Family Advocate.

4.7.6 In 1966 she gained a Diploma in Social Science at the University of Pretoria. Thereafter, and through UNISA, she obtained successively the degrees of B.Proc (1981) and LL.B. (1991). In 1991 she further obtained through UNISA a Diploma in Advanced Labour Law. For approximately five years Mrs Marais was a prosecutor in the Magistrate's Court at Evander/Secunda, during which time she started a kindergarten and she was responsible for establishing local branches of FAMSA and Child Welfare. Her experience in the field of social welfare work is considerable. She was a member of the Marriage Council for four years ; a member of the Mental Health Association (psychiatric welfare work) for four years and the SA Vroue Federasie (adoptions and unwed mothers) for four years. For five years she was employed at SASOL II and III as a counsellor in industrial work and orientation of immigrants. During the last-mentioned period she was, for some four years, the head of Labour Relations at SASOL III. She has been chosen as a part-time Commissioner for

the CCMA. She was appointed to the Bloemfontein Office of the Family Advocate in March 1992.

4.7.7 Twice weekly the Bloemfontein Office undertakes investigations in Kimberley with the assistance of a Kimberley Social Worker seconded from the Department of Welfare. Sessions of the Northern Cape Division Circuit Court at Upington and De Aar, respectively, are attended once every quarter if the number of cases on the roll is sufficient to warrant the presence of a Family Advocate ; or if the presiding Judge requests such attendance.

4.7.8 Regarding the workload of the Bloemfontein Office Mrs Marais reports, *inter alia*, as follows:-

*“ Die kantoor hanteer gemiddeld 50 ondersoeke per maand waarvan 25 swart gesinne is. ”*

4.7.9 The chief weaknesses in the current system which hamper the functioning of the Bloemfontein Office are summarised as follows by Mrs Marais:-

4.7.9.1 Cases of guardianship unconnected with a decree of divorce (eg where the parents of the minor child have died without nominating a testamentary guardian) fall outside Act 24 of 1987 and cannot be investigated by the office.

4.7.9.2 The interests of illegitimate children are likewise not protected under Act 24 of 1987 and (unless the Court itself refers the matter to the Office) no investigation can be undertaken.

4.7.9.3 Should the legal representatives of the parties fail to secure a date for a Court hearing, the Office is not empowered itself to set the matter down for hearing.

4.7.9.4 Some parties lack the funds to pay for a comprehensive psychological assessment when such is necessary. (The Office has, on occasion, managed to bridge this gap by securing the professional services, rendered free of charge: by a psychologist in private practice).

4.7.9.5 The Office's workload is so heavy that families can be consulted once only for a session lasting from three to five hours when, in certain cases, a fuller opportunity for consultation is desirable.

- 4.7.9.6 Follow-up investigations to monitor the family's ability to cope with post-divorce trauma are highly desirable, but cannot presently be undertaken.
- 4.7.9.7 Maintenance issues are directly related to the interest of children and should fall within the jurisdiction of the Family Advocate.
- 4.7.9.8 *“ Die interdikte wat ingevolge die Wet op Gesinsgeweld uitgereik word in die Landdroshof skep soms probleme met ondersoeke by hierdie kantoor. Die ideaal sou wees dat dieselfde afdeling wat die belange van die kinders moet bepaal, ook 'n inspraak moet hê mbt die toestaan van so 'n interdik. ”*
- 4.7.9.9 *“ Tydens ondersoeke waar twee uiteenlopende deskundige verslae ingehandig word, is al rondetafel-samesprekings met die deskundiges gevoer, ten einde geskille op hierdie wyse te probeer verminder. Die koste van hierdie persone moet deur iemand gedra word, tensy die persone dit **pro amico** doen. Die dienste van vrywillige deskundiges om met ondersoeke behulpsaam te wees, behoort ook vergoed te word. ”*

#### **4.8 THE OFFICE OF THE FAMILY ADVOCATE IN PORT ELIZABETH**

- 4.8.1 The Acting Head of the Port Elizabeth Office of the Family Advocate is Adv Rene Claassen. She holds the degrees of B.Iuris and LL.B. Adv Claassen joined the Department of Justice in October 1989. Until 1995 she was a prosecutor in the district and regional court. At her own request she was then transferred to the Office of the Family Advocate. The only other Family Advocate in the Port Elizabeth Office is Adv Louiza de Villiers. Having taken the degrees of B.Iuris and LL.B she joined the Department of Justice in May 1991, and did duty as a prosecutor in Port Elizabeth. In February 1994 (and at her own request) Adv de Villiers was transferred to the Office of the Family Advocate. We were much impressed by the obvious ability and enthusiasm of both these Family Advocates.
- 4.8.2 The present staff complement in the area within the jurisdiction of the Eastern Cape Division is as follows :
- (i) two Family Advocates ;
  - (ii) two permanent Social Workers in Port Elizabeth ;
  - (iii) one Family Counsellor in Grahamstown ; and

(iii) one Social Worker (assisted by Volunteers) in East London.

4.8.3 During our visit to the Port Elizabeth Office we had personal interviews with the Family Advocates, the two Social Workers and several members of the administrative staff. Although the Port Elizabeth Office (like all the other Offices) has to carry an excessive workload, it is efficiently run by a staff all of whom show absolute devotion to duty.

4.8.4 The Port Elizabeth Office has a central situation in the city. It is housed in a converted and refurbished dwelling ; and the waiting-room has been suitably decorated and equipped to make it user-friendly. Both the Port Elizabeth Social Workers impressed us as experienced and competent persons. Ms Mandisa Libala holds two degrees in the social sciences and she has seventeen years experience. Ms Trezinia Malgas also has a tertiary qualification in social science ; and she has had practical experience for ten years.

4.8.5 The extreme pressure of work borne by the Family Advocates in Port Elizabeth may be gauged from the following excerpt from a written report subsequently sent to the Commission by Adv Claassen :-

*“ Alle egskeiding-dagvaardings waar kinders betrokke is, sowel as ondersoek voortspruitend hieruit, moet deur twee advokate hanteer word. Hulle bedien die egskeidingshowe in Port Elizabeth, Oos-Londen, Grahamstad, die Middellandse Rondgaande Hof wat sittings hou te Cradock en Graaff-Reinet en die Grens Rondgaande Hof wat sittings hou op Queenstown en King William’s Town. Die Suidelike Egskeidingshof wat sittings hou te Port Elizabeth, Queenstown en King William’s Town work ook deur die kantoor bygestaan op ‘n **amicus curiae** basis. Die werksdruk van die kantoor het vir die periode Junie 1996 tot Junie 1997 met meer as 100 ondersoek toegeneem...’n Verdere probleem wat opduik indien een van die advokate met siekte- of vakansieverlof is, of selfs een van die sentra buite Port Elizabeth vir doeleindes van hofbywoning besoek, die oorblywende advokaat alle hofsittings, ondersoek en ander werk moet afhandel. Addisionele Gesinsadvokate word dringend verlang om die bestaande werkslading te hanteer...”*

4.8.6 Bisho and Umtata now fall directly under Office of the Chief Family Advocate in Pretoria. At the time of the Commission’s visit to the Port Elizabeth Office these two towns were administered as satellite Offices of the Family Advocate

in Port Elizabeth. In each town a member of the staff of the Attorney-General acted as a temporary Family Advocate. On the situation in Bisho and Umtata Adv Claassen in her report comments thus :-

*“ Bisho is slegs 50 km vanaf Oos-Londen en kan gemaklik gekombineer word met besoeke aan Oos-Londen, indien genoegsame personeel in Port Elizabeth beskikbaar is. (Port Elizabeth bedien reeds huidiglik Oos-Londen). Umtata is egter ongeveer 600 km vanaf Port Elizabeth en moet boonop die omringde platteland bedien. **Ek is van mening dat ‘n voltydse Gesinsadvokaat spesifiek op Umtata gestasioneer sal moet word.**” [ Emphasis supplied ]*

4.8.7 As in the case of every other Office visited by the Commission, so also in the Port Elizabeth Office of the Family Advocate the fly in the ointment is the precarious and unsatisfactory supply of Family Counsellors by the Department of Social Services. In this connection Adv Claassen remarks :-

*“ Daar is reeds vir ‘n geruime tyd probleme aangaande die beskikbaarstelling van maatskaplike werkers as Gesinsraadgewers, aan die Kantoor van die Gesinsadvokaat. Die maatskaplike werkers word soms op kort kennisgewing deur die Departement van Welsyn onttrek en dan nie vervang nie, of work vervang deur onervare personeel. Dit affekteer die werksvloei van die kantoor negatief. Die algemene gevoel onder maatskaplike werkers asook die plaaslike Gesinsadvokate is dat hierdie probleem ondervang kan word, indien die Departement van Justisie hulle eie maatskaplike werkers sal aanstel. Dit sal ook lei tot beter kontinuïteit en beter effektiewe beheer oor die werksaamhede van die maatskaplike werkers...”*

4.8.8 Two of the problems experienced by the Family Advocate’s Office in Port Elizabeth relate respectively to the lack of psychological back-up services and the unsatisfactory waiting-rooms in towns other than Port Elizabeth.

4.8.8.1 In regard to the first-mentioned difficulty Adv Claassen states :-

*“ Dit gebeur ook dikwels dat die partye ernstige bewerings maak jeens mekaar aangaande emosionele onstabieliteit. Dit verg dan dat die partye en kinders deur ‘n sielkundige geëvalueer moet word. In vele gevalle beskik die partye nie oor die nodige finansies om ‘n sielkundige vir sulke*

*doeleindes aan te stel nie. Voorheen het die Psigiatriese Kliniek van die Provinsiale Hospitaal hulle dienste beskikbaar gestel vir die kantoor waar die omstandighede van die partye van so 'n aard was dat die evaluasie genoodsaak was, maar die partye nie oor fondse beskik het nie. Die nuwe beleid van Primêre Gesondheidsorg het egter veroorsaak dat hierdie dienste nie meer beskikbaar is nie. Dit skep 'n leemte en kan dit alleenlik in die belang van die minderjarige kinders wees, indien hierdie dienste weer heringestel word.”*

#### 4.8.8.2

Concerning waiting-rooms Adv Claassen's report read as follows :-

*“ 'n Knelpunt wat gereeld ondervind word, is dat die betrokke akkommodasie wat beskikbaar gestel word vir die Gesinsadvokaat, dikwels in 'n hofgebou is en daar nie voorsiening gemaak word vir geskikte 'kindervriendelike' wagkamers nie...In Grahamstad, Oos-Londen, Bisho en Umtata is daar slegs 'n kantoor toegewys in die hofgebou vir gebruik van die Gesinsadvokaat sonder enige wagkamer-geriewe. Die Hooflanddros te Oos-Londen, mnr Stander, het intussen egter 'n ekstra kantoor in Oos-Londen Hofgebou beskikbaar gestel wat nou ingerig gaan word deur die Gesinsadvokaat vir kinders en gesinne betrokke by ondersoeke. Dit sal terselfdertyd ook aangewend kan word as wagkamer vir minderjarige getuies in seksuele-molesteringsake, wat tans nie privaat wagkamer-geriewe geniet nie.”*

## **CHAPTER FIVE**

# **A BRIEF DESCRIPTION OF THE STRUCTURE AND FUNCTIONING OF THE FAMILY COURT OF WESTERN AUSTRALIA**

### **5.1 THE STATUTORY BASIS OF THE COURT**

Western Australia has been the only State to set up its own Family Court pursuant to sec 41 of the (Commonwealth) Family Act of 1975. The Court was created by a statute known as the Family Court Act passed by the Western Australian Parliament in 1975 and which came into operation on 1 June 1976.

### **5.2 FEDERAL AND STATE JURISDICTION**

5.2.1 The Family Court of Western Australia can exercise throughout the State the Federal jurisdiction invested in it by the (Commonwealth) Family Law Act 1975 and the (Commonwealth) Marriage Act 1961. It can also exercise Federal jurisdiction in cases transferred from the Federal Court of Australia pursuant to certain other Commonwealth statutes.

5.2.2 The Family Court of Western Australia has non-Federal jurisdiction under the Family Court Act 1975 and the Adoption Act. The main areas in which the Family Court has jurisdiction throughout the State are (a) guardianship ; custody ; access ; maintenance ; and (if necessary) parentage and maintenance proceedings with respect to children who are not children of the marriage and (b) adoption.

### **5.3 THE BENCH OF THE FAMILY COURT OF WESTERN AUSTRALIA**

The Bench of the Court consists of a Chief Judge (the Hon Justice I.W.P. McCall) and five other Judges. The outline of the Family Court of Western Australia contained in this Chapter is based on a documentary Introduction

(revised in July 1995), produced by the Registry of the Court as a basic guide to the functioning of the Court, which was kindly made available to the Commission by Chief Judge McCall.

#### **5.4 THE OFFICERS OF THE FAMILY COURT**

In terms of sec 22 of the (State) Family Act 1975 the officers of the Family Court of Western Australia are :-

- 5.4.1 (a) a Registrar and such Deputy Registrars as may be necessary ;  
(b) a Marshal ;  
(c) a Director of Court Counselling ;  
(d) a Collector of Maintenance and such Assistant Collectors as may be necessary ; and  
(e) such other officers and staff as are necessary for the proper functioning of the Court.
- 5.4.2 The Registrar and his five Deputy Registrars hold concurrent appointments as Stipendiary Magistrates. Members of the Registry Staff are officers of the Ministry of Justice.
- 5.4.3 Court Counsellors and their clerical support staff are officers of the **Department for Family and Children's Services** attached to the Family Court.
- 5.4.4 The Marshal of the Family Court of Western Australia is the Sheriff of the Supreme Court. He is primarily responsible for the execution of warrants and service of enforcement summonses issued by the Family Court.

#### **5.5 MAGISTRATES' COURTS OF SUMMARY JURISDICTION**

- 5.5.1 Within the Perth Metropolitan Region all Federal and State Family law proceedings are heard within the one Court structure comprising THE FAMILY COURT OF WESTERN AUSTRALIA AND THE COURT OF PETTY SESSIONS at 150 Terrace Road, Perth. The Court of Petty Sessions is the name of the Court of Summary jurisdiction presided over by a Registrar of the Family Court sitting as a Stipendiary Magistrate.

5.5.2 Outside the Perth metropolitan Region, Federal and State Family law jurisdiction may be exercised by Courts of Summary Jurisdiction constituted by a single Stipendiary Magistrate. These lower courts are limited in jurisdiction. They cannot, for example, grant decrees of dissolution of marriage or make adoption orders unless the parties consent thereto; they cannot determine disputes regarding guardianship and access, or disputes involving property of substantial value.

## **5.6 FAMILY COURT COUNSELLING SERVICE**

5.6.1 Apart from a Director of Court Counselling and a Senior Court Counsellor the Counselling Service has fourteen other Court Counsellors. Each Counsellor has tertiary qualifications in one of the social sciences; and has had extensive experience in counselling and family welfare.

5.6.2 The main emphasis in counselling is on conciliation services. Parties who have separated or who are about to separate are helped to identify and examine their dispute and to seek their own solutions.

5.6.3 Where legal proceedings concern minor children the Family Court will almost always order the parties to attend counselling.

5.6.4 A further function of the Court Counsellor is to assist the Court in making decisions in regard to guardianship and custody disputes by preparing reports for the Court.

5.6.5 The Counselling Service is available to members of the community free of charge and regardless whether or not legal proceedings have been instituted.

## **5.7 INFORMATION SESSIONS**

5.7.1 Information Sessions are presented at the Court twice weekly by a Counsellor and a legal practitioner.

5.7.2 Any person filing proceedings in the Family Court is required to attend one of these sessions before his or her application is heard by the Court.

## **5.8**            **CONFERENCES WITH REGISTRARS**

- 5.8.1            One of the primary functions of the Registrars is to preside at what are known as conciliation and pre-trial conferences.
- 5.8.2            In an attempt to promote settlement a conciliation conference, which has to be attended by the parties and their respective solicitors, is ordered to be held in almost every contested case.
- 5.8.3            Shortly before the trial date the parties are required to attend a further conciliation conference called a pre-trial conference.
- 5.8.4            During the year 1994/1995 the Registrars conducted 2402 conciliation and pre-trial conferences.
- 5.8.5            The number of cases which ultimately proceed to actual trial is relatively small.

## **5.9**            **MEDIATION SERVICE**

In addition the Family Court offers a mediation service to married couples who are separating or who have already separated. In an consensual problem-solving process trained mediators assist the parties in identifying areas in disputes and in exploring possible solutions with a view to settlement.

## **5.10**           **DISPOSAL OF WORK AND WAITING TIME**

- 5.10.1           The bulk of the Family Court's time in court is spent on applications for guardianship, custody, access, property settlement and injunctions.
- 5.10.2           The matters mentioned in 5.10.1 above are heard separately from applications for dissolution of marriage.
- 5.10.3           After a contested case has passed through the conciliation processes without agreement having been reached, the waiting time for trial is three to six months.

## **5.11**            **COLLECTION OF MAINTENANCE PAYMENTS**

The Collector of Maintenance arranges for the collection, disbursement and enforcement of maintenance for those who are not entitled to use the services of the Child Support Agency of the Australian Taxation Office.

## **5.12**            **CHILD-MINDING CENTRE**

The Family Court at 150 Terrace Road, Perth, has a Child-Minding Centre staffed by a qualified child-care worker. The service is available to persons attending court hearings and the counselling, conciliation, mediation and information sessions.

## **5.13**            **CIRCUIT COURTS**

5.13.1            Circuit sittings of the Family Court are held regularly in Albany, Bunbury, Geraldton, Kalgoorlie, and in the Pilbara and Kimberley.

5.13.2            Circuit sittings are usually preceded a week or two earlier by a REGISTRAR'S CIRCUIT for the holding of conciliation and pre-trial conferences and the dispatch of other matters within their jurisdiction as Stipendiary Magistrates.

5.13.3            A Court Counsellor generally accompanies the Judge or Magistrate on each circuit ; and in addition he makes such other visits to circuit and other areas in between circuit sittings as may be required.

## **5.14**            **APPEALS**

5.14.1            In respect of the non-Federal (State) jurisdiction of the Family Court of Western Australia an appeal lies to the Full Court of the Supreme Court of Western Australia.

5.14.2            In the Federal jurisdiction of the Family Court of Western Australia and of the Courts of Summary Jurisdiction ; appeals lie to the Full Court of the Family Court of Australia which sits at Perth two or three times a year.

**5.15****INFORMALITY OF PROCEDURE**

Wigs and robes are worn only in the courtrooms of the Family Court of Western Australia when appeals are heard before the Full Court of the Family Court of Australia ; or when cases transferred from the Federal Court of Australia are being heard.

## **CHAPTER SIX**

# **A BRIEF DESCRIPTION OF THE STRUCTURE AND FUNCTIONING OF THE FAMILY COURT OF NEW ZEALAND**

### **6.1 ACKNOWLEDGMENTS**

The description here given is derived from the following two sources : (i) the Introduction to “ *FAMILY LAW IN NEW ZEALAND* ” [FLNZ] which is taken from the Commentary Bindings of the Butterworths Family Law Service and was presented to the Commission in Auckland by Principal Judge P.D. Mahony of the Family Court ; (ii) “ *THE NEW ZEALAND FAMILY COURT EXPERIENCE* ” [NZFCE], being a paper by Mark Henaghan, Senior Lecturer in Law at the University of Otago, which was delivered at the International Conference of Women Judges held in Wellington in June 1993.

### **6.2 THE STATUTORY BASIS OF THE COURT**

6.2.1 Reference has already been made [in paragraph 2.7 of Chapter Two] to the Report of the Royal Commission on the Courts [ “ the Beattie Report ” ] tabled in New Zealand in 1978.

6.2.2 The Beattie Commission saw the basic problem in fashioning a Family Court as one of balancing the social agency function against the Court of law function. Its conclusion was that the Court and its support staff should initially give every assistance to parties to help them to resolve their own problems through counselling, conciliation and mediation ; but that in cases where these techniques failed to resolve the dispute it would fall for adjudication by the Court of law.

6.2.3 The Beattie Report inspired the Family Court Act 1980 which established the New Zealand Family Court by creating a new division of the District Court with

its own specialist Judges, specialist personnel, and specialised services to deal with family cases. The Court came into existence on 1 October 1981.

6.2.4 In FLNZ (in paragraph 0.5) the following explanation is given :-

*“ The Family Courts Act deals briefly with the composition, jurisdiction, powers, and procedures of Family Courts but does not prescribe their features in any detail. The result is that a reading of the Act itself gives very little indication of the nature of the Courts and how they operate. ”*

6.2.5 In footnote 9 to paragraph 0.5 it is pointed out that in particular :-

*“ ...the Act contains no commitment to the Commission’s idea of a well staffed counselling service as part of the Court structure itself. Instead what has happened is that counselling takes place on a referral basis, principally to counsellors accredited by the Marriage Guidance Council. ”*

### **6.3 THE BENCH OF THE NEW ZEALAND FAMILY COURT**

6.3.1 In terms of sec 5(2)(b) of the Family Courts Act an appointee is required to be :-

*“ by reason of his training, experience, and personality, a suitable person to deal with matters of Family Law. ”*

6.3.2 Most of the initial appointments to the Bench were made from the existing District Court Bench. Subsequently many appointments have been made from members of the practising professions who have specialised in Family Law.

6.3.3 Family Court Judges spend about one-fifth of their time sitting in the general jurisdiction of the District Court in hearing ordinary civil and criminal cases. In Auckland the Commission had the benefit of a lengthy interview with the Hon Justice Silvia Cartwright D.B.E. Now a Judge of the High Court, she was formerly Chief Judge of the District Court, and she has an extensive knowledge of the Family Court. Judge Cartwright stressed the importance of letting Family Court Judges do some general legal work in order to reduce the risk of

“burn-out” - the psychological stress and strain which results from an unvaried diet of traumatic family court cases.

6.3.4 An important feature of the Family Court is described thus in NZFL (in paragraph 0.6) :-

*“ ...Family Court Judges come together as a team from time to time to discuss aspects of their work and to receive instruction from outside experts in relation to matters which have not been part of their formal legal training. Examples are mediation techniques and the utilisation of non-legal professionals such as psychiatrists and psychologists”.*

## **6.4 THE JURISDICTION OF THE FAMILY COURT**

6.4.1 According to NZFCE :-

*“ The Court has jurisdiction over marriage, separation, divorce (or dissolution as it is known in New Zealand), guardianship, custody, access, domestic protection, child abuse and neglect, spousal maintenance and child support, paternity, matrimonial property, protection of the welfare and property rights of incompetent persons, wills between family members, promises relating to wills, the assessment and treatment of mental health problems.”*

6.4.2 The recommendation of the Beattie Commission that Family Courts be given comprehensive original jurisdiction over family matters embraced a number of matters not traditionally seen as part of “ family law”. These included even criminal conduct arising within the family, such as inter-personal assaults, parent-child assaults, incest and abductions. Instructive with a view to any South African endeavours to establish a Family Court, are the following comments in paragraph 0.6 of NZFL :-

*“ The Commission’s view has not been fully implemented as yet. Part of the explanation for this may be a wish not to overwhelm the new Courts with jurisdiction until they have had the chance to become properly established. But there may also be reservations about some of the Commission’s proposals, in particular the recommendation to*

*include some criminal matters within the jurisdiction of the Family Court.”*

## **6.5 THE EMPHASIS ON DISPUTE RESOLUTION WITHOUT A COURT HEARING**

### **6.5.1 COUNSELLING:**

6.5.1.1 The services of counsellors are obtained on a referral basis. A key figure in the system is an officer of the Family Court known as the COUNSELLING CO-ORDINATOR. Counselling Co-ordinators have primarily the administrative function of ensuring that appropriate counselling services are engaged in a particular case. They are the link between the counsellor chosen and the parties.

6.5.1.2 In the New Zealand Family Court counselling is a form of Alternative Dispute Resolution aiming at an agreed settlement between the parties. The State funds six sessions with a counsellor. He explores issues on which the parties may be able to agree. Most requests for counselling are for help in separation-related issues.

6.5.1.3 To illustrate the emphasis on conciliated settlement NZFCE cites the following examples :-

- “
- (i) *Before legal steps are taken either partner can make a request for counselling and a state-funded referral to a counsellor will be provided... .*
  - (ii) *When a partner approaches a lawyer, that lawyer has a legal duty to advise the client of available counselling facilities. The only exception is where the approach is solely concerned with property issues.*
  - (iii) *If an application is filed in the Family Court for separation, maintenance, or custody, the court will*

*arrange for the matter in most cases to be referred to a counsellor.*

- (iv) After a decision to separate has been made by the parties, both their lawyers have a duty to promote conciliation.*
- (v) At all times the Family Court has a duty to consider the possibility of reconciliation or conciliation of any matter in issue and may adjourn the proceedings or nominate a counsellor.”*

6.5.1.4 Everything said in the conciliation process is privileged and may not be used in subsequent Court proceedings.

## **6.5.2 MEDIATION**

6.5.2.1 Before an application to the Family Court comes up for hearing either party or the Judge can call a mediation conference with a view to resolving issues by agreement. Mediation conferences are chaired by Family Court Judges. The same Judge who chairs the mediation conference may also preside at the subsequent trial unless either party objects or the Judge himself considers it inappropriate. The Judge has the power at the mediation conference to make a consent order if the parties so agree.

6.5.2.2 In paragraph 0.6 NZFL states :-

*“ Experience to date suggests that mediation conferences are having a significant effect in avoiding or reducing the scope of Court hearings. Mediation can also be available to parties on a purely voluntary basis outside the Courts system.”*

## **6.5.3 PRE-TRIAL CONFERENCE**

Pre-trial conferences are commonly held in order to define issues in advance. In property and financial matters the parties are required to put on the table what their assets are.

## **6.6 THE SPECIAL POSITION OF THE CHILD**

### **6.6.1 LEGAL REPRESENTATION OF CHILDREN**

When a matter involving children appears to be ripe for hearing the appointment of a solicitor to represent the children is mandatory unless no useful purpose would be served thereby.

### **6.6.2 THE USE OF INDEPENDENT EXPERTS**

The Family Court has the power to call expert assistance of its own accord. In this connection NZFCE explains :-

*“ This is to minimise the adversarial tendency of the ‘battle of experts’. It is also to protect children from constant questioning and testing. Practice does allow for the methods and techniques used by the court expert to be evaluated by the parties calling their own expert to scrutinise how the report for the court has been drawn up. ”*

### **6.7 PRIVACY**

Only the people involved may attend proceedings of the Family Court. The publication of reports of proceedings, other than for professional purposes, requires the leave of the Court.

### **6.8 AN ATMOSPHERE OF INFORMALITY**

No wigs or robes are worn. The parties and counsel remain seated throughout the proceedings. The Judge does not sit in an elevated position. The Court clerk does not sit in front of the Judge. Strict adversarial procedures are relaxed and excessive or unduly aggressive cross-examination is discouraged.

### **6.9 PHYSICAL LOCATION OF THE FAMILY COURT**

Ideally the Family Court is housed in its own building apart from other courts.

## **CHAPTER SEVEN**

### **A SUMMARY OF THE MAIN WRITTEN AND ORAL SUBMISSIONS MADE BY INTERESTED PARTIES TO THE COMMISSION IN REGARD TO THE ISSUE OF A FAMILY COURT IN SOUTH AFRICA**

7.1 Among the interested parties who made submissions on this issue to the Commission there was almost general agreement that some form of Family Court had become urgently necessary in South Africa. As to the particular level at which such a Family Court should function within our hierarchy of courts, opinions differed markedly. These divergent opinions will be indicated in paragraphs 7.6 to 7.9 below.

7.1.2 The broad consensus that a Family Court is a pressing necessity is inspired by dissatisfaction with the present system of adjudication of family matters in South Africa. Such disapproval stems from a number of factors, not the least of which is the fact that under the present system the adjudication of family law matters is fragmented, in the sense that it is scattered over a host of unrelated and unco-ordinated courts. Here it is convenient, however, to consider two particular objections which loomed large in the submissions before us. The first relates to the entirely inappropriate way in which unopposed divorce actions are dealt with in the High Court. The second concerns the fashion in which proceedings in the maintenance court of the Magistrates' Courts are bungled.

#### **7.2 THE MANNER IN WHICH UNOPPOSED DIVORCES ARE DEALT WITH IN THE HIGH COURT**

7.2.1 The volume of divorce litigation in South Africa is large. During the year 1995, for example, 31 683 divorce actions were heard in the High Court. Of this number no less than 30 001 were heard as undefended cases.

7.2.2 The legal costs involved in an undefended divorce are high. This fact is substantiated by estimates given by both urban and country attorneys during

their oral submissions to the Commission. See in VOLUME III the estimates by the following attorneys :-

- (a) Mr C.P. Fourie (between R1 500 and R2 500) [page 58 para 1] ;
- (b) Mr B. Gundelfinger ( “anything between R3 000 and R5 000” ) [page 75, para 7] ;
- (c) Mr A.P. Brandmuller (R2 500) [page 168, para 2] ;
- (d) Mr C.M. Weiss (R2 500) [page 178, para 2].

7.2.3 Despite the high cost of an undefended divorce action, the actual hearing in the High Court is disposed of swiftly and abruptly, often in a matter of no more than three minutes. The manner in which undefended divorces are dealt with detracts from the dignity of the High Court and leaves both the plaintiff and onlookers in the court dissatisfied. See in this connection, in VOLUME III, the oral submissions by the following :-

- (a) Friedman JP of the CPD ( “ *a rubber stamp* ” ) [page 13, para 1] ;
- (b) Eloff JP of the TPD ( “ *something like a sausage machine* ” ) [page 38, para 13 ] ;
- (c) Streicher J of the TPD [page 49, paras 10 & 11] ;
- (d) Attorney C.K. Petty , on behalf of the Law Society of the Transvaal and the ALS ( “...it is very difficult to explain to a person who is probably going through one of the most traumatic experiences of his life, who comes to Pretoria all the way...from Klerksdorp or Ventersdorp...at enormous cost, enormous inconvenience, gets into court and his divorce or her divorce is finished in three minutes.” [pages 102-103, paras 6 & 7] ; and
- (e) van Dijkhorst J of the TPD [page 160, para 2].

### **7.3 THE MANNER IN WHICH APPLICATIONS FOR MAINTENANCE ARE DEALT WITH IN THE MAGISTRATES' COURTS**

7.3.1 In the course of his oral submissions Mr R. Mandelstam, a senior Johannesburg Magistrate, expressed the view [VOLUME III, page 94, para 13] that Magistrates throughout the country were dealing with maintenance matters “ *satisfactorily and adequately*”.

7.3.2 From other interested parties, however, the Commission heard a chorus of complaints in regard to the dismal performance of the maintenance courts. See in VOLUME III the criticisms voiced by the following :-

- (a) Attorney CP Fourie on behalf of the Pretoria Attorneys Association ( “ *totally inadequate* ” ) [page 59, para 6] ;
- (b) Attorney S.D. Helman of Johannesburg ( “ *in the larger centres these courts are an abysmal failure* ” ) [page 68, para 2] ;
- (c) Attorney C.K. Petty on behalf of the Law Society of the Transvaal and the Association of Law Societies [page 105, paras 21 & 22] ;
- (d) Adv G.J. van Zyl, Acting Chief Family Advocate ( “ *Ek meen dat onderhoud miskien tot nou toe in meeste landdroskantore amper ‘n bietjie van ‘n stiefkind was. Die publiek ervaar dit as sulks.* ” ) [page 111, para 6]
- (e) Mr I.C. Prinsloo on behalf of Ten Lecturers at the Justice College in Pretoria ( “ *maintenance is quite in a shambles* ” ) [page 149, para 10]
- (f) Friedman JP of the Bophuthatswana Supreme Court [page 177, para 5] ;  
and
- (g) Attorney P. Sedile, President of the Bophuthatswana Law Society ( “ *the clerks there are inexperienced, they are not legally trained.* ” ) [pages 180-181, para 4].

#### **7.4 THERE IS A GROWING AWARENESS OF THE NEED FOR SPECIALIST TREATMENT OF FAMILY LAW LITIGATION**

7.4.1 The welfare of society necessarily depends on the preservation of its most fundamental constituent element : the family. World-wide there has been for many decades a growing recognition that family law matters should be resolved by courts manned by specialists who are sensitive to the needs of the family as a unit. This awareness is reflected in many submissions made to the Commission. A few examples will suffice.

7.4.2 Appearing before the Commission on behalf of the General Council of the Bar its chairman, Mr M.J.D. Wallis, SC, remarked [VOLUME III, pages 7 - 8, paras 30 & 31] :-

*“ For the ordinary citizen the cases in which they are most likely to encounter the Courts are crime and family-related matters...crime is one*

*of the major problems of our societies, having a massive detrimental effect on all our communities, and if one were to identify one other single social problem, it is the breakdown and damage to family life, the disruptive effects in the community and the family of divorce proceedings, custody battles, financial battles. It is the plight of the divorced mother caring for children, and it is predominantly that side of the equation, hence I stress it, who gets a sort of slightly inadequate maintenance settlement and then struggles on and on, getting poorer and poorer while husband recovers. It is the abused child and that sort of situation...we are tending to look for a broader range of skills from our Judges now, an empathy and human sympathy for people, and an ability to deal with people, because our Courts have become too aloof. That is wrong.”*

7.4.3 Mr Justice J.F. Myburgh [VOLUME III, page 52, paras 14-16] identified the difficulties which family law practitioners often encounter under the present system in dealing with urgent applications seeking interim access to, or custody of, children :-

*“ ...in Johannesburg there is an ‘urgent’ judge who does nothing else but urgent cases of that week...he can be faced with anything between 25 and 50 urgent matters for that week, many of which are opposed, and one of their concerns, and I think it is a valid concern, is that before that judge dealing with all that work, that is just another case that he has to deal with, and he or she just physically cannot devote the attention required to that sort of case, with the best will in the world, simply because of the pressure of work...one of the reasons why they want...specialisation, is that they would go to a court which is sympathetic to...the cause of children...and have time to deal with it...and very often what happens in that urgent court is crucial to the future. Because somebody wins some interim rights, and they very often cement into permanent rights simply by delay...”*

7.4.4 On behalf of the Johannesburg Bar Adv van der Linde put the matter tersely thus [VOLUME III page 60, para 1] :-

*“ The first is the question of a Family Court. In principle the Johannesburg Bar is in favour of the notion of specialisation. It does not adhere to the traditionally supported notion that an appointed judge*

*is automatically qualified best to adjudicate in all matters that society brings before him.”*

7.4.5 In a joint written response to the Commission by Professor S. Burman, Ms B. van Heerden and Ms F. McLennan (all of the University of Cape Town’s Centre for Socio-Legal Research) the following submissions were made :-

*“ Disputes about matrimonial property, maintenance for spouses and children, custody of and access to, children are frequently very complex. They require a practitioner to have an in-depth knowledge of the applicable law (including not only family law but also the law relating to housing, tax, pension funds, etc.) Furthermore they require training in, and sensitivity to, the dynamics of families and communities.”*

[A copy of this written response is to be found in Appendix “ F ” at pages 50 to 51 of VOLUME II]

7.4.6 The National Association of Democratic Lawyers stressed the necessity for specialist knowledge and experience in family law on the part of the judicial officers in a Family Court :-

*“ Nadel would support, and indeed strongly urges, the earliest establishment of a Specialised Family Court. Discrete and particular process and procedures with additional specialised infrastructural support would enable such a Court to expeditiously and sensitively deal with all issues relating to Family Law. Nadel would support the development of such a specialised Bench which would deal solely with and require the requisite expertise and understanding of the matters coming before such a Court...”*

[A copy of an extract from NADEL’S written response is to be found in Appendix “ G ” at page 52 of VOLUME II]

## 7.5

### THE PIVOTAL ROLE OF THE OFFICE OF THE FAMILY ADVOCATE AND THE POSSIBLE EXPANSION OF ITS FUNCTIONS

7.5.1 An analysis of the submissions made to the Commission on the issue of a Family Court for South Africa reflects both enthusiasm for the work presently being done by the Family Advocate's Office and suggestions that its key function should be expanded in future. Whatever form a Family Court may ultimately assume, it is clear that the Family Advocate's Office must be its core.

7.5.2 Mr B. Gundelfinger is Vice-President of the Association of Family Lawyers. He is an attorney in Johannesburg, and divorce and divorce-related matters represent 90 % of his practice. In the course of his oral submissions to the Commission [VOLUME III, pages 74-75, paras 3 - 5] Mr Gundelfinger made the following suggestions in regard to the Family Advocate :-

*“ In my opinion the Family Advocate's Office should be decentralised to make it more effective and autonomous. I believe that the Family Advocate's Office should be retained, and it plays a very important role with regard to access and custody. Certain judges harness the assistance of the Family Advocate. Certain judges detest the Family Advocate and are not really interested in what they have to say. ”*

*“ The point is that very often what happens with contentious matters, particularly relating to access and custody, is that the Family Advocate who has a social worker with him or her, will investigate the matter fully and then prepare a report. This report, in my view, should be **prima facie** evidence. Also what the Family Advocate frequently does is he refers to psychologists and social workers. ”*

*“ The problem at the moment which the Family Advocate has, is that the social workers are seconded to them by the Department of Social Welfare ; they have no say in who should be working in this particular department. They themselves cannot advertise the post for people that are interested in access and custody and family law and I believe that is something that needs to be addressed urgently. ”*

7.5.3 The following significant observations on the critical role of the Family Advocate were made by Mr Justice C.F. Eloff, Judge President of the Transvaal

Provincial Division [VOLUME III, page 76, paras 1 -3] in the course of his oral submissions to the Commission :-

*“ Could I start off by dealing with...the question of the Family Advocate. I could say that in my experience the Family Advocate plays a very important role in litigation. I have frequent contact with the Family Advocate, I meet, as I mentioned earlier, I meet with the representatives of the Bar, Side Bar...and also the Family Advocate.”*

*“ They are skilled persons who have the back-up services that Mr Gundelfinger spoke of and so often they help to facilitate settlements or to query settlements which is also important, sometimes there is a settlement which involves a bit of horse-trading and the Family Advocate picks that up. They are very independent. It is unfortunately a fact, as Mr Gundelfinger said, that one or two judges are not happy at the idea but that is a passing phase ; and it is very rare that that still occurs.”*

*“ I myself have over the past years, frequently sat in divorce matters in the WLD where children are involved or some problem of access or that sort is involved. It has been invaluable to have had the professional assistance of the Family Advocate. Since the system has been invoked, numerous cases have been settled because parties respect the view of the Family Advocate and it has been of great importance in coming to an amicable settlement.”*

7.5.4 In an address [VOLUME III, page 111, para 4] at a public sitting of the Commission Adv G.J. van Zyl (then the Acting Chief Family Advocate) described the Family Advocate’s Office as supplying a structure indispensable to an effectively functioning Family Court since it supplied the essential social welfare component :-

*“ ...ek meen dat die gesinsadvokaat as ‘n struktuur onontbeerlik is vir die suksesvolle gesinshof...die gesinsadvokaat het, meen ek, uiteindelik prominensie begin gee aan die maatskaplike komponent wat u verslag [the 1983 Report] tien jaar gelede alreeds geïdentifiseer het as ‘n belangrike faktor...Daardie maatskaplike komponent het nou eens vir altyd binne die regstruktuur ‘n kanaal gevind om sy prominensie te geniet wat hy lankal verdien, en dit was nie in die verlede so nie.”*

7.5.5 Mr Justice K. van Dijkhorst of the Transvaal Provincial Division [VOLUME III, page 160, para 4] stressed the important catalytic role played by the Family Advocate in promoting agreement on disputed issues in divorce actions :-

*“ Ons het die hulp van die gesinsadvokaat wat goeie diens lewer en veral waar betwiste toesig en beheer is, en in byna 90% van die gevalle of meer word die verslag van die gesinsadvokaat gevolg ; met ander woorde het jy nie meer ‘n betwiste egskeiding nie wanneer daardie gesinsadvokaat-verslag uit is.”*

7.5.6 In the course of his oral submissions to the Commission Mr C.M. Weiss, Chairman of the Rustenburg Attorneys’ Association [VOLUME III, page 178, para 3] described the problems experienced in the North-West Province by reason of the fact that there is no Family Advocate’s Office at Mmabatho :-

*“ ‘n Ander ding wat ek graag onder u aandag wil bring...die gebrek aan ‘n gesinsadvokaat-kantoor in Mmabatho. Op die oomblik is dit ‘n groot gebrek en dit maak dit uiters moeilik en ons regter-president het daarna verwys dat daar aspekte is wat werklikwaar aandag verdien wat mens kundige kennis nodig het en dit is ‘n groot leemte.”*

7.5.7 Mr T. Horn, an attorney of Kimberley, who spoke to the Commission on behalf of Circle 16 of the Cape Law Society [VOLUME III, pages 190 - 191, para 7] mentioned the alacrity with which the Family Advocate’s Office renders assistance :-

*“ CHAIRMAN : In your experience, has his [the Office of the Family Advocate in Bloemfontein] contributed materially to the improvement of the handling of, say, custody issues in the Supreme Court ?*

*MR HORN : Yes, I think I must concede that and he is actually very prompt with his investigations and with his reports. Of course, if you are a litigant you do not always agree with his report, but yes indeed, he does make a contribution.”*

7.5.8 In a joint written response to the Commission by the Centre for Socio-Legal Research [see paragraph 7.4.5 above] its authors state, ***inter alia*** :-

*“...the sphere of operation of the Family Advocates should be extended to cover the provision of counselling services to parents in all disputes involving children, whether or not divorce proceedings are pending. The Family Advocate should ideally have the power to make such counselling obligatory before the parties have recourse to the court. This would, of course, require a very substantial increase in the ranks of the staff available to the Family Advocate, and that training in counselling be obligatory for them. Provision should be made for the time-consuming nature of counselling services. It must be stressed that we are not suggesting compulsory mediation in all proceedings affecting children ; merely the provision of counselling services along the lines of the counselling conference provided for in the Australian model.”*

**7.6 THE DIVERGENT VIEWS HELD BY VARIOUS INTERESTED PARTIES IN REGARD TO THE PARTICULAR LEVEL WITHIN OUR HIERARCHY OF SUPERIOR AND LOWER COURTS AT WHICH THE PROPOSED FAMILY COURT SHOULD FUNCTION**

7.6.1 An analysis of the submissions favouring the establishment of a South African Family Court reveals that in regard to the level at which its proponents wish it to function there exist the following three separate schools of thought :-

- (i) the Family Court should function either as a division of the High Court or as an independent Court having the same or nearly the same status as the High Court ;
- (ii) the Family Court should function as a two-tiered Court functioning partly on the level of the High Court and partly on the level of a lower Court ;
- (iii) the Family Court should function wholly at the level of a lower Court.

7.6.2 In paragraphs 7.7, 7.8 and 7.9 hereunder it will be indicated in turn who the respective adherents are of each school of thought. However, in order to avoid any possible confusion as to where the Association of Law Societies [ “ the ALS ”] stands in the matter, it is necessary first [in paragraph 7.6.3 immediately below] to resolve the conflict which emerges upon a comparison

of two separate responses sent to the Commission by the ALS on two separate dates.

7.6.3.1 In connection with the issue of the Family Court the ALS addressed to the Commission two separate written responses respectively dated 23 August 1995 [ “ **the first ALS memorandum** ” ] and 6 March 1996 [ “ **the supplementary ALS memorandum** ” ]. A copy of the **first ALS memorandum** is to be found in Appendix “ A ” at pages 1 to 20 in VOLUME II. A copy of the **supplementary ALS memorandum** is to be found in Appendix “ H ” at pages 53 to 56 of VOLUME II.

7.6.3.2 In the **first ALS memorandum** the two following proposals are made :-

- “ 1. *We submit that the machinery created by the Magistrates’ Court Amendment Act 120 of 1993 should be immediately halted and reversed.*
2. *A family court should be established at the level of the Supreme Court. There are two ways of approaching this submission : namely, such a court could be established as a division of the existing Supreme Court structure ; or it could be established as a court in its own right.”*

7.6.3.3 The **supplementary ALS memorandum** departs significantly from the main thrust of the **first ALS memorandum**. In paragraph 3 of the supplementary ALS memorandum one finds the following :-

*“ ...we are of the view that unopposed divorce actions and, where appropriate - subject to the prior approval of the Family Advocate - settled matters should be dealt with by a magistrate, but that all other matters should be determined by the Family Court with the jurisdiction and status as set out in our original proposal.”*

In paragraph 4 of the **supplementary ALS memorandum** it is further said :-

*“ By virtue of the proposal that the Magistrates’ Court should - in the limited circumstances as indicated - have jurisdiction, we submit that the machinery created by the Magistrates’ Courts Amendment Act 120 of 1993 should be halted but not reversed. The Magistrates’ Courts Amendment Act should be revisited and redrawn to cater for the*

*implementation of the proposals set out in this supplementary memorandum...*”

7.6.3.4 At a public sitting of the Commission [see VOLUME III, page 102, paras 2 & 3] Mr C.K. Petty made oral submissions on behalf both of the Law Society of the Transvaal and of the ALS. With the specific mandate of the ALS Mr Petty said the following :-

*“ Insofar as the position of the Association of Law Societies is concerned there may be some confusion in...the Commission’s mind inasmuch as you have two written submissions [ the **first ALS memorandum** and the **supplementary ALS memorandum** ] before you. May I ask you to ignore the first submission. ”*

7.6.3.5 Accordingly the Commission treats the ALS as being an adherent solely of the school of thought summarised in sub-paragraph (ii) of paragraph 7.6.1 above.

## **7.7 THE PROPONENTS OF A FAMILY COURT AT THE LEVEL OF A SUPERIOR COURT**

7.7.1 Mr Justice G. Friedman, Judge President of the CPD, made the following submissions [VOLUME III, page 13 paras 1 & 2] at a public sitting of the Commission in Cape Town :-

*“ My own view is that the Family Court should be a division of the Supreme Court. I think that there are improvements than can be brought about in the procedures which it follows. When I say that what I mean is that I do not believe that it is necessary for a Judge in the Family Division or a presiding officer, if it is a magistrate, to sit and hear unopposed divorce cases unless there are complications, for example, with regard to children...I believe that there is room for a Family Division of the Supreme Court because there are a number of cases which come before this Court, and I am sure similar cases come before other Divisions in the Supreme Court, where questions of custody and property rights are heavily contested, and these cases can go on for several days. I think there is room for an expert court dealing with family matters to deal with that type of case. ”*

7.7.2 Mr Justice C.F. Eloff, Judge President of the TPD, expressed the following views [VOLUME III, page 38, para 15] as to the status and quality of the proposed Family Court :-

*“ In Great Britain when parties divorce they do not even have to come before a court, they go to the Registrar and sign a document and they are divorced. So I think that South Africa would be keeping pace with modern thinking if it were to jettison the idea of the Supreme Court being vested with sole jurisdiction to hear divorce cases, and to assign that task to another tribunal, not a lower tribunal, it should be an excellent tribunal which has got more time and can deal with this with greater dignity and free the Superior Courts of the task of doing that, yes certainly.”*

7.7.3 Adv P.R. van Rooyen, SC, speaking on behalf both of the Pretoria Bar and the Pretoria Attorneys Association [ VOLUME III, page 54, para 3 ], said of the proposed Family Court :-

*“ Basically speaking it boils down to this, that these family matters, which also include maintenance, should be adjudicated upon in an expert forum as a division of the Supreme Court, or with the same status as the Supreme Court, being brought closer to the people, but where time and attention can be given to quality and to make use of a multi-disciplinary approach...”*

7.7.4 Adv E. Bertelsmann, SC, speaking on behalf of the Pretoria Bar and the Pretoria Attorneys Association [VOLUME III, page 55, paras 1 -4], stated, ***inter alia*** :-

*“ ...in our written submission we envisaged or we accepted, as a given fact, that a Family Court would be instituted...more or less along the lines of the suggested amendment to the Magistrates’ Courts’ Act on a Magistrates Court level. Having had the opportunity of reconsidering, we are in favour of the establishment of a Family Court but as a division of the Supreme Court on a circuit basis and into which Court should be integrated the existing Black Divorce Courts...We are...against the suggestion that undefended divorces should be dealt with by the lower judiciary or by the Magistrates’ Court. Undefended divorces can very easily develop into defended divorces. I think experience in the divorce*

*courts teaches that undefended divorces very often, in settlement agreements and other issues, maintenance and so on, raise problems which are just as deserving of the attention, the knowledge and the expertise of a specialised Bench...*

7.7.5 One of the aims of the Association of Family Lawyers [ “the AFL ”] is the promotion of the ideal of a Family Division of the High Court. The President of the AFL is Adv B.K. Pincus, SC, who made oral submissions [VOLUME III, pages 64 -67] at a public hearing of the Commission. A written response by the AFL to the Commission is to be found in Appendix “ J ” at pages 57 to 68 in VOLUME II of this Report. Some of the submissions therein made are the following :-

- “ 2. *We wish to commence by placing it on record that we strongly object to relegating this important branch of South African law [family law] from the Supreme Court to an inferior court. Most family law practitioners and members of the public object to their matters concerning family law being dealt with in the Magistrate’s Court.*
  
3. *Family law matters are often extremely complex and they deal not only with complicated matters of law, but also with emotions and essentially the interests of minor children. Because of the importance of the family and family law structures these matters should only be dealt with by the most qualified and highly trained members of the judiciary and family matters should not be perceived by the man in the street as being secondary to commercial and property matters in the eyes of the law.*

7.7.6 In a joint written response to the Commission by the Centre for Socio-Legal Research [see Appendix “ F ” at pages 50 to 51 in VOLUME II] the following submissions are made :-

*“ Ideally, what South Africa needs is a separate Family Court along the lines of the Family Court in Australia, with its supportive staff of court counsellors and its extensive jurisdiction in all matters regarding the family and children. The Family Court of Australia is a superior court having, in some respects, inherent jurisdiction. In keeping not only with the specialized functions of the Family Court, but also with the sensitive nature of the matters with which it deals, there is an express requirement in the enabling legislation that a person may not be appointed as a judge*

*of such court unless he or she is a suitable person ‘ by reason of training, experience, and personality’ to deal competently with matters of family law.”*

7.7.7 In her written response to the Commission [see Appendix “ B ” at pages 21 to 24 in VOLUME II] Professor Cheryl Loots of the University of the Witwatersrand makes the following submissions in regard to the autonomy of the proposed Family Court, its essential functions, and the status of its Judges :-

*“ Ideally the family court should be independent of the Supreme and Magistrates’ Courts. The judicial officers should have their own status, certainly higher than magistrates, perhaps lower than Supreme Court judges. These courts should be housed in buildings which are not as imposing as the Supreme court and a good deal more cheerful than magistrates’ courts. A multi-door approach should be adopted in the sense that each matter is screened and then directed to the procedure most appropriate. Divorces where there is no dispute between the parties and where no minor children are involved might be granted by a registrar on application. Matters involving children should be investigated by a family advocate or social workers. Parties should be directed to mediation where this would be an appropriate procedure for the resolution of their dispute. Only matters involving irresolvable disputes of fact or law or complex issues should be referred to judicial officers.”*

## **7.8 THE PROPONENTS OF A TWO-TIERED FAMILY COURT**

7.8.1 Mr S.D. Helman is a Johannesburg attorney whose practice is concerned almost exclusively with the field of family law. Mr Helman sent a written response [see Appendix “ K ” at pages 69 to 78 of VOLUME II] to the Commission. Thereafter he made oral submissions [VOLUME III pages 68 - 73] at a public hearing of the Commission. In regard to the establishment of a Family Court the main submissions set forth in Mr Helman’s written response [ Appendix “ K ” at page 77 ] are the following :-

*“ 1. That a separate Family Division of the Supreme Court be constituted, preferably as a specialist court, and as an autonomous Court within the existing Supreme Court Structure.*

2. *That the proposed Magistrates' Courts Amendment Act, insofar as it relates to the establishment of Family Courts under the jurisdiction of the Magistrates' Courts be scrapped and that the existing Black Divorce Courts be constitutionally rectified and be referred to as the Family Courts. Their existing rules should be modified to accommodate their new status and additional Courts should be constituted to accommodate the demand that will inevitably follow by being open to all race groups.*
3. *That the judicial personnel in all the abovementioned Courts be selected on the basis of their experience in and knowledge of family law ; that they be temperamentally suited for the adjudication and application of the matters under their jurisdiction ; that they have an interest in family law and that they are willing to accept the responsibility that this office (and the field of family law) requires of them.*
4. *That all Family Courts be Circuit Courts (as is presently the case with the Black Divorce Court)."*

7.8.2 On pages 1 and 2 of the **supplementary ALS memorandum** [Appendix " H "] the ALS states :-

*" Although we continue to support the view that a specialist Family Court structure should be established, for all practical purposes each and every Magistrate's Court should be the office of the Registrar of the Family Court, with authority to issue summonses and to receive the exchange of pleadings, but that in the event that the matter is either unopposed or is settled between the parties, the Magistrate's Court should have jurisdiction to hear the matter and grant the appropriate relief.*

*However, should either party - even in the circumstances of an unopposed or settled action - request the matter be heard by the specialist Family Court, then and in such event the Family Court on circuit should be seized of the matter. We further recommend that there be no cost sanction by the exercise of that choice, as presently visualised in terms of the proposed 1993 amendment to the Magistrate's Courts Act (Act 120 of 1993)."*

7.8.3

The views of the ALS as reflected in the **supplementary ALS memorandum** were further explained by Mr Petty [VOLUME III, pages 102 - 110] in the course of his oral submissions to the Commission. He said, *inter alia* :-

*“ It is our view Mr Chairman that a special family court structure should be established and if that structure cannot be established at the moment, that an office of the Registrar of the Supreme Court should be instituted at each and every magistrate’s court in the country and that that Registrar be allowed only to deal with matrimonial matters. The idea would be to have a Family Court established and that that Family Court would then have a Registrar’s office at each and every magistrate’s court...that Registrar would then be mandated to issues summonses, to exchange pleadings and where necessary to assist litigants in the preparation of documentation.*

*It is our view that it is not necessary for unopposed divorces to create special courts and that magistrates who are properly trained magistrates can deal with these matters expeditiously and cheaply.*

*It is clear Mr Chairman, with respect, that if our proposal is adopted that the 1993 [Magistrates’ Courts] Amendment Act is going to have to be changed in significant respects.*

CHAIRMAN : *Yes, and your suggestion is that throughout the Supreme Court would retain a concurrent jurisdiction ?*

MR PETTY : *Yes. It is our view that immediately a matter becomes opposed that it should then fall outside of the jurisdiction of the magistrate until of course it becomes settled in which case it could revert back. But that all defended trials should go to the Supreme Court, or, if it is established, a family division of the Supreme Court, and that they should be dealt with there. And it is also our view that if people elect to litigate in matrimonial matters in a Supreme Court, or if a family division is established, they should have the right to do that.*

*...I submit that we must find quick solutions and that the solution we have suggested is a viable one. It is one that will be in the interests of the public and it is one that will certainly not reduce the status of divorce proceedings. It may well be that for a time the Black Divorce Court and the magistrates’ court structure that I have suggested must*

*become parallel until such time as we reach the stage of development where the magistrates can in fact hear the divorce matters that Mr Maluleke has referred to.”*

7.8.4 The **supplementary ALS memorandum** was delivered to the Commission on 6 March 1996. On 9 January 1996 oral submissions on behalf of the Law Society of the Cape of Good Hope were made to the Commission by Mr M.T. Steyn [VOLUME III pages 19 to 23]. While advocating a two-tiered Family Court system, Mr Steyn [ page 20 at para 8 ] urged that the Black Divorce Courts should be absorbed into the magisterial limb of the Family Court :-

*“...our view is that we should combine the desire of the Judges and the Association of Law Societies to have a Family Court system in the Supreme Court with a Family Court system in the magistrates’ courts...We submit that the Black Divorce Courts should be taken up in the magisterial Family Court system. It is a system that works, the Black Divorce Court system, it works well, and that is why it survived even under the name of Black Divorce Courts because it is serving the public and serving it well.”*

7.8.5 In the course of his oral submissions to the Commission on behalf of the Association of Family Lawyers Mr B. Gundelfinger made the following brief submission [VOLUME III, page 74 para 2] on the topic of a possible Family Court :-

*“ My proposals are that the current system remains the same save that...as stated by Mr Helman, the Black Divorce Court as presently constituted should be referred to as the Family Court and that there should be ... a family division in the Supreme Court...Mr Helman is the Treasurer of the Association of Family Lawyers and obviously we have had discussions and I concur with what he says.”*

## **7.9 THE PROPONENTS OF A FAMILY COURT AT THE LEVEL OF A LOWER COURT**

7.9.1 Mr R. Mandelstam, a Senior Magistrate in Johannesburg, was a member of the Implementation Committee formed to lay the ground work for the putting into operation of Act 120 of 1993. In the course of his oral submissions to the

Commission [VOLUME III, page 95, paras 18 &19] Mr Mandelstam made a strong plea for the speedy implementation of Act 120 of 1993 :-

*“ It is essential Mr Chairman. If it does not happen, I will now speak in terms of practicalities to the Commission, I had a magistrate at Johannesburg who has a Master’s degree. He is a very competent person. He resigned last month...after a discussion with me. He is at the Bar in Johannesburg now doing his pupillage. One of the main reasons that he resigned is that he came to the conclusion that there is at present with the increased jurisdiction of the magistrates’ court little hope of the implementation of a senior civil court and that he is in a dead end.*

CHAIRMAN : *The name ‘Family Court’ in the 1993 Act is actually a bit of a misnomer ?*

MR MANDELSTAM : *I think so.*

CHAIRMAN : *That court, as you appreciate, will be a court for undefended divorces.*

MR MANDELSTAM : *Indeed Sir.*

CHAIRMAN : *And you see that as its appropriate function ?*

MR MANDELSTAM : *I can see none other there.”*

7.9.2 Mr I.C. Prinsloo is the Director of the Private Law Training Section at the Justice College in Pretoria. He is assisted by Mr A. Burger, an attorney, whose specific task is the training of candidate Family Magistrates and candidate Family Court clerks with an eye to the future coming into operation of Act 120 of 1993. Both Mr Prinsloo [VOLUME III, pages 148-155] and Mr Burger [ VOLUME III, pages 156-157 ] made oral submissions to the Commission in regard to the courses which had been run for the training of such candidates for the Family Courts and in regard to the number and the calibre of the persons attending the courses.

7.9.3 Mr Prinsloo described what steps had been taken at the Justice College in anticipation of the coming into operation of Act 120 of 1993 :-

*“ ...in August 1994 already, for four weeks we presented a seminar for candidate Family Court Magistrates, and then the second one in the beginning of 1995 also a four week course ; and after that as we saw it we presented a similar course for Clerks of the Family Court.*

*In terms of the rules of the [Magistrates'] Commission, as you will know, it is required that a candidate Magistrate successfully completes a course at Justice College, then be appointed acting and then only be appointed as Magistrate. Though the Family... Courts have not been implemented yet we acted pro-actively and introduced these two courses.*

*I would also like to submit to the Commission a copy of the list of Family Court Magistrates who attended the first course in 1994. You will notice, Mr Chairman and members of the Commission, that all the Magistrates...had the LL.B. qualification as envisaged by the Act. You will also see that a number of them have LL.M. degrees in family matters. You will also notice that...a number of them were...practising attorneys who joined the department and also practising advocates who joined the department. You will also notice that their experience is vast in the Civil Court and as far as family matters are concerned. The point I would like to stress is that these people are highly qualified to deal with family matters on the magisterial level.*

*CHAIRMAN : ...if you wanted to put people into the field to do this work, how many Magistrates and in how many Magistrates Courts throughout the country could this be done effectively and practically tomorrow?*

*MR PRINSLOO : Sixty-five...we envisage that the Family Court would function on the same basis as the Criminal Regional Court...we envisage...that we would be able to utilize all 65 who were trained."*

7.9.4 Mr Burger of the Justice College concluded his oral submissions to the Commission by saying [ at page 157, paras 7 & 8 ]:-

*" In summary, then, may I just state that I believe that the Department [of Justice] is eminently well-qualified to nominate people to man and run the Family Courts...I have also experience in lecturing for the Association of Law Societies, as do a number of my colleagues, so we can gauge the ability of people to draft pleadings. I am eminently satisfied that the people whom I have lectured to...at Justice College, that they will do a fine job as draft-persons of the pleadings."*

7.9.5 Mr Justice K. van Dijkhorst of the TPD submitted in the course of his oral submissions to the Commission [ VOLUME III, pages 160-161, paras 1 to 5

] that the proposed Family Court should be combined with a Senior Magistrates' Court :-

*“ Ek wil ‘n paar woorde sê oor die gesinshof. My uitgangspunt is dat egskedingsake hoort net by hoë uitsondering in die Hooggeregshof, en ‘n hoë uitsondering is nie omdat daar kinders betrokke is nie. ‘n Hoë uitsondering kan wees as dit ingewikkelde regspunte is of ‘n verskriklike boedel waar hierdie magnate van Johannesburg wil baklei...*

*‘n Onbestrede egskeding, as ‘n landdros persone in die eg kan verbind, kan ‘n landdros egskedings behartig...dus my siening is die plaaslike landdros moet die onbestrede egskedings plaaslik afhandel. Dit spaar tyd, dit spaar geld en dit kos niemand iets nie.*

*Bestrede egskedings kan ons op ‘n bietjie hoër vlak hanteer. Normaalweg is ‘n bestrede egskeding baie keer oor kinders, soms oor bates. Maar in elk geval hoort dit nie in die hooggeregshof nie, op daardie vlak nie. Ons het die hulp van die gesinsadvokaat...*

*VOORSITTER : Sien u die gesinshof as ‘n selfstandige, eie hof ?*

*VAN DIJKHORST R : Ek sou dit kombineer met ‘n senior landdroshof om mannekrag te bespaar. Daardie landdros het die bekwaamheid en hy kan dit net so goed ook hanteer - as jy nie van die gesinshof gaan maak wat sekere voorstanders van die gesinshof van hom wil maak nie, dit wil sê alles wat op die gesin betrekking het, daar insleep nie...As ek nou praat van die senior landdrosvlak dan is dit nie die amp, seniorlanddros, nie, maar dan is dit ‘n senior landdroshof waarvan ek praat.”*

## **7.10 RESISTANCE TO THE IDEA OF A FAMILY COURT**

7.10.1 At the beginning of this Chapter [in paragraph 7.1] it was pointed out that amongst interested parties who made submissions to the Commission there was almost general agreement that the establishment of a Family Court was necessary. For the sake of completeness reference should be made also to those interested parties who expressed their opposition to the idea of a Family Court.

7.10.2 Addressing the Commission at Pietersburg on behalf of the Northern Region of the Transvaal Law Society [VOLUME III, page 174, para 1] Mr F. Geldenhuys said that although he could understand the need for a Family Court in Gauteng, he considered that at present no Family Court was necessary in the Northern Province. In his view a High Court with its seat in the Northern Province would deal satisfactorily with divorces in the Northern Province.

7.10.3 In the course of his oral submissions to the Commission [VOLUME III, page 186 para 12] Mr Justice J.J. Kriek, Judge President of the Northern Cape Division, voiced his opposition to the idea of a Family Court :-

*“ JUDGE LEON : Do you have any views about the possible establishment of a family court ?*

*JUDGE KRIEK : I wrote a memorandum when that proposal was first mooted [at the time of the earlier Commission] and I expressed very strong views against it.*

## **7.11 THE EXTENT OF THE JURISDICTION TO BE EXERCISED BY THE PROPOSED FAMILY COURT**

7.11.1 Among interested parties there was general agreement that upon the establishment of a Family Court and in respect of those family matters currently justiciable by the High Court, the High Court should enjoy concurrent jurisdiction with the Family Court.

7.11.2 In a written response to the Commission [Appendix “ J ” at pages 57 to 68 of VOLUME II] the Association of Family Lawyers submitted that at least the following matters should be brought within the jurisdiction of a Family Court :-

- “*
- (i) applications for consent to marry ;*
  - (ii) divorce actions and decrees of nullity ;*
  - (iii) ancillary matters arising out of divorce such as maintenance, custody, guardianship of, and access to the minor or dependent children of the marriage ;*
  - (iv) applications for maintenance by a wife both **stante matrimonio** and on dissolution of the marriage, as well as other applications for the enforcement of the duty of support ;*

- (v) actions **pendente lite** such as applications for a contribution towards the costs of a matrimonial action, maintenance for a wife, and the custody, maintenance of, and access to the minor children of the marriage ;
- (vi) property disputes between husband and wife both **stante matrimonio** and on divorce ;
- (vii) applications in terms of the Dissolution of Marriages on Presumption of Death Act 23 of 1979 ;
- (viii) actions arising from a breach of promise to marry ;
- (ix) applications for interdicts in matrimonial matters ;
- (x) applications for the appointment of curators **ad litem/bonis** on the grounds of a spouse's mental illness, inability to manage his/her own affairs, intoxication and the influence of drugs, or prodigality.”

7.11.3 Mr Justice K. van Dijkhorst [ VOLUME III, pages 160-162 ] in the course of his oral submissions to the Commission stressed the importance of confining the jurisdiction of the Family Court within realistic limits. He pointed out that any ambitious attempt to accommodate the needs of an “extended family” would create awkward problems in practice ; and he warned against the danger of overburdening the Family Court with work - particularly during the stage of its infancy. He said :-

*“ As ‘n mens nou die gedagte opvolg wat sekere voorstanders het, dat alles wat op die gesin betrekking het in die gesinshof verhoor moet word dan vra jy jousef af : Nou wat beteken dit in die praktyk ? ‘n Mens moet nie akademies oor die goed dink nie. ‘n Aanranding van ‘n man op sy vrou sal dan daar moet plaasvind. Wat as dit sy vrymeisie is ? Dan is dit nie daar nie. Waarom die onderskeid ? As jy ‘n maand by haar ingetrek het, moet dit dan daar wees, of moes hy dan drie jaar by haar gebly het voordat dit in die gesinshof land, of moet hulle ‘n kind hê ? Aanranding op ouers en grootouers - moet dit in die gesinshof kom? Dit is tog deel van die ‘extended family’.*

*Aanranding op kinders deur ouers, natuurlik moet dit daar kom, maar wat as die aanrander die buite-egtelike vader is ? Ooms wat met kleintjies lol, waar moet dit kom ? Dit is tog seker in gesinsverband. Hulle bly gewoonlik bymekaar, dit is ons probleem.*

*Onderhoud vir die vrou of man, onderhoud vir die kinders, misdade deur kinders, aanranding deur kinders, moord deur kinders, diefstalle en roof ? As alles daar kom en al daardie sake nou weggeneem word uit die landdroshof en die streekhof, waar dit goed gedoen word op die oomblik, bloot om 'n akademiese verbeeldingsvlug te bevredig, waar kom ons ? Ons skep 'n hof wat oorwerk is met 'n spesialis landdros wat ons daar sit as gesinslanddros en hy doen winkeldiefstalsakies. Ons kan dit nie doen nie.*

*Ons moet die gesinshof beperk tot 'n spesifieke ding, dit wil sê egskeidings en onderhoud en toesig en beheer van kinders en dan sal die ding werk. Ons kan altyd as ons dit 'n tyd aan die gang het, kan ons weer na hom kyk oor vyf jaar en sê : Is daar nog dit of dat wat ook daar moet bykom ?”*

7.11.4 Another supporter of the idea of a Family Court who sounded caution in relation to the ambit of its jurisdiction was Mr L. Viljoen, a Pretoria attorney. In the course of his address to the Commission [VOLUME III, pages 165-166, paras 18-20] he too suggested that unless its jurisdiction was narrowly defined the Family Court would be unable to cope with its workload :-

*“ ...ek het nou na baie van die aspekte sit en luister en ek het net tot die gevolgtrekking gekom dat in 'n gesinshof kan 'n mens nie alle gesinsregtelike aangeleenthede wil inpas nie, want dit is regtig 'n groot probleem om alle aangeleenthede oor gesinsregtelike sake binne 'n gesinshof in te pas.*

*Die gesinshof sal baie goed gestruktureer moet wees oor wat hy moet doen, maar wat duidelik vasstaan is dat een van die aspekte is egskeiding, en is onbestrede egskeidings.*

VOORSITTER : *Onderhoud ?*

MNR VILJOEN : *Onderhoud meen ek hoort daarby en byvoorbeeld aannemings hoort ook daar. Maar ek het ook 'n probleem wanneer dit kom by aspekte soos gesinsgeweld. Die kriminele jurisdiksiegedeelte - ek moet sommer sê dat ek my bedenkinge daaroor het want ek kan al klaar sien dat daardie hof onmiddellik uit sy nate gaan bars as alles daar ingepas word.”*

7.11.5

Mr R. Mandelstam, a senior Magistrate in Johannesburg [VOLUME III, pages 93-96, paras 9-15 ; 20-22] in the light of his personal experience at Magistrates' Courts in rural areas, doubted the wisdom of including cases involving the children's court, family violence or maintenance as part of the Family Court's jurisdiction :-

*“ What I am concerned about is, I understand that there is a suggestion that matters such as children's court, family violence, maintenance and all that should be allocated to the Family Courts. To me that sounds like an ideal that simply will not work in practice. I do not from experience from the implementation committee of the Senior Civil Court...see that it will be viable to have a family court in every town in the country, especially not the small 'platteland' towns.*

*Maintenance inquiries, those applicants do not always have the financial means to travel to the nearest big town to first of all lodge the application, secondly to attend the hearing. I am convinced that you must have the facility available five days a week at the town where the applicant stays. I have seen the necessity to open a children's court inquiry immediately. You cannot wait for a court to arrive on circuit **et cetera** for these applications.*

*... A family court, yes, should have all these other things, children's court **et cetera**. But I think one must also think in terms of practicalities there, and not only theory....my home town is Smithfield in the Free State. If the lady staying there in a shack has a maintenance complaint, and that now has to be attended by the family court, which I have little doubt will then have its centre in Bloemfontein, and perhaps attend Smithfield from time to time. She now has to lay a complaint there. There is no train from Smithfield to Bloemfontein...I do not know if the bus service still operates...If she now at 20:00 is being battered by her husband, she needs a family violence interdict, she has no access to the court in practical terms.”*

## **CHAPTER EIGHT**

### **THE BROAD GUIDE-LINES ADOPTED BY THE COMMISSION AND ITS MAIN CONCLUSIONS**

#### **8.1 THE RATIONALE OF FAMILY COURTS**

- 8.1.1 The creation of Family Courts is prompted by a recognition that it is necessary, in general, to give wide and specialised protection and help to the family as the fundamental group unit in society ; and, in particular, that there is a need to protect the rights of minor children and to promote their welfare.
- 8.1.2 For the proper adjudication of family problems by a Family Court an indispensable auxiliary to the court component is a properly staffed Family Counselling and Support Service.
- 8.1.3 Courts of law and social welfare experts do not approach family problems from the same angle, and their respective functions regarding the solution of family problems are not the same. The Family Court seeks to arrive at a synthesis of these dual approaches and functions. While in a Family Court the Court component and the social agency component are partners complementing each other, the emphasis in the Family Court is on mediation rather than adjudication.

#### **8.2 SOUTH AFRICA NEEDS A FAMILY COURT**

- 8.2.1 As result of the fragmentation of jurisdiction the adjudication of family matters in South Africa is cumbersome and inefficient. There is uneconomic duplication of court staff and services ; lack of uniformity in approach ; and unnecessary inconvenience and expense to members of a family who, in connection with one and the same family problem, are sometimes compelled to go successively to a number of different courts. Fragmentation of jurisdiction also results in lack of co-ordination between various auxiliary social services assisting the courts.

8.2.2 South Africa urgently needs a Family Court. In its 1983 Report the earlier Commission recommended the establishment of a Family Court of comprehensive jurisdiction. No legislation has been passed since to give effect to that recommendation.

**8.3 SINCE 1983 ATTEMPTS AT LEGISLATIVE REFORM WITH A VIEW TO THE ESTABLISHMENT OF SOME SORT OF FAMILY COURT HAVE BEEN HALF-HEARTED AND INEPT**

8.3.1 The tentative (and largely abortive) attempts at legal reform in the field of family law adjudication from the time of the appearance of the 1983 Report until the present time have been traced in Chapter Three [ at pages 41 to 52 ] of this Report. With one significant exception - the Mediation in Certain Divorce Matters Act, No 24 of 1987 - this chapter in the history of our legislative reform is a wretched one. It reflects, in particular, an apparent inability on the part of the legislature to grasp that without the essential component of an auxiliary Family Counselling and Support Service no tribunal can properly to be regarded as a Family Court.

8.3.2 When a tribunal - whatever the scope of its legal jurisdiction may be - lacks this essential component, it is nonsensical to describe it as a Family Court. For this reason alone the designation "family court" assigned to the divorce courts for which provision is made in the Magistrates' Courts Amendment Act, No 120 of 1993, is wholly misplaced.

**8.4 DESPITE THE RUDIMENTARY NATURE OF ITS FUNCTIONS THE OFFICE OF THE FAMILY ADVOCATE HAS AN INFRASTRUCTURE WHICH THROUGH APPROPRIATE LEGISLATION MAY BE EXPANDED AND DEVELOPED INTO A PROPER FAMILY COUNSELLING SERVICE CAPABLE OF SUSTAINING A FAMILY COURT**

8.4.1 Some comfort to those interested in the proper adjudication of family law matters was provided when the provisions of Act 24 of 1987 were put into operation on 1 October 1990. The significance of this piece of legislation has been considered in Chapter Three [ in paragraph 3.6 at pages 45 to 46 ] of this Report.

8.4.2 Although Act 24 of 1987 represented something of a break-through, it was but a modest one. This Act's most glaring defect was that it failed to give the Family Advocate any **locus standi** in divorces in the Black Divorce Courts. Sec 1 of the Divorce Courts Amendment Act, 1997 [ see paragraph 3.11.5 in Chapter Three above ] belatedly cures this omission. It is to the credit of the Family Advocates that, despite their excessive workload, they sought to counteract this injustice by providing their services to Black Divorce Courts on an **amicus curiae** basis. The provision of such services, however, imposes an intolerable burden on the slender resources of the Family Advocate.

8.4.3 A further and no less serious flaw in Act 24 of 1987 is that it restricts the function of the Family Advocate to inquiries, reports and recommendations in regard to the welfare of children after the institution of a divorce action. The Commission agrees with the suggestion of Adv G.J. van Zyl [see paragraph 4.4.14 in Chapter Four of this Report] :-

*“ Na my mening sou die totstandkoming van ‘n Gesinshof waarskynlik ook voorafgegaan moet word deur nuwe wetgewing, en indien dit die geval is, is dit moontlik die ideale tyd om ook opnuut te kyk na die Wet op Bemiddeling in Sekere Egskeidingsaangeleenthede, no 24 van 1987, deur dit meer in ooreenstemming te bring met die behoeftes van die Gesinshof. Na my mening behoort die Wet ideaal gesproke geskrap en vervang te word met ‘n meer duidelike Wet waarin die afdeling se funksies gepas uitgebrei word om meer omvattende hulp aan kinders te verleen buiten bloot dié wat in egskeidingsaksies betrokke is.”*

8.4.4 The Commission firmly endorses the suggestion that the time is ripe for an entirely new statute to replace the niggardly provisions of Act 24 of 1987. In this connection the Commission also agrees with the statutory improvements proposed by the Socio-Legal Research Centre [see paragraph 7.5.8 in Chapter Seven of this Report] to the following effect :-

*“ ...the sphere of operation of the Family Advocates should be extended to cover the provision of counselling services to parents in all disputes involving children, whether or not divorce proceedings are pending. The Family Advocate should ideally have the power to make such counselling obligatory before the parties have recourse to the court. This would, of course, require a very substantial increase in the ranks of the staff available to the Family Advocate, and that training in*

*counselling be obligatory for them. Provision should also be made for the time-consuming nature of counselling service.*” (Emphasis provided)

8.4.5 A perusal of the provisions of Act 24 of 1987 shows that the “Family Advocate” created by it is, in truth, purely a “Children’s Advocate”. In the opinion of the Commission it is essential that in a fresh statute replacing Act 24 of 1987 the functions of the Family Advocate be so amplified that he or she becomes, in the real sense of the word, a “Family Advocate”. His or her services should cater not merely for children but for the whole family.

8.4.6 In Chapter Three of this Report [in paragraph 3.4] it has been pointed out that the reference to “Mediation” in the title to Act 24 of 1987 is misplaced ; and that the investigative and representative functions of the Family Advocate prescribed by the Act do not involve the process of mediation. In practice the Family Advocate does in fact use mediation techniques ; but in the view of the Commission it is imperative that the Office of the Family Advocate should provide a comprehensive counselling service, including mediation as a means of facilitating settlement of a wide range of disputed issues within the family.

## **8.5 FAMILY COUNSELLORS SHOULD BE MEMBERS OF A SEPARATE SPECIALISED BRANCH OF THE PUBLIC SERVICE WITH ITS OWN BUDGET**

8.5.1 The Commission considers that there is insufficient recognition, both on the part of the public and within official circles, of the outstanding services rendered to the children of South Africa by the Office of the Family Advocate. All the Family Advocates are able and experienced experts in their field and, despite the fact that they are grossly overworked, they discharge their important functions with rare dedication. In the opinion of the Commission it is essential that Family Advocates should receive market-related salaries.

8.5.2 Critical to the successful operation of the Family Advocate’s Office, however, is the availability of a sufficient number of well-qualified and suitable experienced Family Counsellors. The work of the Family Advocates is seriously hampered by the fact that every Office in the country suffers a critical shortage of Family Counsellors. For example :-

(a) Johannesburg:

*“Our main problem is the lack of counsellors”*  
[paragraph 4.3.4 at pages 56 to 57 of this Report]

(b) Pretoria:

During the past twelve months the Family Advocate...has experienced a steady decline in the availability of social welfare support systems, both within the Civil Service and from outside services.

[paragraph 4.4.6 at page 59 of this Report]

(c) Cape Town:

*“ Though this is the biggest office in the country, here was for a period of almost one year only one Family Counsellor, and only recently a second appointment was made. (Due to the absence of an agreement between the Departments ?)”*

[paragraph 4.5.9 at page 64 of this Report]

(d) Durban:

*“ This lack of Family Counsellors is a problem experienced by every office throughout the country and has been going on for the past five years that we have been in operation. ”*

[paragraph 4.6.9. at page 67 of this Report]

(e) Port Elizabeth:

*“ Daar is reeds vir geruime tyd probleme aangaande die beskikbaarstelling van Gesinsraadgewers aan die Kantoor van die Gesinsadvokaat. Die maatskaplike werkers word soms op kort kennisgewing deur die Departement van Welsyn onttrek en dan nie vervang nie of word vervang deur onervare personeel. Dit affekteer die werksvloei van die kantoor negatief. ”*

[paragraph 4.8.7 at page 74 of this Report]

8.5.3

In the opinion of the Commission the only effective solution to the intolerable state of affairs indicated above lies in the creation (within either the Department of Justice or the Department of Welfare) of a separate specialised Branch of Family Counsellors designed to provide experienced social welfare workers to the Office of the Family Advocate on a regular and reliable basis. This Branch should have its own budget.

**8.6**                    **THE PROFESSIONAL QUALIFICATIONS, THE EXPERIENCE AND THE PERSONAL QUALITIES REQUIRED OF A PRESIDING OFFICER IN THE FAMILY COURT**

8.6.1                    It has already been mentioned [paragraph 3.8.5 in Chapter Three] that in terms of Act 120 of 1993, should it be brought into operation, an Appointments Board will advise the Minister of Justice as to the “suitability” of persons for appointment as family magistrates. Act 120 of 1993 is silent, however, as to the criteria according to which such suitability is to be tested.

8.6.2                    In an instructive article “A Family Court for South Africa - Some General Remarks”, Stellenbosch Law Review, vol 5 No 1 (1994) 176, Professor J.A. Robinson of the University of Potchefstroom makes the following observations (at page 185) :-

*“ No specific mention is made of any personal characteristics which a family magistrate should possess. The involvement of the Chief Family Advocate and two family magistrates [ as members of the Appointments Board advising the Minister] seems to indicate that a specific personal attitude towards family matters will be important, but even so, the relevance of these personal characteristics is not stated. The Family Law Act 1975 of Australia on the other hand, contains specific requirements in this regard. A person cannot be appointed as a judge of the family court unless he has been a judge of another court or has been enrolled as a legal practitioner of the high court or of the supreme court of a state or territory for not less than five years and unless he is ‘by reason of training, experience and personality’ a suitable person to deal with matters of family law.*

*One would certainly expect the South African legislature to take cognisance of the Australian example and to insert a similar provision into the South African statute. The special status of marriage, the family and children in society requires a definite personal attitude towards such matters.”*

8.6.3                    Reference has already been made to the fact [paragraph 6.3.1 in Chapter Six] that to be appointed to the Bench of the New Zealand Family Court the candidate must be a “suitable person” to deal with matters of Family Law :-

*“ by reason of his training, experience and personality. ”*

8.6.4 The Commission agrees with the following submissions by the Association of Family Lawyers [paragraph 7.7.5 in Chapter Seven] :-

*“ Because of the importance of the family and family law structures these matters should only be dealt with by the most qualified and highly trained members of the judiciary and family matters should not be perceived by the man in the street as being secondary to commercial and property matters in the eyes of the law. ”*

8.6.5 In the opinion of the Commission the statute establishing a Family Court for South Africa should provide specifically that in order to be considered for appointment as a presiding officer in the Family Court the candidate should have :-

- (a) an appropriate professional legal qualification ; and
- (b) appropriate practical experience in Family Law work ; and
- (c) a predilection for Family Law work in all its ramifications ; and
- (d) a compassionate personality.

**8.7 IN THE OPINION OF THE COMMISSION SOUTH AFRICA’S NEEDS WOULD BE SATISFIED NEITHER BY A FAMILY COURT FUNCTIONING AS A LOWER COURT NOR BY ANY HYBRID FAMILY COURT OF WHICH A LOWER COURT IS AN INTEGRAL PART**

8.7.1.1 Should Act 120 of 1993 be brought into operation, then, as already shown, the resultant family court will be a family court in name but not in substance. The “family court” envisaged by Act 120 of 1993 will have neither a comprehensive jurisdiction nor a Family Counselling and Support Service. It will be simply a new forum for the adjudication of divorce actions in which the presiding officer will be a Magistrate.

8.7.1.2 In the rehabilitated divorce courts established under Act 9 of 1929, as amended by the Divorce Courts Amended Act, 1997, the presiding officers will be deemed to be regional magistrates. Although the services of a Family Advocate and a Family Counsellor under Act 24 of 1987 will be available to them, these

divorce courts have neither comprehensive jurisdiction nor a Family Counselling and Support Service.

8.7.2 Open to no less serious criticism, so the Commission considers, is the proposal of the Association of Law Societies as explained in the **supplementary ALS memorandum** [Appendix “ H ” in VOLUME II], in terms of which every Magistrate’s Court in the country will have jurisdiction to hear and grant decrees of divorce in unopposed divorce actions.

8.7.3 Not including the TBVC territories, there are some 314 Magistrates Court offices in South Africa. It need hardly be said that it would be entirely beyond the capabilities of the Family Advocates’ Office to monitor divorce actions instituted in so immense a number of inferior courts. In the opinion of the Commission it would be a most retrograde step to withdraw from the scrutiny of the Family Advocate a single divorce action instituted anywhere in our country. Whether a divorce action in which the welfare of the minor children is at stake requires the attention of the Family Advocate will depend upon the particular circumstances of the case and not on whether the action is opposed or unopposed.

8.7.4 The Commission agrees with the following critical comments on **the supplementary ALS memorandum** made by Beth Goldblatt (*op cit* at page 23):-

*“ The Association of Law Societies’ proposal does not seem to see the need for a Supreme Court level Family Court to cover unopposed matters and sees the magistrate’s courts as the logical and accessible location for such matters. This indicates a failure to appreciate that a specialised Family Court should offer advice and welfare services in all family matters whether or not these are opposed . By allowing magistrates to hear all unopposed family matters including custody, access and related matters without necessarily being in a position to determine the interests of children would greatly increase their jurisdiction without fulfilling the Supreme Court’s responsibility as upper guardian of minors. ”*

8.7.5 There is, however, a further and, in the view of the Commission, fatal objection to placing the proposed Family Court (or any constituent part of it) within the Magistrate’s Court. This objection derives from the essential requirement that

the Family Court must enjoy a positive public image, and that it should gain the confidence of the ordinary man and woman in the street.

8.7.6 This cannot be achieved by having the Family Court within the Magistrate's Court. Historically the development of our system of courts has been such that in the minds of the vast bulk of our population the Magistrates Courts are associated first and foremost with the criminal justice system. The Commission records its complete agreement with the following appraisal [Appendix " B " in VOLUME II of this Report] by Professor Cheryl Loots :-

*“ The atmosphere of the magistrates' courts would not be conducive to easing the misery caused by troubled family relationships. ”*

8.7.7 It is, moreover, a relevant consideration that since the establishment of Regional Courts some forty years ago the better prospects of advancement in these Courts have attracted very many of the abler Magistrates to pursue careers in the criminal rather than in the civil courts. In consequence the standard of civil justice in the Magistrates Courts has suffered. In addition it should be noted that most Magistrates are appointed as such directly from the ranks of prosecutors.

## **8.8 THE FAMILY COURT SHOULD BE AN INDEPENDENT SUPERIOR COURT WITH ITS OWN SPECIALISED STRUCTURE**

8.8.1.1 In the opinion of the Commission the proposed Family Court should not be a Division of the High Court. The Family Court should be an entirely independent Superior Court. There should ultimately be a Division of the Family Court in each of the provincial divisions of the High Court in which there is an Office of the Family Advocate. The Family Court should be created by a statute which will come into operation on a date to be fixed by the President in the Gazette.

8.8.1.2 **As and when a Family Court is established within the territorial area of any provincial division, then within that area the jurisdiction of the divorce courts established under section 10 of Act 9 of 1929 (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997) should be phased out.**

8.8.2 The Commission considers that the presiding officers in the Family Court should be designated “FAMILY COURT JUDGES”. Family Court Judges should be appointed by the President upon the recommendations made to him by the Judicial Services Commission. They should receive the same salary as High Court Judges.

8.8.3 It is widely recognised that Judges who do nothing but family law work are exposed to greater psychological stress and strain than Judges whose judicial duties are more varied. Since Family Court Judges of the proposed Family Court will preside only in matters involving family law the Commission considers that a Family Court Judge should be appointed for a fixed term of seven years. With the consent of the Family Court Judge (but again upon recommendation by the Judicial Services Commission) his or her term of office will be renewable by the President.

8.8.4 Family Court Judges should be assisted by officers of the Family Court designated “FAMILY COURT COMMISSIONERS” whose functions will be similar to those of the Registrars of the Family Court of Western Australia.

They will perform limited judicial functions (including maintenance cases, unopposed divorce actions and interlocutory applications) and they will preside at conciliation and pre-trial conferences. A Family Court Commissioner should receive a salary equivalent to 75 % of the salary of a Family Court Judge. Family Court Commissioners will be appointed by a statutory Appointments Commission, but their suitability for office will be determined with reference to the same criteria [see paragraph 8.6.4 above] applicable to Family Court Judges. The term of office for a Family Court Commissioner should be seven years subject to the proviso that, where necessary or expedient, *ad hoc* appointments for shorter periods may be made.

8.8.5 The costs of civil litigation in the High Court are exorbitant, and beyond the reach of the average would-be litigant. Even the costs of an undefended divorce [ see paragraph 7.2.2 in Chapter 7 ] are unacceptably high. The bulk of South Africa’s population is impoverished. **Ready access to the proposed Family Court by all, including the neediest, will be achieved only by prescribing a very modest tariff of costs for that Court. In the opinion of the Commission the Family Court should have a tariff of costs based essentially on the tariff applicable in the Magistrates Court.**

- 8.8.6 In regard to unopposed divorce actions a number of interested parties submitted to the Commission that South Africa should have a summary dissolution process by which the plaintiff's testimony would be received in the form of an affidavit only ; and an order for divorce would be granted without any *viva voce* evidence given in open court. Having reflected carefully on the matter the Commission has arrived at the firm conclusion that - at least for the foreseeable future - such a system of summary dissolution of marriage should not be adopted in this country. Almost as rife as poverty in our country is illiteracy. In the opinion of the Commission a procedure of divorce by affidavit would heighten the risk of divorce procured by fraudulent means. A further and even more cogent argument against divorce by affidavit is the following. There is an ever-growing perception in South Africa that divorce has become the merest formality, and that orders for divorce are too easily granted. In the view of the Commission public interest and the national conscience both require the retention of the present system. The procedure which requires a plaintiff to testify in open court and which enables the presiding judicial officer to test the evidence, not only in regard to the question whether the marriage has irretrievably broken down but also in relation to the adequacy of the arrangements proposed for the custody, care and maintenance of the minor children of the marriage, serves at least to some extent to remind the public of the sanctity of marriage ; and that divorce is not to be had simply for the asking.
- 8.8.7 At administrative level the Family Court should have a Registrar to be in charge of its Registry at the seat of the Court. In addition there must be a staff of Clerks. The Clerks will undergo intensive specialised training in order to equip them to assist unrepresented litigants in the Family Court, both at the seat of the Court and at those towns at which the Family Court will sit when it proceeds on circuit. At each circuit town the Clerk of the Magistrate's Court will act as the Family Court Registrar by receiving pleadings and notices filed by litigants whose matters will be heard during the Family Court's next visit to the circuit town.
- 8.8.8 The Commission considers it essential that Act 24 of 1987 should be repealed as soon as possible. It should be replaced by an entirely fresh statute called "**The Family Advocate and Family Counselling Act**" [ " the FAFCS Act " ]. The FAFCS Act should, *inter alia* :-

- (a) give the Family Advocate ***locus standi*** in all divorces irrespective of the racial groups to which the parties may belong ;
- (b) give the Family Advocate ***locus standi*** to inquire into and to report to the Family Court in connection with any child, whether born in or out of wedlock, and whether or not a divorce action affecting the child has been instituted ;
- (c) give the Family Advocate ***locus standi*** to assist parties to a customary union or a religious marriage not recognised by the civil law ;
- (d) relieve the Family Advocate from the absolute duty to institute an inquiry whenever required to do so by the parties despite the fact that no valid reason at all for an inquiry may exist (eg. a father's claim to custody of a newly-born child) ;
- (e) establish, as part of the Family Advocate's Office, a Family Counselling Service which will be staffed by a separate specialised Branch of Family Counsellors [see paragraph 8.5.3 above].

8.8.9 The Family Counselling Service thus created by the FAFCS Act will be attached to the Family Court and it will provide the social agency component in that Court, and, where necessary in any other court exercising jurisdiction concurrently with the Family Court. In addition the Family Counselling Service will be available to members of the public, free of charge, irrespective whether or not they are involved in divorce or other family litigation.

## **8.9 THE JURISDICTION TO BE EXERCISED BY THE PROPOSED FAMILY COURT**

8.9.1 As already mentioned in paragraph 2.4 in Chapter Two, **Annexure " i "** (at pages (ii) to (iii)) reflects the recommendations of the 1983 Report as to what matters the earlier Commission considered should fall within the jurisdiction of a Family Court and what matters should be excluded therefrom.

8.9.2 The 1983 Report recommended that the Family Court should be created at the level of the Regional Court. Having reviewed the needs of South Africa fourteen years later this Commission has been impelled to the firm conclusion that the Family Court should be a Superior Court. Nevertheless, for the purposes of determining what jurisdiction should be assigned to a Family Court at Superior Court level the recommendations of the 1983 Report in regard to jurisdiction afford a useful starting point in the inquiry.

- 8.9.3 Subject to minor textual amendments (which will be reflected in Chapter Nine of this Report) the Commission considers that the proposed Family Court should exercise jurisdiction in respect of all the matters listed in sub-paragraphs (a), (b), (c), (d), (e), (f), (j) and (k) of paragraph 9.6.1 of the 1983 Report [see pages (ii) to (iii) of **Annexure “ i ”** ].
- 8.9.4 The 1983 Report recommended that there should be excluded from the jurisdiction of a Family Court [ see page (iii) of **Annexure “ i ”** ] :-
- “ (d) cases in which paternity is sought to be determined and which affect the status of a woman or child ; ”*
- 8.9.5 This Commission considers, however, that cases in which paternity is sought to be determined and which affect the status of a woman or child are pre-eminently suitable for adjudication by a Family Court at Superior Court level.
- 8.9.6 The 1983 Report was silent as to a Family Court’s jurisdiction in respect of customary unions and religious marriages. This Commission takes the firm view that there should be justiciable by the proposed Family Court disputes between a man and a woman arising from a spousal union subsisting (or which has earlier subsisted) between them, which union is recognised by their own customs or religious beliefs but not by the civil marriage laws.
- 8.9.7 The 1983 Report recommended [see page (iii) of **Annexure “ i ”** ] that jurisdiction should be given to the Family Court :-
- “ (g) to try juveniles under the age of 18 years upon criminal charges ;*
- (h) to try criminal trials involving assaults committed within the context of the family (for example, child-battering or assaults by one parent on another) ; ”*
- 8.9.8 The Commission considers, however, that, at least in the initial stages of its existence, the proposed Family Court should not exercise any criminal jurisdiction. In the opinion of the Commission it should in this connection heed the cogent cautionary submissions made to it by Mr Justice van Dijkhorst [paragraph 7.11.3] and Mr Attorney L. Viljoen [paragraph 7.11.4].

8.9.9 In addition (and in this respect broadly following the recommendations of the 1983 Report - see **Annexure “ i ”** at page (iii) ) the Commission considers that the Family Court should not exercise jurisdiction in respect of the following matters :-

- (a) cases in which the validity or attestation of a will or other testamentary document is in question ;
- (b) cases in which the status of a person in respect of mental capacity is sought to be affected ; and
- (c) cases in which damages are claimed in respect of seduction or breach of promise or adultery . \*

In the opinion of the Commission the cases set forth in paragraph (a), (b) and (c) above do not fall appropriately within the sphere of Family Law and are inappropriate for adjudication by a Family Court.

## **8.10 THE FAMILY COURT WILL HEAR FAMILY LAW CASES ALSO BY MEANS OF A CIRCUIT COURT SYSTEM**

8.10.1 There was general agreement among interested parties that a Family Court should serve rural areas by means of a Circuit Court system. The Commission considers that it is essential for the Family Court to operate not only at its seat in a metropolitan area, but that in addition it should serve rural areas by means of a regular circuit system.

8.10.2 In regard to the adjudication of family matters by the Family Court in country towns it will be necessary to proceed experimentally and to determine, by a process of trial and error, what country towns should be visited, at what intervals, and what the duration of the visits to a particular circuit town should be. Initially the Family Court may find it convenient to model its circuit on the itinerary followed by the Regional Court ; and perhaps to use the facilities of the local Magistrate’s Court.

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\* *The 1983 Report referred only to seduction and breach of promise*

8.10.3 The Commission considers that the Family Court circuit system should be broadly based on the pattern of the Western Australian Family Court [paragraphs 5.13.1 to 5.13.3] which has already been briefly described.

8.10.4 In the opinion of the Commission circuit sittings should be preceded a week or two earlier by a Family Court Commissioner who will hold conciliation and pre-trial conferences. On the circuit proper the Family Court Judge should be accompanied by one or more Family Court Commissioners. In addition the Family Court Judge will be accompanied by a trained Clerk who will, where necessary, assist and advise unrepresented litigants in the preparation of and filing of pleadings and notices.

**8.11 THE FAMILY COURT SHOULD BE LAUNCHED BY WAY OF A PILOT PROJECT AND THE PIECEMEAL PHASING OUT OF THE DIVORCE COURTS ESTABLISHED UNDER SECTION 10 OF ACT 9 OF 1929**

8.11.1 Having due regard to South Africa's slender resources, interested parties were almost unanimous in suggesting to the Commission that it would be prudent to pave the way for the establishment of country-wide Family Courts by initially launching a pilot project.

8.11.2 The Commission is unanimously of the opinion that in the first instance a single Family Court should be established within one provincial division of the High Court only. Although the pilot Family Court will be located in the city in which the Office of the Family Advocate is based, such pilot court should also undertake regular circuits to country districts within the provincial division.

8.11.3 The impressive quality of the services rendered by the Family Advocate has already been stressed. In each of the cities of Johannesburg, Pretoria, Cape Town, Durban, Bloemfontein and Port Elizabeth the country is singularly fortunate in having an Office of the Family Advocate staffed by persons of great ability, experience and enterprise.

8.11.4 In the opinion of the Commission the selection of a single Office of the Family Advocate to form the nucleus of a Family Court pilot project cannot be made by comparing the respective merits of the personnel of the various offices, for the reason that the quality of the Family Advocates is uniformly excellent. The process of selection, so the Commission considers, has to be determined rather

by purely objective considerations, such as the size of the population served by a particular Office; the caseload carried by that Office; and last but not least, the relative accessibility of the particular Office to country towns to be visited by the Family Court on circuit.

8.11.5 Using the objective criteria indicated in paragraph 8.11.4 above the Commission concludes that the most suitable area for monitoring the Family Court pilot project is the territory falling within the jurisdiction of the Natal Provincial Division of the High Court. This conclusion is based more particularly on the following three considerations :-

- (A) Of South Africa's nine provinces KwaZulu-Natal has the largest population (8,5 million).
- (B) Proportionately the Durban Family Advocate's Office carries the highest caseload of inquiries for Family Advocates [ see par 4.6.7 in Chapter 4].
- (C) From the point of view of accessibility the position of Durban relative to the rest of KwaZulu-Natal is a favourable one. Those large towns which lie furthest from Durban (such as Newcastle, Vryheid, Empangeni, Port Shepstone and Kokstad) can be reached from Durban by road within the space of three hours.

8.11.6 In order to avoid fragmentation of jurisdiction, and having regard to the divorce courts established under section 10 of Act 9 of 1929, the Commission considers it essential that actions for divorce in KwaZulu-Natal should be governed by the following legislative provisions :-

8.11.6.1 From the date of the establishment of the Family Court in the province of KwaZulu-Natal no further cases will be enrolled in the divorce courts established under section 10 of Act 9 of 1929 (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997) in any district falling within the jurisdiction of the Natal Provincial Division.

8.11.6.2 Part-heard cases in the divorce courts mentioned in paragraph 8.11.6.1 will be completed in the divorce court concerned by the judicial officer seized of the particular case.

- 8.11.7 The Commission considers that the pilot project in KwaZulu-Natal should be monitored for a period of twelve months, whereafter the Government should decide when and in what other provincial divisions of the High Court in South Africa further Family Courts should be established. The date on which the Family Court thereafter begins to function within the area of jurisdiction of any other provincial division of the High Court will mark the beginning of the phasing out within that area of the jurisdiction of the divorce courts established under section 10 of Act 9 of 1929 (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997).

## **8.12 CONCURRENT JURISDICTION WITH OTHER COURTS**

- 8.12.1 The Commission considers that in respect of all those family matters which are currently justiciable by the High Court but which will form part of the jurisdiction to be conferred upon the Family Court, the Family Court should exercise its jurisdiction concurrently with the High Court. On this point interested parties were generally agreed.
- 8.12.2 The Family Court circuit will visit circuit towns only intermittently. In addition many small rural towns will never be visited by the Family Circuit Court. In country towns the local Magistrate is not infrequently required to make urgent orders as a Commissioner of Child Welfare or in the Maintenance Court. The great inconvenience which would be caused to country litigants in need of such urgent orders were the Family Court to be given exclusive jurisdiction in respect thereof was graphically explained to the Commission by Mr R. Mandelstam [paragraph 7.11.5 in Chapter Seven].
- 8.12.3 The Commission considers it essential that in respect of the Child Care Act, No 74 of 1983, and the Maintenance Act, 1963, the Family Court should exercise its jurisdiction concurrently with the Magistrates Courts.
- 8.12.4 In respect of those Family Courts subsequently to be established elsewhere than in KwaZulu-Natal, legislative provisions similar to those described in paragraph 8.11.6 above will, *mutatis mutandis*, be essential.

**8.13****APPEALS FROM THE FAMILY COURT**

The Commission considers that appeals from the Family Court should lie to the Full Court of the High Court.

**8.14****PHYSICAL LOCATION AND ACCOMMODATION OF THE FAMILY COURT**

The Commission considers it highly desirable that, so far as is reasonably possible, the Family Court should be housed separately from other Courts ; and that special attention should be given to its lay-out and appointments. It should contain comfortable waiting-rooms ; enough conference rooms ; and ample child-care facilities.

## **CHAPTER NINE**

### **THE COMMISSION'S UNANIMOUS RECOMMENDATIONS FOR THE ESTABLISHMENT IN SOUTH AFRICA OF A FAMILY COURT**

- 9.1** As an essential first step towards the establishment of a Family Court the Commission recommends the repeal of The Mediation in Certain Divorce Matters Act, No 24 of 1987, and the enactment in its place of a statute to be styled :-

*“ The Family Advocate and Family Counselling Service Act ” [ “ the FAFCS Act ” ]*

The basic provisions to be contained in the FAFCS Act have been described in paragraph 8.8.8 in Chapter Eight.

- 9.2** As the next step towards the establishment of a Family Court the Commission recommends the passing of a statute to be styled :-

*“ The Family Court Act ”.*

The Family Court Act will provide for the establishment of a Family Court of comprehensive jurisdiction which will be an independent Superior Court with its own specialised structure and functions.

- 9.3** There will ultimately be a Division of the Family Court within the area of jurisdiction of each provincial division of the High Court in which there is an Office of the Family Advocate. Each division of the Family Court will adjudicate family law cases in rural areas by means of a circuit court system.

**9.4**            **THE LAUNCHING OF A FAMILY COURT PILOT PROJECT AND THE PHASING OUT OF THE DIVORCE COURTS ESTABLISHED UNDER SECTION 10 OF ACT 9 OF 1929**

**9.4.1**            **Since it would be impracticable to establish simultaneously a number of Family Court divisions, the Commission recommends that the Family Court be started by a single monitored pilot project to be launched within the area of jurisdiction of the Natal Provincial Division of the High Court.**

**9.4.2**            **The date on which the Family Court begins to function as described in paragraph 9.4.1 will also mark the beginning of the phasing out within the province of KwaZulu-Natal of the jurisdiction of the divorce courts established under section 10 of Act 9 of 1929 (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997). [ see paragraph 9.12(IV) hereunder ]**

**9.4.3**            **The date on which the Family Court thereafter begins to function within the area of jurisdiction of any other provincial division of the High Court will mark the beginning of the phasing out within the area of jurisdiction of such provincial division of the jurisdiction of the divorce courts established under section 10 of Act 9 of 1929 (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997). [ see paragraph 9.12(V) hereunder ]**

**9.5**            **The Judges in the Family Court will be designated**

***“ Family Court Judges”***

**and they will be appointed in the same manner as High Court Judges. They will be paid the same salary as High Court Judges, but their term of office will be limited to a period of seven years subject to the possibility of renewal as mentioned in paragraph 8.8.3 in Chapter 8.**

**9.6**            **Family Court Judges will be assisted by judicial officers called**

***“Family Court Commissioners”***

**whose duties will include the hearing of maintenance cases and unopposed divorces ; and part of whose functions will be to preside at pre-trial conferences and at conciliation conferences ordered by a Family Court Judge in advance of or during a hearing of a trial action or an application. Family Court Commissioners will also be appointed for a term of seven years. Their appointment will be made by the Minister of Justice on the recommendation of a small Appointments Committee consisting of family law experts whose chairman will be a Family Court Judge.**

**9.7 Candidates for appointment either as a Family Court Judge or a Family Court Commissioner will be required to have :-**

- (a) an appropriate professional legal qualification ; and**
- (b) appropriate practical experience in Family Law work ; and**
- (c) a predilection for Family Law work in all its ramifications ; and**
- (d) a compassionate personality.**

**9.8 Each Division of the Family Court will have its own Registry and Registrar. It will also have a staff of trained Clerks who will assist unrepresented litigants in the Family Court both at the seat of the Court and at circuit sittings of the Court. At each circuit town of the Family Court the Clerk of the local Magistrate's Court will act on behalf of the Family Court Registrar by receiving pleadings filed by litigants whose matters will be heard by the Family Court on circuit.**

**9.9 Each Division of the Family Court will have an administrative officer styled :-**

***"The Counselling Co-ordinator"***

**who will be in charge of the Family Court's social agency component.**

**9.10 The social agency component in the Family Court will be provided by the Family Counselling Service which in terms of the FAFCS Act [see paragraph 8.8.8 above] will be part of the Family Advocate's Office. The Family Counselling Service will be attached to the Family Court.**

**9.11** The Family Counselling Service will, *inter alia*, discharge the following three functions :-

- (a) **The Reception Process at the Family Court's Reception Centre.** At the Reception Centre family disputes will be sifted and classified. Family Counsellors will provide social counselling and advice.
- (b) **The Conciliation Process.** In cases of irreparable rift in the marriage this process is aimed at helping estranged spouses to communicate with each other directly and to good purpose, in order to make their parting less traumatic for them as well as for their minor children. This process seeks to resolve by agreement disputed issues such as custody of and access to minor children and the division of matrimonial assets.
- (c) **A Supporting Service to the Court component of the Family Court.** Where the Court has to adjudicate upon a family matter the Family Counselling Service will see to it that any further social welfare or other specialised investigation that the Court may require will be promptly undertaken by one of its own Family Counsellors or by some approved outside welfare agency or other specialists.

**9.12** **THE JURISDICTION OF THE FAMILY COURT**

- (I) **The Commission recommends that the Family Court will have jurisdiction, concurrently with the High Court :-**
  - (a) to hear those matters which are at present heard in the divorce court of the High Court and which, in addition to divorce itself, will include the following :
    - (i) matters ancillary to divorce such as the division of matrimonial assets ; maintenance for a spouse and minor children ; custody of and access to minor children ; and guardianship of minor children ;

- (ii) applications *pendente lite* for a contribution towards the costs of a divorce action ; for maintenance ; and for interim custody of and access to minor children ;
  - (iii) applications for maintenance as between parent and child and grandparent and grandchild ;
  - (iv) applications for interdicts in matrimonial matters ;
- (b) to hear the matters at present heard by the High Court under the Age of Majority Act, 1972 ;
  - (c) to grant consent to the marriage of a minor if such minor's parent or guardian refuses such consent ; which power is at present exercised by a Judge of the High Court under sec 25(4) of the Marriage Act, 1961 ;
  - (d) to hear cases in which paternity is sought to be determined and which affect the status of a woman or child.
- (II) The Commission recommends that the Family Court will have jurisdiction to hear matters involving disputes between a man and a woman arising from a spousal union subsisting (or which earlier subsisted) between them, which union is recognised by their own customs or religious beliefs but is not recognised by the civil marriage laws.
- (III) The Commission recommends that the Family Court will have jurisdiction, concurrently with the Magistrates' Courts :-
- (a) to hear the matters at present heard by the Commissioner of Child Welfare under the Child Care Act, No 74 of 1983 ;
  - (b) to hear the matters at present heard in the Maintenance Court under the Maintenance Act, 1963 ;
  - (c) to carry out the duties and exercise the powers assigned to Magistrates in terms of Chapter 3 ( see sections 8 to 18 ) of the Mental Health Act, 1973 ;

- (d) to investigate the accommodation or care of aged or debilitated persons under section 6 of the Aged Persons Act, 1967, and to carry out the duties under sections 5(3) and 5(4) of the said Act ;
  - (e) to hold enquiries under the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 1971, and commit persons to rehabilitation centres.
- (IV) The Commission recommends that from the date on which the Family Court is established within the province of KwaZulu-Natal :
  - (a) no further cases will be enrolled in the divorce courts established under section 10 of Act 9 of 1929 (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997) , in any district falling within the jurisdiction of the Natal Provincial Division ;
  - (b) part-heard cases in the divorce courts mentioned in (a) above will be completed in the divorce court concerned by the judicial officer seized of the particular case.
- (V) The Commission recommends that from the date of establishment of any Family Court within the area of jurisdiction of any other provincial division of the High Court elsewhere in the country :-
  - (a) no further cases will be enrolled in the divorce courts established under section 10 of Act 9 of 1929 (whether functioning as at present or whether functioning pursuant to the Divorce Courts Amendment Act, 1997), in any district falling within the jurisdiction of such other provincial division ;
  - (b) part-heard cases in the divorce courts mentioned in (a) above will be completed in the divorce court concerned by the judicial officer seized of the particular case.

### **9.13 APPEALS FROM THE FAMILY COURT**

**The Commission recommends that appeals from judgments of the Family Court should lie to the Full Court of the High Court.**

#### **9.14 PHYSICAL LOCATION AND ACCOMMODATION OF THE FAMILY COURT**

**The Commission recommends that, so far as is reasonably possible, the Family Court should be housed separately from other Courts ; and, where that is not feasible, the Family Court should at least have its own separate entrance. Special attention should be given to the lay-out and appointments of the Family Court in order to create a relaxed and informal atmosphere. Well-appointed and cheerful waiting-rooms should have a supply of playthings with which to occupy young children. There must be sufficient and comfortable offices in which interviews and conciliation and mediation sessions may be conducted. Adequate child-care facilities for infants are essential. At the reception centre there should be an informed and sympathetic receptionist on duty.**

#### **9.15 FREE LEGAL ADVICE ON FAMILY MATTERS AT THE FAMILY COURT**

**With a view to providing free legal advice on family matters to members of the public, both at the Family Court reception centre and at circuit sittings of the Family Court in rural areas, the Commission recommends that the Family Court should make use of the services of legally qualified volunteers from recognised legal clinics and (should they in future be required to perform community service) the services of newly-qualified legal graduates performing community service.**

#### **9.16 RULES FOR THE FAMILY COURT**

**The Commission recommends that the rules for the Family Court to be formulated in due course by the Rules Board for Courts of Law should reflect a shift in emphasis away from adversarial and towards inquisitorial litigation procedures.**

## ANNEXURE “ i ”

### **A COPY OF THE RECOMMENDATIONS REGARDING THE CREATION OF A FAMILY COURT MADE IN THE 1983 REPORT OF THE COMMISSION OF INQUIRY INTO THE STRUCTURE AND FUNCTIONING OF THE COURTS**

- “ 9.1 The Commission recommends the establishment of a single family court for all inhabitants of the Republic, irrespective of race, having comprehensive jurisdiction in regard to family matters. The precise scope of the new court’s recommended jurisdiction is indicated in par. 9.6.1 below. The Commission recommends that the new court should be a lower court functioning at the level of the regional court and should be known as “the family court”.
- 9.2 Elsewhere in this final report the Commission has already recommended that all judicial officers in the lower courts should be independent of the Public Service. This recommendation applies equally to judicial officers who will preside in the family court.
- 9.3 The Commission recommends -
- (a) that the existing children’s court, juvenile court and maintenance court be unified under one roof as a family court;
  - (b) that the family court should have concurrent jurisdiction with the Supreme Court to hear divorce actions and applications ancillary thereto;
  - (c) that the family court should also be given jurisdiction in respect of the matters referred to in paragraph 9.6.1 below.
- 9.4.1 The Commission recommends that the structure of the family court should have two components -
- (a) a social component known as the family court counselling service;
  - and
  - (b) a court component.
- 9.4.2 The family court counselling service will fulfil three functions:
- (a) *The reception process* at the family court’s reception centre, where family problems will be sifted and classified; where both legal advice and social counselling will be available; and where the spouses in marriages that can still be saved will be referred to marriage counsellors with a view to reconciliation;

- (b) *the conciliation process*, which, in cases of an irreparable rift in the marriage, is aimed at helping estranged spouses to communicate directly and to good purpose with each other to make their parting less traumatic for them as well as for their minor children; and to resolve by agreement disputed points (such as custody of and access to minor children and the division of matrimonial assets);
- (c) *the supporting service to the court*, where the court has to adjudicate upon a family matter the counselling service will see to it that any further social welfare investigation or action that may be required by the court will be undertaken either by the counselling service's staff or by the staff of some approved social agency.

9.4.3 The court component of the family court will be a court of law and a court of record in which a legally qualified judicial officer will preside and in which the rules of procedure and evidence will apply. The permanent rules board, the establishment of which is recommended elsewhere in this final report, will, however, in considering rules for the family court, bear in mind that in the adjudication of family matters a shift in emphasis away from the adversary system of litigation towards more inquisitorial procedures would benefit the administration of justice.

9.5 The Commission recommends that the minimum legal qualification for a judicial officer in the family court should be the degree of LL.B.

9.6.1 The Commission recommends that jurisdiction be conferred upon the family court -

- (a) to hear those matters that are at present heard in the divorce court of the Supreme Court and which, apart from divorce itself, will include the following:
  - (i) matters ancillary to divorce, such as the division of matrimonial assets; maintenance for the wife and minor children; custody of and access to minor children; and guardianship of minor children;
  - (ii) applications *pendente lite* for a contribution towards the costs of a divorce action; for maintenance; and for interim custody of and access to minor children;
  - (iii) applications for maintenance as between parent and child and grandparent and grandchild;
  - (iv) applications for interdicts in matrimonial matters;
- (b) to hear the matters at present heard by the Supreme Court under the

Age of Majority Act, 1972;

- (c) to grant consent to the marriage of a minor if such minor's parent or guardian refuses such consent; which power is at present exercised by a judge of the Supreme Court under section 25(4) of the Marriage Act, 1961;
- (d) to hear the matters at present heard in the Black divorce court;
- (e) to hear the matters at present heard by the Commissioner of Child Welfare under the Children's Act, 1960;
- (f) to hear the matters at present heard in the maintenance court under the Maintenance Act, 1963;
- (g) to try juveniles under the age of 18 years upon criminal charges;
- (h) to try criminal trials involving assaults committed within the context of the family (for example, child-battering or assault by one parent on the other) ;
- (i) to carry out the duties and exercise the powers assigned to magistrates in terms of Chapter 3 (see sections 8 to 18) of the Mental Health Act, 1973;
- (j) to investigate the accommodation or care of aged or debilitated persons under section 6 of the Aged Persons Act, 1967, and to carry out the duties under sections 5(3) and 5(4) of the said Act;
- (k) to hold enquiries under the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971, and commit persons to rehabilitation centres.

#### 9.6.2

The Commission recommends that the family court should have no jurisdiction in respect of the following matters:

- (a) Cases in which the validity or interpretation of a will or other testamentary document is in question;
- (b) cases in which the status of a person in respect of mental capacity is sought to be affected;
- (c) cases in which damages are claimed in respect of seduction or alleged breach of promise;
- (d) cases in which paternity is sought to be determined and which affect the status of a woman or child;
- (e) criminal trials involving a juvenile charged jointly with an adult as a fellow-accused.

- 9.7.1 The Commission recommends (see paragraph 8.10.3 above) that the Divorce Act, 1979, be amended so that -
- (a) where there are minor children of a marriage no action for divorce may be instituted until an approved social agency has investigated the circumstances both of the children and of the parties to the action;
  - (b) the court will grant a decree of divorce only after both parties shall have testified before it;
  - (c) where there are minor children of a marriage a decree of divorce will be granted only after the court has been satisfied, having regard to both the evidence of the two parties and a report by the social agency referred to in (a), that the arrangements proposed for such minor children are satisfactory.
- 9.7.2 As regards divorce actions and applications ancillary thereto, the Commission's recommendation (see paragraph 9.3 above) is that the family court should have concurrent jurisdiction with the Supreme Court. In the opinion of the Commission it is therefore necessary that the amendments to the Divorce Act indicated in paragraphs 8.10.3 and 9.7.1 above should be made with due expedition; and that these amendments should not be held over until the establishment of the family court.
- 9.8.1 The Commission recommends that the Divorce Act, 70 of 1979, be so amended that whenever in an action for divorce the court *mere motu* appoints a legal representative for minor children, the costs of such legal representation shall be borne by the State, unless the court otherwise orders.
- 9.8.2 The Commission recommends that simultaneously with the establishment of the family court an office of "Children's Friend" be created for the Republic.
- 9.8.3 The Children's Friend will be legally qualified and in proceedings of the family court he will protect the interests of minor and dependent children. Where the interests of a minor child are at stake and the Children's Friend is of opinion that the proper protection of the child's interests so requires, the Children's Friend will have the power to arrange for legal representation of the child concerned at public expense.
- 9.9 The Commission recommends that the services of approved legal clinics should be enlisted in the functioning of the family court. The Commission foresees that recently qualified lawyers working at legal clinics will act in a part-time capacity as legal advisers at the reception centre of the family court and will, where necessary also be appointed by the Children's Friend to undertake the legal representation of minor or dependent children in the proceedings of the family court under the supervision of the Children's Friend.
- 9.10.1 The Commission recommends that whenever, in the opinion of the presiding family court magistrate, proceedings instituted in the family court present an exceptionally difficult question of fact or an important and intractable question of law he should have the power to transfer the matter to the Supreme Court for adjudication by it.

- 9.10.2 The Commission recommends that an appeal should lie to the Supreme Court from any final decision of the family court. In this connection it will be necessary appropriately to amend the Children's Act, 1960.
- 9.10.3 The Commission recommends that when the Supreme Court exercises concurrent jurisdiction with the family court in respect of any family matter, the first-instance jurisdiction of the said two courts will run concurrently; and that an applicant will have the right to go to the family court to seek variation or the setting aside of an earlier order of the Supreme Court in the same matter.
- 9.11 The Commission recommends that the family court should as far as possible be housed separately from other courts, and that special attention should be given to the lay-out and interior appointments and facilities of the family court. Well-appointed waiting rooms, offices in which interviews may be conducted, and child-care facilities are essential at a family court. At the reception centre of the family court there should be a sympathetic and informed receptionist on duty.
- 9.12.1 The Commission recommends that with regard to the hearing *in camera* of certain family matters -
- (a) provisions similar to section 8(3) of the Children's Act, 1970, should apply in children's court proceedings in the family court;
  - (b) provisions similar to section 5(3) of the Maintenance Act, 1963, should apply in maintenance proceedings in the family court;
  - (c) provisions similar to section 153(4) of the Criminal Procedure Act, 1977, should apply in criminal trials where accused persons under the age of eighteen years are tried in the family court.
- 9.12.2 The Commission recommends that no prohibition be placed on public attendance at divorce proceedings.
- 9.13 The Commission recommends that the family court should serve the rural areas by means of a circuit system.
- 9.14.1 The Commission has already pointed out (see paragraphs 7.6.2, 7.6.3 and 7.6.4 above) that the country-wide establishment of the family court should be preceded by one or more pilot projects; and that the four metropolitan areas containing the largest population concentrations (the PWV area, Cape Town, Durban and Port Elizabeth) are the obvious testing grounds for the family court pilot projects,
- 9.14.2 The Commission recommends that the family court be launched in South Africa by means of monitored pilot projects to be undertaken in each of the

said four metropolitan areas. For the duration of such pilot project(s) any court having jurisdiction in family matters at the inception of the pilot project(s) will exercise concurrent jurisdiction with the family court. Upon the establishment of family courts country-wide, only the Supreme Court will exercise such jurisdiction concurrently with the family court.”