CHAPTER 23

A NEW COURT STRUCTURE FOR SERVING THE NEEDS OF CHILDREN

23.1 Introduction

An effective decision-making forum for children in need of alternative care, protection and parental responsibilities dispositions is a key component that will be crucial for the proper implementation of the proposed new children's legislation in South Africa. The question of an appropriate forum for the handing down of legally-binding decisions affecting children has therefore been regarded as a significant one in the earlier phases of the work of the Child Care Project Committee. Key questions, such as the continued role of the High Court as the 'upper guardian of all minors,' and when children should have a right to legal representation in court, were debated both at the regional workshops held by the Project Committee in 1998, and at a focused workshop specifically on Forums and Forum Orders that was held in Pretoria on 15 April, 1999.

A Law Commission Research Paper entitled: 'Children and the Courts: How Can We Improve the Availability and Dispositions of Legal Forums?' (hereafter cited as 'The 1999 Forum Paper') has been circulated by the Commission.[1] Whilst the 1999 Forum Paper discussed possible models for reform of South African Law and provided foreign comparative material, the purpose of this Chapter is to provide specific recommendations for a new court structure designed for producing certain legally-binding decisions for children. The specific focus of this Chapter is on an improved court structure for children in need of alternative care arrangements, whether this is to be provided by the State or by a reallocation of parental responsibilities between caregivers acting in a private capacity.

It should be noted that the situation of children who are charged or appear as witnesses in criminal trials is not covered in this Chapter. This is in line with government policy decisions to the effect that these aspects need to be dealt with in other legislation.

Many of the recommendations in this Chapter are based upon responses to our Issue Paper. We have also been influenced by the outcomes of debates and views presented at our Workshops.

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1 Written in January 1999 by Professor FN Zaal and available from the Law Commission.

Aside from group responses at Workshops, the Commission has also received individual responses to its courts worksheet which took the form of a questionnaire on courts. In addition, the Commission has collected responses from children who took part in a child participation process. An overview of opinions contained in these different categories of responses is provided in 23.2 of this Chapter, below.

23.1.1 **The Family Court Pilot Project**

It needs to be borne in mind that a Family Court Pilot Project has been established in South Africa and that legislation establishing a network of Family Courts may be promulgated. This initiative follows on from important work done earlier by the Hoexter *Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court*.[2] This Commission recognised that there was a need for the establishment in South Africa of a specialist Family Court of comprehensive jurisdiction.[3] In a submission to the Hoexter Commission, the Association of Law

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2 *Commission of Inquiry into the Rationalisation* of *the Provincial and Local Divisions of the Supreme Court*: *Third and Final Report* (17 Dec. 1997, Government Printer RP 203/1997). Note that this Report is hereafter referred to as the '*1997 Hoexter Commission Report*'.

3 See generally, *1997 Hoexter Commission Report* at Vol. 1 Book 1 Part 2. The latter Part is entitled 'The Need for the Establishment in South Africa of a Specialist Family Court of Comprehensive Jurisdiction'. See also Debbie Dudlender **Doing something for nothing: The Family Centre Pilots** Law, Race and Gender Research Unit, UCT, 2000 ; Rashida Manjoo (ed) **Family Courts In South Africa (Proceedings of a workshop held in**

Societies of South Africa recommended that the proposed Family Courts should, inter-alia, take over the work of Children's Courts.[4] The Child Care Project Committee supports this submission and considers that the work currently carried out by Children's Courts should in future become part of the work carried out by Family Courts.

Aspects of proposed new Children's legislation which relate to court services will obviously need to be in line with any future legislation covering the work of Family Courts. The data collected by the Child Care Project Committee and discussed in this Chapter may, to some extent, be of assistance to future drafters of Family Court legislation. The proposals with regard to courts in this Chapter are designed to be congruent with a possible future Family Court system. It should particularly be noted that a complete design covering all details needed for a new court system has not been offered in this Chapter. Such a design will more appropriately be provided in future specialised Family Court legislation. However, appropriate court services are essential for children and a fundamental reform of the current Children's Court system as provided for in the Child Care Act 74 of 1983 is urgently needed. Therefore, some important reforms are proposed in this Chapter and in the draft Bill. The idea has been to provide for an improved Court system for children in need of care or placement decisions which can be initiated either before or together with specialised Family Court legislation that will be promulgated in the future.

23.2 **Responses received by the Law Commission**

23.2.1 **Responses to the Issue Paper**

Cape Town in November 2000) Workshop Report, Law, Race and Gender Research Unit, UCT, 2001.

4 *1997 Hoexter Commission Report* Appendix A, at p15 item(e).

Responses to the Issue Paper are contained in a document entitled *Collation of Comments on Issue Paper 13 - Review of the Child Care Act* (SA Law Commission 1999). For convenience, this document will hereafter be referred to as '*Collation*'. Responses to the Issue Paper stressed the importance of the child's right to be present and to participate in decision-making processes.[5] With regard to whether courts dealing with different aspects of child and family matters should continue to operate as separate kinds of courts (the present approach) the majority of responses to the Issue Paper favoured an integrated court which could deal with the whole range of domestic matters.[6]

5 *1997 Hoexter Commission Report* Appendix A, at p15 item(e).

6 *Collation* pp. 45-47 & pp. 74-75

With regard to the role of the High Court in the future, the majority of Issue Paper responses favoured a transferral of the functions of the High Court as a court *a quo* to a lower court that would be less expensive, more specialised and geographically more accessible than the High Court.[7] For convenience, such a specialised lower court has been referred to in this Chapter by the suggested title of the 'Child and Family Court'.[8] There was, however, strong support for the High Court continuing to serve as a Higher Court of Appeal or Review. With respect to the High Court serving as the 'upper guardian of all minors,' this was supported only insofar as commensurate with transferring a much greater role down to the Child and Family Court. The idea of a three-tier system with District and Regional Child and Family Courts and then High Courts was supported in some of the responses to the Issue Paper.[9]

In responses to the Issue Paper, there was considerable support for the Child and Family Court being a specialised forum in the sense that its adjudicating officers would be specialists both as regards their training and their concentration on child and family work. It was considered acceptable, if resources were limited, that one such court might serve several magisterial districts in areas where the case load might be low (*Collation* p.74-76).

On the question of whether all magistrates should continue to be eligible to do Child Care work, there was a division in responses to the Issue Paper. Respondents who stressed the need for specialisation and appropriate interpersonal skills felt that not all magistrates should continue to be eligible. Respondents who gave priority to the need for a sufficient number of adjudicators to be accessible to children throughout the country considered that all magistrates should continue to be eligible, but argued in favour of the need for special training.[10] With regard to the training of

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7 *Collation* pp.52-53.

8 This title is recommended because it indicates that children would be a priority concern.

9 *Collation* pp.52-53.

10 *Collation* pp.77-79.

adjudicators, there was support for a concept of apprenticeship and training through actual experience. There was also considerable support for qualifications involving exposure to disciplines such as psychology and social work, as well as law.[11]

11 *Collation* pp. 78-80.

With regard to the rank or status of the adjudicating officer, respondents to the Issue Paper were split between suggesting the level of a magistrate and suggesting a level half-way between that of a magistrate and a High Court judge.[12] With regard to other persons sitting together with legally-trained adjudicators in order to decide matters, responses to the Issue Paper were cautious. Having additional persons may unnecessarily complicate and slow down adjudication and may also intimidate the child. However, the preponderance of opinion leaves room for the possibility of an additional person, even a lay person, provided that the additional person in some way supplements the knowledge or language skills or experience of the adjudicator in a manner that will assist with the proper adjudication of the matter. Additional persons should not be added to the legally-trained adjudicator unless there are reasonable grounds for this.[13] Insufficient training of many of our present court adjudicators was stressed in some responses received.

In Issue Paper 13, respondents were asked how a balance could be struck between allowing child-parties to give evidence, but not pressuring them to do so. Many responses favoured the use of legal representatives to assist in this regard. There was also a view that striking this balance could be difficult in practice and would require appropriate experience and understanding of children from the court adjudicators. One adjudicator argued that a screening function should come into play so that the child's wishes about appearing can be ascertained before the hearing. It can then be decided beforehand whether the child should appear.[14] There was support for the adjudicating officer being accorded the power to speak to the child privately where this is essential for promoting the best interests of the child.

Issue Paper respondents were asked who should represent children. It was pointed out that there is a tendency at present for lawyers who represent children to present views other than those of the child herself. Nevertheless, there was strong support for the use of lawyers to represent children, although it was realised that this might not be feasible or necessary in simpler or less contentious matters. There was, in particular, strong support for specialist legal representatives, rather than the use of any available legal representative. Specialisation could be achieved by extending the role of family advocates, by using court staff or, finally, by using private legal practitioners (inter alia, via

12 *Collation* pp.80-81.

13 *Collation* pp. 81-82.

14 *Collation* pp.82-84.

the medium of Legal-Aid). But only lawyers who have experience and/or training in child and family law work should be used.[15]

With regard to the kind of training needed by persons who represent children in court, there was considerable support in the Issue Paper for such representatives requiring a legal training. However, appropriate legal training and knowledge in family and child law was stressed and there was strong support for additional appropriate training from other disciplines such as social work.[16]

15 *Collation* pp. 84-86.

16 *Collation* pp.86-87.

Issue Paper respondents were asked to assess the grounds when a legal representative should be appointed to a child via Legal Aid. They were referred to S8 (A) and Regulation 4(A) of the Child Care Act 74/1983. The majority of respondents approved of these provisions and recommended that they be incorporated within a Children's Code.[17] However, an experienced Children's Court commissioner criticised all but two of the sub-provisions of Regulation 4A in a manner which points to a need to reformulate some of them.[18] With regard to Regulation 4A(1)(b), it does not seem appropriate that a social worker should be able to compel an adjudicating officer to appoint a legal representative.

The Commission recommends as follows:

Where a hearing is to be held in order to determine whether a child is in need of removal by the State into alternative care, a social worker who has investigated the circumstances of the child may recommend to the Child and Family Court that a legal representative should be appointed to act on behalf of the child. Such a recommendation should be made where the social worker's investigation indicates that the child may be substantially prejudiced if no such appointment is made.

Issue Paper respondents were asked whether adult parties should be provided with legal representation at State expense. Views were divided on this question, largely because of the resource implications. Respondents were also asked whether unmarried fathers should be required to proceed directly to the High Court where they wish to apply for guardianship, access or

17 *Collation* pp.88-90.

18 Response of Mr D Rothman at p.90:*Collation*.

custody.[19] A strong majority of respondents considered that it should rather be a lower court which should become a forum of first instance in cases of this nature. Perceptions about the inaccessibility and expense of the High Court appear to have motivated these responses.

19 Response of Mr D Rothman at p.90:*Collation*.

In the Issue Paper, respondents were asked some questions about specific types of possible court orders. There was considerable support in favour of an 'anti-harassment' order that would prohibit a named individual from interfering in specified ways with a particular child. It was suggested that such an order could take the form of a rule *nisi* which would set down a return day on which the respondent could challenge the order if she/he saw fit. This would be similar to the provisions of the Domestic Violence Act of 1998.[20]

On the question of whether a court should have the ability to award a State grant to children in urgent need, responses to the Issue Paper were mixed. There was considerable support for the concept, but concerns were expressed by many respondents about the State's ability to fund such grants. Since many respondents agreed that appropriate cases do occur in practice, it would seem appropriate to allow for courts to have a power to award a special emergency grant, from a special budget, but in exceptional cases only, where both the investigative social worker and the court feel that this is appropriate on a short-term basis whilst another, longer-term grant is being arranged through the normal social security system.[21]

There was strong support in the Issue Paper for the idea of courts which issue orders concerning children being accorded a power to change such orders. It was felt by respondents that such courts should be able to monitor, vary or review their own orders where this became necessary in best interests of a child affected by the order.[22] Some respondents considered specifically that a court must have the power to review, monitor and amend its orders especially insofar as they affect children. Respondents also pointed out that, where a court does change its order, the change (like any other order) should be subject to an appeal process by any aggrieved party who can establish grounds.

Issue Paper respondents were asked to comment on the present system, as set up in the Child Care Act 74 of 1983, whereby officials functioning under the authority of the Minister of Social Development and the Minister of Education have the power either not to implement or else to alter child placements as ordered by the children's court. There was no support for the present system in

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20 *Collation* pp. 100-101.

21 *Collation* pp.101-102.

22 *Collation* pp.102-104.

this regard. A strong majority of the respondents argued that the ability to alter children's court orders must be that of the court alone.

Children's court orders can presently last for a maximum of two years. A strong majority of respondents to the Issue Paper were of the view that this time limit is not appropriate. It was felt by many of these respondents that in care proceedings and other forms of child placement situations the court should have an unfettered discretion to decide upon how long its order should last. In particular, the court should have the power to issue an order that will last until a child reaches the age of majority if this is appropriate. It was therefore recommended by some Issue for the and Paper respondents that the children's court or its future replacement have an unfettered discretion to decide upon how long orders should last.[23]

Respondents to the Issue Paper strongly supported the idea that, once a child has been placed by a court, that child should have the right to be brought back before the court if the child is substantially unhappy about some aspect of the placement. It was considered by some respondents that this right could serve as a way of uncovering abuse which sometimes occurs during the placement of a child.[24] Respondents to the Issue Paper were particularly strongly against the idea that any administrative\civil service officials delegated powers by a Minister should have the power to terminate a court order.[25]

It has been widely recognised internationally that undue delays in completing court cases involving children tend to be particularly prejudicial to such children. Respondents to the Issue Paper were therefore asked whether more deadlines should be imposed with regard to the completion of court cases in new Child Care legislation. Whilst there was some support for this approach, the majority view was to the effect that there is a danger of over-regulating where, in practice, each case has to

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23 See *Collation* pp. 105-106.

24 *Collation* pp.106-108.

25 *Collation* pp.126-127.

be dealt with on its own merits and in a context where appropriate time frames may differ widely. There was, however, support for the current S14(3) of the Child Care Act 74/1983 which indicates that, once a care proceedings case has been started on the children's court roll, it can be remanded, at most, for fourteen days at a time.[26]

26 For a recommendation, see Part 20.7.4.3 below.

There was also support for a court's power to impose deadlines as and when it saw appropriate. This power should therefore be accorded to courts which deal with issues affecting children. The court will then be able to impose deadlines as appear appropriate to a particular case.[27]

With regard to the court procedures to be followed in future, respondents to the Issue Paper were of the view that these should predominantly be covered in Regulations to the proposed new Child Care legislation. In considering procedural reforms, there is a difficult question of balance. There was a recognition amongst many persons consulted by the Children's Code Project Committee that a decrease in formality and technicality of court procedures and proceedings might make courts more accessible to the majority of our population, but this would have to be achieved in a way that retained fairness to all parties.[28]

Respondents to the Issue Paper were strongly in favour of a capability for a future Court to be able to issue urgent interim orders in all types of cases affecting children, pending a main hearing at a subsequent date. There was even support for an approach (similar to that of the Domestic Violence Act 116 of 1998) allowing for an interim order to be issued, in emergency or very serious situations, even before there is an opportunity to hear the other party on a subsequent return day.

23.2.2 **Responses to the Worksheet on Courts**

A Worksheet which took the form of a questionnaire on children and the courts was prepared by the Child Care Project Committee for its Workshop on Courts and for distribution to other interested

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27 *Collation* p131.

28 *Collation* pp.149-160.

persons. The responses to the Worksheet on children and the courts were collected and collated in 1999 by Law Commission researcher, Ananda Louw.[29]

29 Law Commission Project 110 (1999) *Review of the Child Care Act: Children and the Courts* -hereafter cited as '*Project 110*'

Like Issue Paper respondents, Court Worksheet respondents generally accepted the concept of a three-tier court structure placed at district magisterial court, regional magisterial court and High Court levels. It was considered by some respondents that the Courts need a screening component and the Family Advocate concept should be extended so that Family Advocates become broadly-empowered child assistance officers who can investigate and bring before courts any appropriate case concerning a child. Staff attached to the Family Advocates' offices should be able to instigate investigations on behalf of children and could register privately-reached parental responsibility agreements (plus variations thereof) or parenting plans.[30] Some respondents considered that the Family Advocates' offices could instigate or carry out mediation and facilitate family group conferences where these are required by the Court.

Many respondents considered that the new courts dealing with children in the future must have the power to instigate lay forum hearings where appropriate.[31] It was suggested by some respondents that lay forums should be designed to reach decisions without utilising a legally-trained judge as final adjudicator. Lay forums specifically indicated could include family group conferences, mediation, and use of community courts or traditional courts.[32] Lay forums could provide preventive services and should be overseen by an officer of the court.[33]

The role of the High Court should be that of appeal and review of decisions from the lower tiers.[34] With regard to adjudicators in the future courts, there was considerable support by court Worksheet respondents (like the Issue Paper respondents as noted above) for additional training in other

30 *Project 110* p.20.

31 *Project 110* pp. 2-5.

32 *Project 110* p.5.

33 *Project 110* p.7.

34 *Project 110* p.7.

relevant disciplines besides law. There was also support, once again, for a power to have an assessor from another discipline sit with the adjudicator if the adjudicator considered that this is necessary.[35] With regard to the training of High Court adjudicators, Worksheet respondents supported the idea of a specialized section of the High Court to hear appeals in child and family law matters or, failing this, at least having certain High Court judges who specialize in such work.[36]

35 *Project 110* pp.10-11.

36 *Project 110* p.12.

As far as the cultural and linguistic affinity of Child and Family Court adjudicators is concerned, Worksheet respondents supported the idea of adjudicators who can speak at least three official languages. Failing this, it was considered that assessors who could speak the home language of a child or other party could sit with the adjudicator. An additional factor is proper training of interpreters for child and family work where interpreters have to be relied upon.[37]

As regards the procedural role of adjudicators in courts dealing with children, court Worksheet respondents were of the view that a more activist role, involving a shift to a more inquisitorial approach, should be required of adjudicating officers. It was felt that an adversarial procedure would still be required where there are disputes of fact to be settled.[38] Insofar as any child may be involved or affected, the most important function of any lawyers who may appear will be to assist the court in reaching a decision which treats the best interests of the child/children involved as paramount.

The need to improve the general public's access to the courts was also stressed as an important requirement by respondents to the court Worksheets. It should not be essential to have a lawyer in order to be successful in court. Adjudicating officers will need to adapt their role accordingly. Legal-Aid must be available where it is needed.[39]

There was strong support amongst the court Worksheet respondents for an integrated court system where a single court could deal with different aspects of a domestic matter at one time. It was felt by respondents that this would save considerable time delay.[40]

Monitoring by a court of its order could be achieved by imposing a return day where the court sees

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37 *Project 110* pp.13-14.

38 *Project 110* pp. 22-23.

39 *Project 110* pp.23-24.

40 *Project 110* p. 24.

fit. An additional form of monitoring would be to allow any social worker who is supervising or investigating parties during a post-court-order phase to instigate a re-hearing if the court's order is not being complied with.[41]

Worksheet respondents were concerned to provide the courts which work on behalf of children with 'teeth'. It was suggested that both criminal sanctions and contempt of court orders should be available to these courts. In addition, the courts should be able to impose punitive costs orders on any party.

41 *Project 110* p.25.

As regards the geographical jurisdiction of courts, the solution recommended by some respondents was a broad availability of courts, regardless of where in the country a cause of action arose. In this regard, there was support for an approach such as has been taken in the Domestic Violence Act 116 of 1998. A factor, however, could be in which locality it would be best for a child-party to have the matter heard. In the court Worksheet responses there was support for greater involvement of local authorities and designated lay community safe-guarders.[42] This would necessarily involve additional persons becoming subject to court orders. Court Worksheet respondents were of the view that lawyers who appear in cases involving children should be required to undergo specialized training in family law issues. They should have experience of working with children and understand family dynamics.[43]

As can be seen, a wide range of issues were helpfully addressed in the court questionnaires. It is also noteworthy that the majority of court Worksheet respondents and the Issue Paper respondents were in agreement on most matters considered by both groups.

23.2.3 **The Child Participant Responses**

42 *Project 110* p.28.

43 *Project 110* p.30.

As was indicated in Chapter 1 of this Discussion Paper above, the Child Care Project Committee was able to collect responses from children as a result of a Child Participation Process.[44] The data obtained from this process was collected and presented in a document entitled *Report on workshops held to give effect to Article 12 of the United Nations Convention on the Rights of the Child (Children's Participation)*.[45] For ease of reference, this document will be cited hereafter as the '*Children's Participation Report'.* Part 3.6 of the *Children's Participation Report,* which is entitled 'Law Courts,' provides some useful information concerning children's views about courts. In this Part, children were asked, 'Should there be a special Court that deals only with children who cannot live with their parents?' The record of responses indicates that all children asked this question answered in the affirmative.[46] It may thus be concluded that there was very strong support amongst the child participants for a separate, specialised Court that deals only with child care issues.

When asked about training for adjudicators in courts that deal with care issues, more than 80 percent of the children who responded to this question considered that the kind of training that was needed would be of a kind which would teach adjudicators how to understand children better.[47] It would thus seem that the children's concerns were not so much about legal training for adjudicators as about the kinds of listening and other interpersonal skills that would enable them to hear and appreciate the voices of children.

An interesting result obtained was that fewer than 5% of the child participants felt that social workers are able to perform sufficiently well in representing children in care proceedings. The remaining children felt that it would be better to have an additional representative.[48] When asked in a follow-a question who that representative should be, fewer than 4 percent of the children felt that it could be the court adjudicator. Also, fewer than 4 percent of the children felt that the representative ought to be a lawyer, although more than 80 percent of the children felt that lawyers could form part of the pool of persons from whom a representative could be chosen.

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44 For a discussion of the process, see Chapter 1 at Part 1.5, above.

45 This Report was prepared for the Child Care Project Committee by the Community Law Centre of the University of the Western Cape. The Report is undated.

46 See the responses to question 3.6.1 in the *Children's Participation Report* at pp 37-38.

47 See the responses as presented in Table 3.6.3 of the *Child Participation Report* at p 38.

48 See the responses presented in Table 3.6.4 of the *Child Participation Report* at pp 38-39.

Approximately 12 percent of the children had a specific concern about lawyers needing proper training to equip them to deal with matters involving children. The majority of children (more than 75 percent) seem to have been predominantly concerned about the representative being a person whom the child knows and trusts.[49] From the perspective of the children, therefore, the relationship that the representative is able to build up with the child is by far the most important factor.

49 See the responses presented in Table 3.6.5 of the *Child Participation Report* at p 39.

When asked to make additional comments about courts, a significant proportion of the child participants were of the view that child-friendly courtrooms with colourful time-out rooms were important. Adjudicators should be dressed informally and children should be given a chance to speak for themselves. A minority of the children wanted to be able to speak in their mother-tongue and have cases dealt with promptly. Some children felt that the adjudicators should be able to speak to them privately before reaching a decision. A few children who had obviously had bad experiences in this regard stressed the importance of having transport available to take them back to a residential care institution after the hearing. A small group who had had the rare experience of being provided with a lawyer in children's court proceedings indicated that younger "student lawyers" were more understanding of children than the older lawyers and thus better.[50] In a particularly damning finding, a group of children who had experience of both criminal courts and the children's courts indicated that they had a better experience in the criminal court from the point of view of being allowed to express their opinions![51]

The Child Participation Responses thus contained some important perspectives regarding courts. The views expressed by the children have been kept in mind in planning a proposed new system of courts for dealing with care, protection and parental responsibility issues.

23.3 **Fundamental Problems in the Present System**

23.3.1. **Too Many Courts**

As is well known, we presently have a variety of courts which can issue orders that may refer to and significantly affect the lives of children. These courts include the High Court, Divorce Courts, Maintenance Courts, Children's Courts, Juvenile Courts and courts issuing domestic violence orders. A first serious point of weakness in the present South African court structure as it affects

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50 Table 3.6.9-responses to the question, 'Are there other things that you want to say about the Courts?'. See the *Child Participation Report* at pp 40-41.

51 The *Child Participation Report* at p 41.

children is therefore the multiplicity of forums dealing with various aspects. As has emerged from the research of the Project Committee, this multiplicity of courts has numerous disadvantages. For example, because each court deals only with certain types of case, a child or adult applicant\witness may have to appear in more than one court.

The present system of conducting hearings and issuing court orders in an incremental manner and in a multiplicity of forums frequently increases privately-incurred and State expenses, and results in delays whilst the child and/or other parties are left to suffer from uncertainty and insecurity about her/their future. Another negative consequence of our multiple-court system is that children are sometimes 'systemically abused' by having to undergo multiple assessments and questioning by different persons for purposes of different court hearings. These children may have to relate painful details -for example, in regard to sexual abuse- over and over again to different professionals who are preparing for and conducting different cases. The system of a multiplicity of courts is thus not only frequently ponderous and slow, it subjects children and others to secondary, systemic abuse which could be reduced by the use of a single, broadly-encompassing forum which could deal with all or most legal aspects of a multifarious familial problem.

The present variety of courts is so daunting in terms of expense and time consumption that it is not surprising that the general public, and even child care professionals, often do not make full use of the services which the courts offer. Whilst it would be quite unfair to place the blame wholly at the doors of the courts, the large numbers of street children in many parts of South Africa are surely clear evidence that many children in need of alternative care decisions are not being dealt with effectively through the courts. As the AIDS pandemic progresses, the numbers of orphaned children and other children affected and infected by the disease is growing steadily, and it is indeed necessary for the court system to be reformed so that considerably more children can receive the benefit of prompt, efficient, and effective decision-making about their future placements, and legal rights generally.

23.3.2 **Courts as Out of Touch with the Parties**

Aside from the overly narrow jurisdiction of many of our current courts and their inaccessibility as discussed above, there are further fundamental problems in regard to their functioning. In terms of effectiveness, our courts need to become places where children feel empowered - they must genuinely feel that they can speak out and\or be properly represented, so that their voices will

indeed be heard and their wishes and needs be sufficiently taken into account.[52] Not only will this require a new culture of sensitivity to children, but it will also require far more effective communication between children (or their representatives) and decision-makers or decision-facilitators than has often been the case under the present court system. Major barriers in this regard have come to light in the course of the research already conducted by the Project Committee, and some are noted in the next paragraph below.

It has been pointed out by some respondents that there are weaknesses in the training, motivation, interpersonal skills and other skills of many of those who staff our courts. The problem includes adjudicators and can be found up to and including the level of the High Court. Many judicial officers conduct proceedings only in one or two of the official languages and, indeed, they are often obliged so to do. Regardless of what the position may be with adults, there is a need for decision-makers to be able to communicate directly with children in the languages with which the children are most familiar.[53] There is also an urgent need for new forms of inter-disciplinary training for those who work with children in our courts. Current University systems of legal training do not produce sufficient graduates properly equipped to work constructively and effectively in courts with traumatised children and their dysfunctional families. Conversely, graduates who have had a social work (or other relevant discipline) training are not being equipped to understand the nuances of, for example, evidential law and the purposes of cross-examination in certain situations. Nor is the

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52 As is required by article 12 of the 1989 UN Convention on the Rights of the Child to which South Africa is a signatory. See also articles 7,8 and 9 of the 1990 African Charter on the Rights and Welfare of the Child. Frans Viljoen describes these articles as allowing for "self-asserting rights". See Frans Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel *Introduction to Child Law in South Africa* (Juta, 2000) 214, at 221.

53 See FN Zaal 'Language, Culture and the Detritus of Apartheid: Understanding and Overcoming Secondary, Systemic Abuse in South African Child Care Proceedings' in JA Eekelaar & T Nhlapo, eds. *The Changing Family: Family Forms and Family Law* (1998 Oxford University Press) 341, at 347.

difference between genuine child advocacy and making protective decisions for the child always appreciated, even by family advocates.[54]

23.3.3 **Conclusion**

As can be seen from the discussion above, there are a range of serious and fundamental problems which beset our current hierarchy of courts when viewed from the perspective of their ability to provide cost-effective, rapid and appropriate interventions on behalf of significant numbers children and their families. It is with a view to addressing these problems that a recommendation for a new court structure is offered in this Chapter. A further consideration which has to be kept in mind is the constraint of the limited financial resources available in South Africa at the present time. Any new structure has to pass stringent tests of cost-effectiveness.

23.4 **A new model for a Decision-Making Forum: basic considerations**

It may be submitted that an important reform would be to move from a multiplicity of segmented courts to a more broadly-encompassing decision-making forum that can deal with legal issues affecting children and/or familial situations in a integrated, holistic manner. Ideally, the new forum must offer an attractive degree of accessibility, together with prompt, well-communicated decision-making. It should further offer strong powers of direct and culturally-empathetic communication with children and other family members.

An aspect which needs careful consideration where children are involved is the extent to which a court should insist upon formal and technically-perfect procedures in all aspects of all cases. It

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54 This was unanimously agreed by more than 60 delegates (most of them South African social workers and lawyers) at the Cape Town Conference on ‘The Changing Concept of the Best Interests of the Child’. The Conference was held on 28 January, 1999.

would seem that the ideal forum may sometimes require some degree of flexibility in *its modus operandi*\method of working. For example, there are cases (or aspects of cases) where an informal procedural mode may be the ideal one in encouraging the child and other involved persons to speak freely and to genuinely accept a constructive solution that is likely to meet the best interests of the child and a dysfunctional family unit. On the other hand, there frequently occur what may be termed the 'hard phases' of cases where it may be necessary to resort to cross-examination and other aspects of a formal, sometimes adversarial, procedure in order to get at the truth and protect the interests of persons at whom accusations have been directed. By way of illustration, it may be pointed out that the informal children's panels in Scotland, whilst they have proved successful for many forms of child care proceedings, have been recognised as subject to shortcomings when it comes to dealing with child abuse cases.

In a case of child abuse, the stakes are high and a child might be considered by a forum for possible removal from a parent who has been accused of abusing the child. If the parent denies the abuse, it may well be argued that the parent has a right to all the protective features of a traditional adversarial hearing (obviously, subject to the child receiving appropriate procedural protection). On the other hand, in a case where the parent does not deny abuse and now wishes to help achieve what is in the best interests of the child, an adversarial approach might simply cause deeper familial rifts which may endanger future familial reunification that might be in the best interests of the child in the longer term.

As can be seen from the discussion in the previous paragraphs above, the question of how to strike a correct balance between child-friendly informality and the protective functions of formal, technical procedures is a difficult one.[55] A detailed new system of court procedures may need to be left to future Family Court legislation. For the purposes of the proposed new Children's Legislation in its initial phase (prior to the arrival of Family Court legislation) some specific recommendations concerning urgent matters of procedure and evidence have been made later in this Chapter.[56]

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55 For example, the child who is the subject of care proceedings may need to be questioned in order to discover the truth in regard to an important fact. If the adjudicator allows the questioning to take the form of harsh cross-examination in Court, this may inflict psychological harm on the child. For further discussion see Noel Zaal and Carmel Matthias 'The Child in Need of Alternative Care' in CJ Davel, ed. *Introduction to Child Law in South Africa* (Juta, 2000) 116, at 119.

56 See Part 20.7.4.2, below.

The Commission recommends that:

Better methods need to be developed for the selection and training of court adjudicators who are required to make decisions about future placements of children.[57] Such adjudicators should be required to use formal court procedures in a child-friendly manner that is supportive of family unity where appropriate.

Aside from the need for some degree of procedural flexibility as recommended above, it is further recommended that it is necessary for a new forum structure to be able to discriminate between complex and straightforward cases. In terms of cost-effectiveness, accessibility and a productive, high case turnover, it is recommended that it is necessary to be able to fast-track urgent, simpler and less-contested matters.

On the other hand, there will always be more complex cases or ones in which there is a large array of disputed issues. In order to achieve optimum efficiency on behalf of the public, it appears to be necessary to have a simpler and faster procedure or a different, quicker forum to deal with more straightforward matters and emergency relief applications. Conversely, those involved in more complex matters deserve and require a forum which is capable of providing the time and expertise necessary to produce an appropriate response and resolution.

Unfortunately, the staff of the present children's courts are often culturally or linguistically out of touch with persons who appear in those courts as parties.

It is recommended that the cultural understanding and linguistic skills of staff in a new forum structure designed for making child-placement decisions must be made a training and selection priority.

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57 For further recommendations which flow from this recommendation See Part 20.6.1, below.

23.5 **Lay Forums**

In the 1999 Forum Paper, detailed consideration was given to lay forums as utilised in many other legal systems[58] in order to reach important (and sometimes legally-significant) decisions concerning children.[59] Lay forums may be understood as serving purposes not altogether dissimilar from those of courts, but as avoiding the use of trained judicial officers for reaching a final decision.[60]

23.5.1 **Advantages of Lay Forums**

Avoidance of the use of legally-trained adjudicating officers and, concomitantly, avoiding formal court procedures, have been noted in various countries as bringing a number of basic advantages. In a less formal and adversarial environment, the child often feels less intimidated. This may also be true for other family members and may thus be conducive to more successfully healing problems that have occurred within the family.

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58 For a comparative analysis, see Sanette Nel 'Community courts: Official recognition and criminal jurisdiction - a comparative analysis' (2001) XXXIV **CILSA** 87. See also the Queensland Children's Court Act, 1992; the Law Reform Commission of Canada's **Working Paper 1: The Family Court**, January 1974; the Ireland Law Reform Commission's **Consultation Paper on Family Courts**, March 1994.

59 For further information in regard to the 1999 Forum Paper, see Note 1 and the accompanying text, above.

60 For discussion and comparative materials see generally the 1999 Forum Paper at pp. 3-15 and pp.26-30.

Dispensing with trained judicial officers (and sometimes lawyers) may also bring improvements in accessibility and inexpensiveness of lay forums. With these advantages, the setting up of large numbers of lay forums at community or 'grassroots' level for children and domestic cases may begin to seem worthwhile. The South African Law Commission, in its Discussion Paper entitled *Community Dispute Resolution Structures*, has endorsed community involvement in the resolution of disputes.[61] There is thus support for involving community members in case adjudication.

One of the most successful forms of lay forum in many countries, the family group conference, uses the wider family of the child to compose the forum. Self-help and self-empowerment for dysfunctional or disputing families can thus be put forward as significant advantages of the family group conferencing concept.

23.5.2. **Disadvantages of Lay Forums**

Whilst an investigation of the advantages of lay forums was undertaken in the 1999 Forum Paper, it must also be realised that there are some difficulties and problematic aspects attendant upon their utilisation.

Just as much as informal proceedings may encourage some children to speak freely, case studies have shown that in other situations children may feel completely vulnerable and unprotected from abusing adults in an informal situation.[62] Where the decision reached at a lay forum is to be accorded any kind of legally-binding status, concerns immediately arise in regard to the way in which the decision was reached. Specifically, in the absence of any legally-trained person making the decision, there is always a danger that unsubstantiated, incomplete or one-sided information may have been given undue weight. Fair and objective evaluation of evidence is a vitally important

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61 Discussion Paper 1987, Project 94 (31 October 1999), especially at p.vi and pp.54-55.

62 Lillian Edwards *Green's Concise Scots Law: Family Law* (Edinburgh 1997) at 232.

skill which legal adjudicative training and experience provides.

In the absence of a trained judicial officer, there is always the possibility that the rights of a person or persons involved may have been infringed. Persons who are not legally trained may, for example, confuse between a mere allegation and a fact which is properly proven. Children, being vulnerable and generally less effective than adults in asserting themselves, are especially at risk of having insufficient weight accorded to their wishes in lay forums. As was noted above, these dangers have been recognised in the Scottish system. Although Scottish children's panels have trained adjudicators and 'Child Reporters' involved, they do not attempt to settle disputed facts. These are sent to a court for adjudication and the matter is then returned to the Panel.

23.5.3 **Conclusion**

It is submitted that South Africa, as a nation with limited financial resources, will not be in a position to afford the luxury of moving a matter back and forth between a court and a lay forum in the manner used in Scotland to settle any serious factual dispute that might arise. Multi-culturalism and high levels of corruption and violence endemic in many South African communities at the present time also count against the viability of setting up a network of lay forums throughout the country.

A major additional problem would be the expense of setting up, monitoring and maintaining a whole new network of lay fora. It is submitted that the undeniable value of informal procedures for certain cases can be incorporated in a less expensive manner than setting up an entire separate network of lay-resolution bodies and supporting structures intended to assist children and dysfunctional families. A recommendation designed to allow for a less expensive method for incorporating the advantages of informally-reached decision-making is therefore suggested below at Part 20.6.3 of this Chapter.

23.6. **Child and Family Courts**

The Project Committee recommends as follows:

The primary legal decision-making forum structure for children who appear to be in need of alternative care or placement should be a 'Child and Family Court' network which will

provide adjudicators in every magisterial district, down to the present District Court level. These adjudicators should not merely hand down legal decisions; they should also be capable of engaging constructively during the court-hearing process with traumatised children and other members of dysfunctional families. The title of 'Child and Family Court' is recommended for two reasons. Firstly, it gives recognition to the fact that a family environment is ideal for children and thus needs to be kept in mind at all hearings of the Court. Secondly, the proposed new name (in place of the present, 'children's courts') signals a new departure in the form of a new kind of court with much wider powers and better resources on behalf of children who require legally-binding parental care or alternative care decisions.

23.6.1 Capabilities for Decision-Makers in the Child and Family Courts

As compared with the present children's courts in South Africa, and effective court for child care and protection decision-making will require enhanced capabilities. One aspect which will require attention he is support staff. In this regard, a specific recommendation which can be made at this point is as follows:

Efforts must be made to ensure that the proposed Child and Family Courts can draw upon the services of sign language interpreters who have had proper training in court procedure in legal language.

An effective court for dealing with children and domestic matters in South Africa requires what may loosely be described as four fundamental capabilities. Firstly, it is clear that its functioning and adjudication are dependent upon a good degree of appropriate legal expertise. An adjudicating officer in this court will require a law degree and must be sufficiently legally-trained in the sense that she/he has a sound knowledge of family and child law, constitutional rights and court procedures.

The Commission therefore recommends that:

A legally-trained and sufficiently experienced judicial officer who has a law degree is an essential element for protecting the rights of those who appear before the Child and Family

Court and for making fair and legally-valid decisions.

However, when it comes to domestic matters and other matters significantly affecting children, mere legal training and experience is not sufficient. A second area of capability is required which draws on a range of 'extra-legal' skills and knowledge traditionally associated with certain other disciplines besides Law. It must and recognised that Child and Family Court adjudicators require more than just a knowledge of legal rules -'black-letter law'- if they are to work really effectively in cases of relationship-dysfunction.

The Commission recommends that:

Persons who are appointed to serve permanently as Child and Family Court adjudicators must, as a result of prior experience and/or training, have some basic understanding of child development, familial relationships and psychology. Such adjudicators must also have a basic understanding of local cultural practices that affect child-rearing. Such and adjudicators must also have a basic knowledge and appreciation of our current welfare resources (such as different residential care environments) and what can be achieved by mediation, family group conferences, play therapy, family therapy and social work techniques generally.

Aside from the legal expertise traditionally required of judicial officers and the other-discipline expertise alluded to the in the previous paragraph above, there are yet further capabilities which decision-making officers of a Child and Family Court will require if they are to have a significant impact in the face of our child- and family-related social problems.

The Commission recommends as follows:

Persons selected for permanent positions as adjudicating officers in the proposed Child and Family Courts must have a personality and motivation which are appropriate for dealing with dysfunctional families and, particularly, children who may be traumatised.

Judicial officers who are only capable of working in a formal and adversarial manner are not appropriate for a genuinely effective Child and Family court. Their inter-personal capabilities should

e such as to enable them to interact effectively and constructively with children and dysfunctional family members.

It is also recommended by the Commission that:

The Child and Family Courts must be designed in such a way that they have the ability to communicate meaningfully with those who appear before them and, in particular, with any child who wishes to express views and who will be significantly affected by the decision to be reached in these Courts.[63]

Many children who presently appear before South African Courts are confused, intimidated and alienated by what becomes, for them, a strange, meaningless process.[64]

A significant problem in South Africa is that, in many situations where children appear as parties, the language which the judicial officer uses differs from the language with which the child is most familiar. In a situation where adjudicating officers of a Court can neither speak directly to a child nor understand, at first-hand, what she or he is saying, it can hardly be said that the child has genuinely been given a right to be heard as is mandated by Article 12 of the 1989 UN Convention On the Rights of the Child. Article 12 of the Convention provides the child with a right to express views freely and to have due weight given to those views.[65] In the absence of direct communication between the child and court, this right is necessarily diminished. The use of a court interpreter inevitably introduces an artificial constraint in communication and to some extent blurs meaning so that the child will never be fully certain about the weight accorded to her or his views.[66]

Whatever may be the considerations which affect adult parties, it would seem important, if we are to advance a genuine children's rights culture, that we strive to produce courts which can

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63 More specific follow-up recommendations are provided in Part 20.6. 2, below.

64 See generally Karen Muller & Mark Tait 'Little Witnesses: A Suggestion for Improving the Lot of Children in Court' 1999 THRHR 241.

65 South Africa became a signatory to the 1989 Convention on 16 June 1995. See also article 4(2) of the 1990 African Charter on the Rights and Welfare of the Child.

66 For further discussion and comments by children's court commissioners KGT Kutshwa, BM Mchunu and MP Mtshali, see FN Zaal 'Children's courts: An underrated resource in a new Constitutional era' in R Robinson, ed. *Law of Children and Young Persons in South Africa* (Butterworths 1997) 925 at 112.

communicate directly, supportively and meaningfully with the majority of children who appear before them. Where this is not achieved, it can be hardly be said that a court is treating a child-party's best interests as "paramount" as required by S28(2) of our Constitution.

It is recommended by the Commission that:

Where a child is a party to a matter in the Child and Family Court or is likely to be significantly affected by the decision of the Court, the child's wishes in regard to direct communication must be considered. If the child is able and wishes to communicate directly with the adjudicating officer during the hearing in one of the official languages of South Africa, direct communication with the court must be arranged unless the urgency of the matter precludes this. In such a situation of direct communication, at least one of the adjudicating officers, or someone sitting as an assessor with such adjudicator, must be able to communicate directly with the child in the official language requested by the child.

It is submitted that where children seek direct communication with an adjudicating officer and this is denied without good cause, the procedure of the forum is flawed, and may fall short of promoting a children's rights culture which treats the best interests of the child as paramount.

23.6.2 **How Are the Capabilities To Be Achieved?**

The capabilities referred to above appear to be essential ones for a genuinely-effective Child and Family Court which interacts meaningfully with members of the community, produces decisions and reasoni and and ng which parties can understand, and provides the best possible and most correct outcomes.

How, then, is the broad range of skills and capabilities required to be concentrated and embodied each time that the Child and Family Court sits?

20.6.2.1 **Longer-term Solution**

In the longer term, there are significant implications for training of adjudicating officers. As has already been suggested, correct and supportive decision-making in regard to traumatised children

in particular and dysfunctional families in general are not sufficiently facilitated by a merely legal training. As has also been suggested, a genuinely effective Child and Family Court requires staff with an inter-disciplinary range of skills and/or experience. Present methods of University study which tend to confine students mainly within, for example, either Social Work or Legal Training, need to be altered to permit students to obtain qualifications of a more inter-disciplinary nature. A mix between appropriately selected Law, Police Science, Social Work, Psychology and Criminology courses, for example, could produce graduates who, after appropriate experience, could serve as adjudicators who have the requisite range of capabilities. University students with career interests in children and families should also be encouraged to study practical courses in least three official languages.

23.6.2.2 **Short-term Solutions**

The Commission recommends as follows:

With regard to the capabilities needed so that an adjudicator in the Child and Family Court can deal with a particular case, where it is not possible to combine the requisite range of expertise within a single individual, the proposed new children's legislation must make it possible for up to three persons to adjudicate in Court as a panel.

The first member of the panel (and chair) would be a legally-trained judicial officer. The second could be a person qualified in social work or another relevant discipline and the third (added if necessary) would be a person fluent in the official language of preference of a child-party who expressed a wish to communicate with the court in that language. This third person could be a professional or could add a lay element (with its attendant advantages as discussed earlier under lay forums) to the Court and would ensure that direct communication with the child (and\or other party) was possible. Of course, if either the judicial officer or the second professional adjudicator could speak the parties' language of preference and had sufficient community empathy, then a third panel member would usually not be necessary. They should be some flexibility with the possibility, for example, of including two judicial officers and perhaps a third person according to the range of skills required for a particular case.

The simple answer, then, to providing the range of expertise essential to create a genuinely-

effective Child and Family Court would be to create a capability for employment of more than one individual as a decision-maker if and where necessary and feasible.

An alternative or additional solution for the short-term would be to provide short, concentrated courses of training for adjudicators that are designed to complement the skills and knowledge which they already have. For example, a prospective adjudicator could be required to spend a set number of hours observing certain courts (where she/he had not had experience) in session. The prospective adjudicator could also be required to do a course of study on child development, child abuse and non-adversarial dispute-resolution methods. Appropriate institutions such as Universities or the Justice Training College should be contacted with a view to offering courses for local candidates. Courses in indigenous languages and culture should also be provided for Child and Family Court staff at all levels.

The Commission therefore recommends that:

The Department of Justice must arrange for appropriate courses of study and periods of observation at court proceedings being conducted by experienced adjudicators as part of the training requirements for all staff of the Child and Family Courts. Whilst the child's (and other parties') right to confidentiality must be respected, this must be balanced against the provision of sufficient access to the Child and Family Courts for bona fide trainees (including private practitioners and students from appropriate disciplines) and for bona fide researchers.[67]

23.6.3 **Incorporating a Lay Element**

67 Note that some further recommendations concerning the eligibility and training of adjudicators are put forward in Part 20.8.1 of this Chapter, below.

It is submitted that the lay component of the proposed new Child and Family Court should be incorporated in two ways. Firstly, as has already been recommended above, the proposed new children's legislation should make it possible for a person to be placed on the adjudicating panel of the Child and Family Court purely in order to provide someone who can speak directly to and empathise culturally or community-wise with the child and/or other party. Such a person can be selected for appropriate experience in working with children and/or families and also to provide an element of community representation that will help to link the Court with those who appear before it. There is nothing strikingly new about this proposal. As early as 1937, it was proposed that assessors should sit with legally-trained judicial officers to deal with child care cases in South Africa.[68] In article 21 of the Family Court Bill 62 of 1985 it was again proposed that up to two persons could sit with a family magistrate hearing a civil or criminal matter in the proposed Family Courts.

Secondly, aside from the presence of adjudicators with extra-legal skills or experience, there is another way in which the advantages of informal decision-making ought to be incorporated. A recommendations and supporting comments are provided in the next section of this Chapter, below.

20.6.3.1. **Instigating a Lay Forum**

The Commission recommends that:

The new Child and Family Court should have included amongst its capabilities the power to instigate extra-curial problem-solving or solution-seeking methods such as either mediation or a family group conference.

Family group conferences, in particular, have been found in several jurisdictions to be an extremely successful method for resolving certain types of child care and other familial cases.[69]

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68 For further discussion of the historical situation, see F N Zaal 'Language, Culture and the Detritus of Apartheid: Understanding and Overcoming Secondary, Systemic Abuse in South African Child Care Proceedings' in John Eekelaar & Thandabantu Nhlapo, eds. *The Changing Family: International Perspectives on the Family and Family Law* (1998). 341, at 342.

69 See, for example, the 1999 Forums Paper at pp.12-16 for some comparative materials. See also Part 20.5.1 of this Chapter, above.

It is further recommended by the Commission that:

Within available financial resources, the Child and Family Court should have a discretion to choose the most appropriate form of extra-curial remedy available. For example, if it appears to a Child and Family Court that a tribal authority or other community organisation is well placed to assist with resolving or monitoring a case, or can assist in any other way, the Court should have the power (and budget) to make an appropriate order. The Child and Family Court should therefore be able to require traditional leaders to attempt to mediate\monitor certain familial disputes where this appears to be appropriate.

Relevant factors would be what resources are available in a particular community and whether the family regards itself as falling under a particular tribal authority.

In line with the previous two proposals, the Commission thus recommends that:

The proposed new Child and Family Court should be able to make use of lay forums where these appear appropriate. Where the Court instigates such a Forum, the results must be reported back to the Court.

It is submitted that the recommendations above would allow for selective and occasional use of lay forums on behalf of children in appropriate cases without South Africa being committed to the expense and the difficulties of setting up and maintaining an entirely separate network of lay forums and supporting structures. It is thus submitted that the recommendations above allow for cost-effective use of the advantages of informal decision-making in the familial sphere.

The Commission further recommends that:

The proposed new children's legislation should be framed in such a way as to require Child and Family Courts to consider available financial resources before deciding to employ extra-curial solutions. Also, such solutions should only be instigated where these appear to be the most appropriate way of dealing with a significant problem or reaching a decision on behalf of a child who is in need of a placement solution.

Thus, lay forums should be used in a practicable and cost-effective manner with the financial implications and possible gains for the child being taken into account. With the Child and Family Court instigating the process and being reported to, the Court will be in a position to give legal validity to appropriate decisions reached by the lay forum or to hold proceedings of its own where no decision is reached or anyone wishes to appeal to the Court in regard to the lay forum decision.

It is recommended by the Commission that:

Both the proposed first and second levels of the Child and Family Court should have the power to instigate lay forums.[70] Whilst the Court should have the power to instigate extra-curial problem-solving mechanisms in appropriate cases, adjudicators of the Court should not themselves purport to sit or operate as a lay forum.

As has already been suggested above, instigation of lay forums should be done selectively and within the limits of a fixed court budget. Using the Child and Family Protector in certain cases should reduce costs.[71] Practice should be allowed to develop naturally with regard to the types of case\criteria that indicate instigation of a lay forum. A social worker's or Child and Family Protector's report could be required as motivation by a court contemplating instigating a lay forum. Both levels of the Child and Family Court will need to have the ability to instigate lay forum strategies such as family group conferences where these appear to have potential for promoting the best possible outcome in a case. The Court should not sit/operate as a lay forum itself.

In terms of who should provide family group conferencing and mediation services, family advocates may, in the course of their work, help to reduce intra-familial\domestic tensions or hostility, since they have been trained in mediation. However, if they become directly involved in intensive mediation\lay forum activities, they may come under procedural attack for not being in an independent position if they or a colleague later have to represent a child from the same family in court. It is for this reason that the Child and Family Protector is proposed for a primary role in

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70 For recommendations concerning the proposed first and second levels of the Child and Family Court, see Part 20.7.1 below.

71 For comments and recommendations regarding the use of the Child and Family Protector in this role, see Part 20.8.3 below.

certain less-formal, extra-curial techniques.[72]

23.7 **Levels and Jurisdiction of the Child and Family Court**

23.7.1 **Multiple Courts Versus An Integrated Approach**

72 See Part 20.8.3 below.

The South African Family Court Bill of 1985 envisaged family courts as operating at the level and with the status of regional magistrates' courts. The South African Family Court Pilot Project begun in 1997 currently utilises a hybrid approach whereby both magistrates' and divorce courts operate alongside one another.[73]

The Commission recommends that:

From the point of view of children who require alternative care and parental responsibility decisions, it is necessary to work towards the establishment of a court system capable of providing, a holistic resolution of a broad range of child and related familial problems, rather than continuing with what has been identified as a major weakness of the current system, namely, parties moving back and forth between different, narrow-jurisdiction forums.

In order to provide the most efficient and cost-effective service for children who require alternative care and and parental responsibility decisions, it is recommended that it is necessary to have a Child and Family Court which can function at two different levels.

With regard to the types of case to be allocated to the proposed two different levels of the Child and Family Court, it is recommended that it is necessary to allocate cases according to their complexity or the length of time that they appear to require.

It is worth noting that there are simpler child care or parental responsibility matters which do not need a considerable amount of court time. For example, in some child-placement cases there is only one very obvious and appropriate placement for the child. An example of such a case would be where the child's parents have been killed in a motor accident and there is a relative with excellent parental skills who is the only available applicant to take over parental responsibility for the child. On the other hand, there are difficult matters which may reveal themselves by such possible indicators as more than two parties in contention, appointment of legal representatives and\or complex evidence or ethical issues arising out of factors such as artificial conception of a child and\or surrogate motherhood.

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73 Professor Cheryl Loots 'Family Court Pilot Project' p.2 (Department of Justice: 6 November 1997). See generally also Department of Justice *Family Court Action Plan* (ND -issued on 16 February, 2000).

The Commission therefore recommends as follows:

With regard to the two levels of the proposed Child and Family Court, it is recommended that the first component should be designed for a higher case turnover of simpler and shorter matters. Its adjudicator or adjudicating panel should still where necessary be able to provide the range of interdisciplinary expertise and communication-ability already recommended above, but could be less experienced officers than those who should sit in level two. It is recommended that the officers in the second level should deal with matters that require more time or are complex. These officers will thus need to be more experienced and/or more extensively trained than those who staff level one.

It needs to be stressed that, in terms of a vision for a new and genuinely effective Child and Family Court, adjudicating officers in both level one and level two must be able (where appropriate) to take a holistic approach and deal with all aspects of a case that bear directly upon the care needs of the child. This may require more than one court appearance, with remands needed for investigation or preparation relevant to additional aspects (such as the rights of other parties) which the court decides, *mero motu* (of its own accord), require resolution. In order to save on time and expense, the same adjudicator should, where possible, attend at subsequent hearings. This would be in accordance with the "One Judge One Family" approach as used in Hawaii.

The Commission recommends that:

Should it appear that a case is not appropriate for the proposed level one of the Child and Family care Court, then procedural machinery must be built into the new child care legislation to allow for a quick and easy transfer to level two of the Court. Level two should also serve as an appeal or review facility from level one, and the High Court should serve as an appeal or review facility from level two, particularly in view of the support for this role which was expressed at the workshops held by the Project Committee.[74]

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74 On the role of the High Court see further Part 20.9 of this Chapter, below.

23.7.2 **A Reception Component**

Criteria for dividing cases between different court tiers have been proposed above in Part 20.7.1 of this Chapter.

The Commission recommends that:

A necessary component of a genuinely effective Child and Family Court is a reception and screening officer to make decisions about which level of the Court a case should be referred to and also about whether additional investigation, additional adjudicators and/or a lay forum should be a necessary prerequisite to further resolution of the case. The reception officer could be named a Child and Family Protector.

An introduction of this Officer is recommended as important since the current children's courts have been severely hampered in their functioning since the withdrawal of children's court assistants. It is submitted that the current description/terminology of, 'children's court assistant,' does not accord sufficient recognition of work importance. Hence, a designation of 'Child and Family Court Assistant' is not recommended.

As per the Law Commission's Child Care Issue Paper responses, it is recommended by the Commission that:

Children should be granted a legal right to be placed back before the court where they wish to raise an objection about some aspect of their placement.[75] The Child and Family Protector, as a staff member attached to the Court, should be required to arrange this procedurally on behalf of any child who needs to reappear.[76]

If provided for a new child care legislation, the Child and Family Protectors would be able to carry out an important function in deciding whether matters should be referred to a Level One or Level

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75 See Part 20.2.1, above.

76 Further on the Child and Family Protector see Part 20.8.3 of this Chapter, below.

Two Court. This should be done before evidence is led in order to avoid unnecessary expenses and delays.

23.7.3 **Case Jurisdiction**

In terms of the actual range of cases which should be dealt with by the proposed Child and Family Court, it is important to keep in mind that it has been proposed that the Court ought to be able to draw upon a broad range of legal, relevant extra-legal and communication skills which will render it capable of performing valuable services. Given this, it is necessary, from a cost-effective point of view, to get as much use from the Court as possible. It would therefore seem most appropriate to give the Court a wider jurisdiction and the present children's courts as regards the remedies which it can offer on behalf of children.

Aside from cost-effectiveness, there is also the point that, if one goes forward on the basis of a broader approach to child and familial problem- and dispute-solving (as has been discussed earlier in this Chapter as an important basic principle), then a wider category of dispute-jurisdiction is also indicated.

It is therefore recommended by the Commission that:

The Child and Family Court should take over the current case jurisdiction of the present children's courts. The Child and Family Court should replace these courts. It should also be able to provide the additional care and protection orders recommended later in this Chapter, below. It should have jurisdiction to allocate parental responsibilities and deal with parental disputes about children except where these arise as part of divorce litigation in a case where the divorce has not yet been finalised.[77]

It is submitted by the Commission that the Child and Family Courts should not serve as criminal courts for the purpose of trying children who have been charged with criminal offences. However, it

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77 Where parental responsibilities fall to be allocated between divorcing parents at divorce, this should at present continue to be dealt with by the divorce courts and the High Court. In the light of the possibility of Family Court legislation being prepared in the future, the Child Care Project Committee does not believe that it ought to offer recommendations at this stage which might interfere unduly in the jurisdiction of the courts which currently handle divorces.

should be noted that a juvenile criminal case may be converted to a Child and Family Court enquiry through diversion to the latter Court.

It is recommended by the Commission that:

If a matter is heard in a Sexual Offences Court, that Court should have the power to make any Care Order that a Child and Family Court could make if the child is in need of alternative care. Thus, the matter should not necessarily have to be referred to a Child and Family Court for an order relating to the protection of the child.

The aim behind the above recommendation is to reduce the problem of children who are victims of sexual abuse having to appear in or be assessed for more than one Court. The aim is therefore to reduce secondary systemic abuse currently imposed by our multiple-court system.

It is recommended by the Commission that:

Where, in the course of conducting an alternative care or parental responsibilities inquiry, a Child and Family Court adjudicator or adjudicating panel reach the conclusion that a domestic violence protection order or a maintenance order are needed, it should be made possible for the Court to issue such orders.

Although a lay forums and extra-curial decision-making have already been dealt with earlier in this Chapter, for the sake of completeness it should be mentioned again here that it has been recommended that adjudicating officers in the Child and family care Court require a power to instigate lay settlement techniques such as mediation or family group conferences if they conclude that such are appropriate.[78] But these lay techniques should be implemented outside the Court and the outcome reported back to the Court.

It should be noted that some further aspects relevant to the case jurisdiction of the Child and Family

78 See further Part 20.6.3 of this Chapter, above.

Courts are discussed in Parts 20.7.5, 20.9 and 20.10 below.

23.7.4 **Procedures of the Child and Family Court**

23.7.4.1 **The Procedural System**

It is recommended by the Commission that:

Pending the promulgation of new procedures in future Family Court legislation and subject to some specific procedural proposals in the proposed children's legislation which are discussed below, currently existing court procedures should be used by the Child and Family Court. These should as far as possible be those which presently govern the Children's Courts, but with additional modifications as appropriate to new types of work.

The present Children's Court procedures are primarily governed by sections 8 and 9 of the Child Care Act 74/1983. A key provision is S9(1)(iv) of the Child Care Act which indicates that 'the conduct of proceedings' is to be in accordance with the provisions of the Magistrates' Courts Act 32/1944. However, this and the other procedural provisions in S9 of the Child Care Act are currently subject to an introductory limiting clause in that section. This introductory clause requires the provisions of the Magistrates' Courts Act to apply 'Save as is otherwise provided in this Act or in any other law'. A second important limitation to be found in the introductory part of S9 of the Child Care Act is that the provisions of the Magistrates' Courts Act are only to apply to Children's Courts '*mutatis mutandis'* -in other words, with 'the necessary changes being made' according to essential differences in the nature of Children's Courts work.

As has been discussed in the previous paragraph, the procedural system for the Children's Courts has involved using the procedural rules in the Magistrates' Courts Act as a foundation. This foundation is subject to any specific changes necessitated by the wording of the Child Care Act. Secondly, adjudicators in the Children's Courts have a discretion to use additional procedural modifications, '*mutatis mutandis,*' where these are necessary because of differences in the nature of their work as compared with work in the ordinary Magistrates' Courts. This combination of rules appears to have worked reasonably well.

It is therefore recommended by the Commission that:

The current procedural rules governing the children's courts be utilised for the proposed Child and Family Courts, subject to some specific, urgently needed procedural provisions recommended for the new children's legislation in the next Part of this Chapter, below.

The drafters of the South African Family Court Bill 62/1985 decided to create a special power that would allow the Minister of Justice to make procedural rules for the Family Courts that were proposed in the Bill. In article 37(1) of the Bill, they proposed a power for the Minister, after consultation with the chief family magistrates envisaged under the Bill, to make rules regulating the proceedings of Family Courts. A question to be considered is whether a similar provision is needed for the purposes of the proposed children's legislation. If the Minister were accorded a power to make or amend rules of procedure applicable to the Child and Family Courts, this would add flexibility to the existing Children's Courts procedural scheme as summarised in the previous paragraph, above. It has been proposed earlier in this Chapter that, as compared with the existing children's courts, a wider range of additional duties should be taken on by the proposed Child and Family Courts that would replace the Children's Courts.

In view of the greater range of categories of work proposed, it is recommended by the Commission that:

It is necessary to include a provision in the proposed new children's legislation that would allow the Minister of Justice to make additional or amend existing rules of procedure in the Child and Family Courts.

The power recommended above might also be useful in allowing the Minister to phase in certain types of work so that the Child and Family Courts could, if necessary, increase their range of work by stages.

23.7.4.2 Specific Recommendations

It is important to appear in mind that a Department of Justice Family Court Project Committee (as referred to above) is drafting new Family Court legislation which will ultimately cover court procedures. Pending the drafting of such legislation, it has been recommended in the previous

section of this Chapter above that the procedures currently governing the children's courts should in the meantime continue to be applicable to the proposed Child and Family Courts. As exceptions to this approach, certain urgently needed procedural reforms have been proposed in this Part of the Chapter.

The specific procedural recommendations offered below should be provided for by means of specific rules in the proposed new children's legislation.

It is recommended by the Commission that:

The basic mode of functioning in the Child and Family Court be inquisitorial, as opposed to accusatorial. Given the need for an inquisitorial role for the presiding officer, she/he must also have the power to call witnesses, or direct that there be further investigation or other investigation where she/he feels that this is necessary for a proper resolution of the case.

It is further recommended that it be expressly stated, as part of the procedures of the Child and Family Court, that a child-party has the right to be present and to participate at a court hearing (or to convey her views in chambers to the Adjudicating Officer), if she so wishes and is able. Amongst the procedural provisions included in the proposed new children's legislation should be one which compels the presiding officer to ensure that the view of any child-party is heard if the child wishes to express a view. This must be facilitated and due weight given to the views and wishes of the child.

It will be remembered that it was recommended in Part 20.4 of this Chapter that Child and Family Court adjudicators need to be able to direct proceedings in a way which is child-friendly and which promotes family unity where appropriate. At the same time, they need to be able to enforce procedural formalities to the extent that these are appropriately protective of persons involved. They need to have sufficient experience, authority and discretion to enable them to avoid and prevent an overly technical use of procedures and formalities where such an approach would be inappropriately damaging to the best interests of a child or other vulnerable person. The use (also recommended above) of decision-makers with additional expertise or training in relevant non-legal disciplines would, it is submitted, help to produce a child- friendly environment in the Child and Family Court where this is procedurally appropriate.

It is recommended by the Commission that:

A provision should be included in the proposed new children's legislation that requires Child Family Court adjudicators to direct court proceedings in a way which is child-friendly and which promotes family unity where appropriate.

It is also recommended by the Commission that:

A provision should be included in the proposed new children's legislation which indicates that whilst a child should have the right to remain present throughout the proceedings if she or he is a party, the Court must have the power to allow a child to leave the proceedings or be questioned through an intermediary system where the Court decides that this is in the best interests of the child (child-party or witness).

It is submitted that the greater range of skills at the disposal of the proposed Child and Family Court (by comparison with existing courts) will place it in a better position to assess when or if a child needs to be present in Court.

It is recommended by the Commission that:

In line with international trends in favour of less formal and technical proceedings in child and family matters, the presiding officer should have a discretion to accept hearsay evidence and relax other rules of evidence if she/he deems that this is appropriate. The Court must be permitted to take into account hearsay evidence, provided that this is in the best interests of justice or the child or other party.

It is further recommended by the Commission that:

The proposed new children's legislation should include a provision to the effect that the Child and Family Court must ensure that any child who appears before it is not subjected to any interrogation and verbal or non-verbal intimidation which, given the age, personality and psychological state of the child, she or he is not able to sustain without the likelihood of

serious harm.

The above recommendation, if implemented, would require a judgement-call by the Court, aided by any assessor and/or representative of the child.[79] Children or other vulnerable persons ought not to be subjected to unnecessarily harsh cross-examination which is aimed primarily at confusing or intimidating them, as opposed to seeking legitimately to establish the truth in an appropriate manner.

It is recommended by the Commission that:

A provision should be included in the proposed new children's legislation which indicates that presiding officers in the Child and Family Courts have the power and discretion to halt cross-examination of a person appearing at an inquiry when it goes beyond the bounds of what is appropriate.

The above recommendation, if implemented, will require that presiding officers have the necessary skills to make the decision required. The reason for including such a provision is that instances of very destructive cross-examination [secondary, systemic abuse] of abused children have been reported as occurring during court hearings.

It is recommended by the Commission that:

The proposed new children's legislation should include a provision to the effect that the presiding officer in a Child and Family Court has a power to consult in chambers with a child who may be significantly affected by an order of the Court. This power should only be exercised if it is found to be necessary in order to achieve a proper resolution of a case. When the power is exercised, the presiding officer should be required to record his/her reasons for deciding to meet with the child in chambers in writing on the Court record.

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79 See also Part 20.11 of this Chapter, below.

An example of when the above proposed power might be needed is in a situation where it appears to the presiding officer that a child has been or may be too intimidated to speak about an important aspect during a court session. Alternatively, in another case it may be inappropriate for a child to be expected to choose between two opposing caregivers in open court. Where it is essential in the best interests of a child, the presiding officer should therefore be accorded the right to consult with a child-party or child-witness in private before or during a matter. As indicated in the recommendation above, the officer must record his/her reasons for so doing as part of the court record.

It is further recommended by the Commission that:

Where a presiding officer in the Child and Family Court decides that it is necessary to consult with a child in chambers (in accordance with the previous recommendation above) the officer should have an unfettered discretion to decide whether any other person should be present during the consultation.

The Court may, on occasion, need the power to remove a person from its proceedings - either temporarily or permanently. An example would be a situation where a child is suffering trauma at the proceedings. An abusive parent might be continuing with abuse during the proceedings – verbal or body-language abuse. Or a legal representative might be using inappropriately adversarial methods after being requested not to.

The Commission therefore recommends that:

The proposed new children's legislation should include a provision to the following effect: any person may be ordered to leave the proceedings where a presiding officer of the Child and Family Court decides that this is in the best interests of any child who may be significantly affected by a decision to be reached by the Court, Where a court uses this power, it must justify having done so by putting down reasons in writing.

It is further recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect

that the Child and Family Court is required to conduct its proceedings *in camera*. However, the legislation should indicate that an exception to this is that limited numbers of persons other than the parties before the Court should have the right to request permission from the presiding officer to attend proceedings of the court for purposes of training or *bona fide* research - this should override the confidentiality aspect. It is recommended that written permission must be obtained from the Court where any person wishes to publish\reveal the name\identity of any party\witness to proceedings in the Court. This latter requirement should apply where the publishing\revealing is to go beyond what is necessary in conducting a case or working on\investigating the case by involved professionals working in the best interests of a child or other party.

23.7.4.3 **Prompt Services**

It is submitted that the emphasis in the Child and Family Court must be on prompt services.[80] The Commission is of the view that there should also be a general presumption written in at the beginning of the proposed new children's legislation that delays are presumed to be against the best interests of children. Legal representatives must not be permitted to delay proceedings based on reasons that have nothing to do with the merits of the case.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that officers of the Child and Family Court must in all situations endeavour to provide prompt services for children and other applicants. The legislation should also contain a clause which is worded to provide a general presumption that delays will be prejudicial to children involved or affected by the services of the Court. A further provision should indicate that, in particular, the Court should not allow itself to be unduly delayed by awaiting other Court decisions, and should have the power to prevent legal representatives or other

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80 See also Ziyad Motala 'Judicial accountability and court performance standards: Managing court delay' (2001) 34.2 **CILSA** 172.

persons from unduly drawing out proceedings or postponing them without very good reason.

In accordance with the Commission's Issue Paper responses as provided by practitioners, it is not recommended that the proposed children's legislation should contain numerous specific time deadlines. However, as recommended by respondents, it is recommended by the Commission that:

The current section 14(3) of the Child Care Act 74\1983, which allows for court remands of only up to 14 days once a care inquiry has begun should appear in the new children's statute specifically for such cases.

As proposed by respondents to the Commission's Issue Paper, it is recommended that:

In any case where the Child Family Court has jurisdiction, it should be accorded the capability to provide urgent interim orders. Where appropriate, these should be provided even in the absence of the other party.

It is submitted that the above capability would assist in the provision of prompt services where these are needed.

23.7.5 **Court Levels**

As has already been mentioned above, the Committee recommends that:

The Child and Family Court should consist of two levels. Firstly, there should be a level one operating at district magisterial level and, secondly, a level two operating at regional magisterial level.

The above recommendation is made in view of the importance of enhancing accessibility and affordability for the majority of our population. Personnel who staff both levels of the Court should undergo specialised training and should then be accorded a status different from that of staff who are only trained to serve in the ordinary magistrates' courts.

It is further recommended by the Commission that:

Both the proposed Level One Child and Family Courts and the proposed Level Two Child and Family Courts should have a court assistant named a 'Child and Family Court Protector'. The Protectors will carry out important functions, inter alia, in deciding whether matters should be referred to a Level One or Level Two Court. This should be done before evidence is led in order to avoid unnecessary expenses and delays.[81]

As has already been suggested, it is recommended by the Commission that:

When hearing cases, presiding officers at Level One and Level Two Child and Family Courts should have a discretion to appoint up to two additional adjudicators.[82]

It is recommended by the Commission that:

Level Two of the Court should be required to deal with more complex matters. It thus requires presiding officers with greater experience and expertise. In order to assist with the problem of accessibility, Level Two Courts should be able to exercise jurisdiction over matters that can be dealt with in a Level One Court.

For reasons of accessibility, it is recommended that all emergency orders and urgent interdicts in all matters that can be dealt with by a Child and Family Court should be available from a Level One Court.

The Level Two Court should deal with more complex and time-consuming cases. Factors that ought to be taken into account in considering whether matters should go to a Level One or Level Two Court are with of the cases contested or whether there is an international

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81 See further Parts 20.7.2 and 20.8.3 of this Chapter.

82 For further discussion see Part 20.6.2 of this Chapter, above.

dimension. It is recommended that the proposed children's legislation should contain an express provision to the effect that international adoption cases should be dealt with by Level Two Courts.

A matter in regard to which the Committee seeks further comment and would appreciate guidance is whether artificial procreation cases should be dealt with in the High Court. The Committee is of the view that cases involving surrogate motherhood contracts should preferably be dealt with in the High Court, but it would welcome responses in regard to whether such cases, or other categories which may be suggested, should be excluded from the jurisdiction of the proposed Child and Family Courts.

With regard to allocation of cases between the proposed kept level One and kept level kept two kept courts, the Commission further recommended as follows:

Parental agreements should be registered or interpreted in a Level One Court, but if disputed, should be dealt with in a Level Two Court. The Committee recommends that an unmarried father should be eligible to apply to a Level One Court to obtain some/all parental responsibilities, but if the allocation of such responsibilities is disputed by any person, he will have to apply to a Level Two Court. Proof that paternity of a child is unknown may be provided in a Level One Court, but disputed paternity matters would have to be heard in a Level Two Court. If a Court directs that a family group conference should be held in a case of child abuse, it must provide reasons why it has so directed, since this will often not be an appropriate step.[83]

The Committee would welcome further responses regarding alternative care or parental responsibility cases with an international dimension. It could be argued that, because of the problems of accessibility and expense, even matters with an international dimension should ordinarily fall within the jurisdiction of a Level Two Child and Family Court. At the present time, the children's courts, with their relatively poor resources, are expected to deal with international adoption cases. On the other hand, it could be argued against this that the greater resources available at the level of the High Court indicate that it might be better to have only the High Court

83 On scope of work see also Part 20.10 of this Chapter, below.

deal with alternative care or parental responsibility cases with an international dimension. At the present time, the High Court deals with international parental abductions and the Committee would welcome responses specifically in regard to whether the High Court should continue to do so as a Court of first instance.[84]

23.7.6 **Accessibility of the Child and Family Courts**

The parties who would tend to appear before the proposed Child and Family Courts will most probably usually be children and parents (or other primary caregivers). However, child protection, alternative care or parental responsibilities cases may sometimes involve other persons, such as members of an extended family, siblings, cohabitees or neighbours.

It is recommended by the Commission that:

The proposed children's legislation should contain provisions designed to discourage the proposed Child and Family Courts from adopting a technically-restrictive procedural approach in order to deny someone who has a substantial interest in the proceedings from presenting his or her case and, where appropriate, from being regarded as a party.

Cases may occur where, for example, two or more sets of persons wish to apply to become adoptive parents of one particular child. As regards such applicants, a 'first-come, first-served,' approach may not be in the best interests of the child concerned, nor may it be fair to all concerned.

It is further recommended by the Commission that:

A provision needs to be enacted in the proposed new children's legislation which is to the effect that any person who wishes to assert the right to be a party in a case pending or currently underway in the Child and Family Court should be permitted to appear and/or place

84 On the role of the High Courts, see further Part 20.9 of this Chapter, below.

documentation before the Child and Family Protector of the Court in order to try to make out a case that she or he has an interest in the proceedings sufficiently substantial that she should receive the status of being a party. Should the person establish a *prima facie* case, the Child and Family Protector should immediately refer the matter to the Court for a decision which might involve a special hearing. Nor should cases involving children be finalised until a reasonable opportunity has been provided for hearing any known and available person who, in the view of the Court, has a substantial interest in the case or appears to have a substantial contribution to make that may be relevant to the proceedings .

The Commission recommends that:

With accessibility to the Courts being a major failing at the moment, any *bona fide* person be permitted to bring a case or potential case to the notice of the Court assistant named the Child and Family Protector. It is recommended that the Protector should be legislatively accorded the power, if necessary, instigate an investigation by a social worker, other professional or via the auspices of the nearest office of the Child and Family Advocate.

A wide range of persons including, for example, neighbours or social workers, should be encouraged to bring cases or possible cases to the attention of the Child and Family Court Protector.

The Commission recommends that:

The Child and Family Protector should be legislatively empowered to play an important role in receiving information and screening applications for hearings in the Child and Family Court.

Child and Family Protectors will therefore need to have the necessary experience and knowledge to make a correct decision about whether a particular matter should first be referred to a social worker, the police, the Child and Family Advocate or a lay agency before it is referred to the Child and Family Court for a hearing.

The Commission further recommends that:

When a child has been or needs to be subjected to an emergency removal, the Child and Family Protector must see that the matter is dealt with as a matter of urgency.[85] Matters involving children with disabilities may also need urgent attention. Part of the work of the Child and Family Protector should be to consider whether any case requires a preliminary/or interim order from the Child and Family Court.

85 For the current provisions governing emergency removals of children, see S12 & S13 of the Child Care Act 74\1983.

23.8 Human Resource Aspects relevant to the Child and Family Courts: Staffing, Training and Motivation[86]

23.8.1 Selection and Training of Adjudicators

It is recommended by the Commission that:

As regards training, although all adjudicating officers in the Child and Family Courts should have a Law degree and undergo the rounded and multi-disciplinary training or experience recommended and discussed above,[87] this should, realistically, not be an essential requirement before a magistrate or other appointed person can exercise the functions of an adjudicator in the Child and Family Court.

This recommendation is made for reasons of practicality and because it will take time to achieve the overall training required. It is essential that children and families have access to courts down to district magisterial level in the meantime.

It is further recommended by the Commission that:

Because of the vital importance of court accessibility for children and/or families, all magistrates, even at district court level, should, in the first phase of a new legislative dispensation, be *ex officio* empowered to sit in the Child and Family Court.

However, it is important to recognise that non-specialist magistrates are not ideal and should be used only for what is referred to as 'the-initial phase' of implementation of the proposed new children's legislation in Part 20.13 of this Chapter below.

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86 As regards interpreters, see 13.4.7 above, at recommendation (e).

87 See Part 20.6 of this Chapter, above.

It is recommended by the Commission that:

In order to provide staff with additional motivation and skills, the proposed new children's legislation should allow for salary and status implications to attach to a course of training which should be set up for Child and Family Court adjudicators.

A classic example of a situation which requires special training of adjudicators is the so-called, 'child abuse accommodation syndrome'. It is well-documented that children find it difficult to disclose abuse and that they do not necessarily recall and retell abuse in a systematic and chronological fashion. It is typical for children to retract disclosures about child abuse, due to the fear generated by the crisis to which the disclosure gives rise.[88] This frequently gets them labelled as liars and unreliable witnesses. A judge who has only legal training about the credibility of witnesses might tend to reject evidence of a child given in such a fashion unless she/he was aware of the effects of the child abuse accommodation syndrome.

As regards placement of children in residential care, adjudicators in the Child and Family Courts need to be trained to the point where they are able to constructively explore other options with investigative social workers, particularly at hearings involving babies and pre-schoolers.
The Commission recommends that:

Specifically as regards alternative care orders which they will sometimes need to issue, adjudicators in the proposed Child and Family Courts should be trained in regard to the limitations and disadvantages inherent in any institutional ('residential') child care facility environment as opposed to a family environment. They should be required (by an express provision in the proposed new children's legislation) to consider all possible alternatives before placing a child in a residential care facility.

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88 See CJ Hobbs, HGI Hanks & JM Wynne *Child Abuse and Neglect: A. Clinician's Handbook* (Churchill-Livingston Publishers, 2ed.1999) at 181-182.

23.8.2 **Child and Family Advocates**

It is submitted that it is unfortunate that family advocates are presently confined mainly to undertaking work in certain divorce cases and international parental abduction cases. Other types of case arise where children may need skilled representation - for example, care proceedings arising out of abuse of a child. Also, confinement mainly to divorce and international abduction tends to limit family advocates somewhat to working primarily with a wealthier part of the population, namely, those who can afford court divorces and international travel or litigation.

The Commission therefore recommends that:

In the proposed new children's legislation, Family Advocates should be rendered (in addition to their present duties) eligible to represent children in any type of case that comes before the Child and Family Courts. They should be legislatively empowered to do so where requested by the Child and Family Court, by a Child and Family Protector, and of their own initiative.

The current title of 'family advocate' does not expressly indicate a child focus. Some children who desperately need the assistance of family advocates do not have families in the form of surviving close relatives.[89] In order to encourage support for children and accurately portray the true emphasis of their work, the current appellation of 'family advocate' should be changed.

The Commission therefore recommends that:

The present family advocates be renamed 'Child and Family Advocates'. Should the legislature also wish to open the work of family advocates to attorneys in the future, within an appropriate new title would be 'Child and Family Representative'.[90] The Child and Family Advocates should be legislatively tasked with the function of representing children (or else arranging for appropriate legal representation) in the Child and Family Courts and in Child

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89 Some AIDS orphans fall into this category.

90 For convenience and in order to avoid confusion with terminology, the designation of 'Child and Family Advocate' has been used in this Chapter.

and Family Court matters taken on appeal or review to the High Court.

A possible concern with the recommendation above might be that it poses a danger of family advocates becoming overloaded with work. In the light of this concern the Commission recommends as follows:

Child and Family advocates should not be required to appear in every Child and Family Court case. Rather, they should be legislatively required to appear (or else arrange for appropriate legal representation) in cases where they consider it necessary or where they are requested to do so either by a Child and Family Protector or by an adjudicator in the Child and Family Court or in the High Court. The proposed legislative ground that should be used by a relevant person in deciding whether to require such representation should be:

"In any situation where it appears that the child would benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcomes for the child.

In considering whether this ground applies, any views expressed by the child in regard to such representation must be taken into account. The Child's maturity must be taken into account when deciding how much weight to accord to the views of the child."

The Commission also recommends the following provision:

If she\he considers it necessary in order to represent (or arrange for legal representation of) a child in the Child and Family Court, the Child and Family Advocate can direct a family counsellor and/or other appropriate person to investigate the matter and prepare a report.

Appropriate cases sometimes occur where an adult party deserves and requires legal representation at state expense.[91] For reasons of expense, it is anticipated that it will not be

91 For the results of some South African field research regarding representation for adult parties in the children's courts, see F. N. Zaal *Do Children Need Lawyers in the Children's Courts?* (Community Law Centre: University of the Western Cape, 1997) at pp. 52-58. Whilst this Study dealt mainly with legal representation for children in the children's courts, it included some findings in regard to representation for adults in these courts.

possible to cater for many such cases.

The Commission therefore recommends that:

The proposed new children's legislation should contain a provision which is to the effect that where an adjudicator in a Child and Family Court or a judge in a High Court dealing with a case taken on review or appeal from the Child and Family Court the considers that any adult party should in an exceptional case have legal representation at state expense via legal aid, an instruction to this effect will be directed to the nearest office of the Child and Family Advocate. The Child and Family Advocate may either undertake the representation or contract the representation out to a private lawyer who is currently on the Family-Law Roster.[92]

23.8.3 **The Child and Family Court Protector**

As is clear from earlier recommendations in this Chapter, the Commission believes that it is necessary to appoint an officer to each Child and Family Court to assist generally in its functions and also to carry out some specific tasks. The Child and Family Court Protector is based upon the previous concept of the children's court assistant as provided for under the Child Care Act 74/1983. However, by comparison with the children's court assistants a greater range of functions is proposed for the Child and Family Court Protector.

The Commission recommends as follows:

An officer called the Child and Family Court Protector should be appointed to serve at every Child and Family Court. In addition to the tasks already recommended for this officer, the proposed children's legislation should contain a provision indicating that it is and the function of the Child and Family Court Protector to assist the Child and Family Court generally in its functioning. In addition, express provisions in the legislation should indicate that it is the duty of the Child Family Court Protector to screen all matters brought to the

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92 As to the proposed Family Law Roster of lawyers, see further Part 20.8.4, below. On representing adult parties, see also the last paragraph in Part 20.8.4.

court:

a) To see whether the case falls within the jurisdiction of the court and, and if so, whether further investigation\preparation is necessary and, if so, to issue directions; and\or

b) Where a Child is a party or may be significantly affected by an order of the Child and Family Court, to consider whether the ground for appointment of a legal representative to the child applies.[93]

Where it appears to the Child and Family Court Protector that the ground for appointment of a legal representative to a child does apply, the proposed new children's legislation should indicate that it is the duty of the Child and Family Court Protector to direct the local Child and Family Advocate to provide or arrange for child representation.

The Commission does not recommend that the Child and Family Court Protector be legislatively empowered to undertake legal representation of the Child or other party. However, as will appear from the recommendations below, the Commission does propose some other tasks for this officer.

The Commission recommends that:

The proposed new children's legislation should contain a provision which indicates that, where necessary, the Child and Family Court Protector should advise and assist unrepresented parties in their preparations for a hearing which is pending in the Child and Family Court. As part of their job requirements, Protectors should have an up-to-date knowledge of local services (such a social work or legal advice services) which may be useful to persons preparing for a hearing in the Child and Family Court. As part of their advice service, the Protectors should be able to explain such local services to Court clients, and offer referrals to clients who wish this.[94]

In order to allow for as many cases as possible to be dealt with, and for cases to be dealt with as

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93 Note that the wording of a ground for appointment of a legal representative to a child in a Child and Family Court matter has been recommended in the previous Part of this Chapter, above.

94 On the reception duties of the Child and Family Court Protector, see also Part 20.7.2 of this Chapter, above.

appropriately as possible, the Child and Family Court Protectors should also have to undertake certain further tasks.

The Commission recommends that:

The proposed new children's legislation should contain provisions which indicate that Child and Family Court Protectors may attempt to undertake mediation themselves or arrange for a family group conference (which they may not undertake themselves) where one of these two remedies appears to be particularly appropriate. Where the Child and Family Court Protector considers that a family group conference may be appropriate, it is recommended that the following procedure be legislated for: the Child and Family Court Protector must recommend to the Child and Family Court that a family group conference be instigated. If the Court agrees, or when instructed by an adjudicator of the Child and Family Court, the Child and Family Court Protector must set up a family group conference, record the outcome thereof, and convey this to the Court. Details of the conference must be kept on file as part of the Court's records. A member\s of the family may be required to pay the costs of the family group conference or, within the confines of the available Court budget, some or all of the costs may be borne by the State.

The capabilities proposed in the above recommendation are in line with the conclusions reached earlier in this Chapter as regards the usefulness (in some cases) of extra-curial problem-solving or 'lay forums'.

The Commission further recommends that:

A protector or adjudicator in the Child and Family Court should not instigate either mediation or a family group conference where he/she is currently aware that there has been an allegation of physical or sexual abuse of a child involved in the case. The protector or adjudicator may require a social worker or other professional person to provide a report if this will assist in reaching a decision about whether to initiate mediation or a family group

conference.[95]

Because of the importance of the duties proposed for Child and Family Court Protectors, the Commission felt that it was necessary to give some consideration to the status of these officers.

The Commission recommends that:

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95 **In alternative care inquiries a social worker will have investigated the case before the final hearing in the Court. In other cases the request for the report could be sent to a family counsellor based at the local Child and Family Advocates' office.**

One of the duties of the Child and Family Court Protector should be to issue an appropriate form to parents who wish to fill out a joint Parenting Plan in the form of a mutual and private contractual agreement between themselves. The proposed new children's legislation should allow for such a form to be issued. In addition to issuing the form, the Child and Family Court Protector should be prepared to sign as a witness to such a contract and keep an official copy of it.[96]

The Commission recommends that:

Child and Family Court Protectors must be recognised as court staff and, as such, their salaries must be paid by the Department of Justice. A dual-Departmental control structure will be damaging to the efficiency of the functioning of the Child and Family Courts and will thus be detrimental to the many children and families who need their services.

23.8.4 **Legal Aid Representation of Parties**

With regard to lawyers who represent persons at proceedings of the Child and Family Court, two basic considerations need to be kept in mind. Firstly, a party to such proceedings must, of course, always be at liberty to hire any legal representative of his or her choice. Secondly, in regard to payment or provision of legal representatives by the State, it is necessary to avoid wasting precious State financial resources.

The Commission recommends as follows:

Only the following lawyers should be eligible to represent children (or adult parties) at State expense in proceedings of the Child and Family Court:

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96 **For discussion and further recommendations concerning Parenting Plans, see 8.6, above.**

1. Child and Family Advocates

2. Lawyers on the Family-Law Roster

Family Advocates are generally overloaded with cases at present. By opening their work to cover some additional forms of representation they may sometimes be extended beyond their capabilities in terms of staff availability.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that the Senior Child and Family Advocate at each office is empowered to contract Child and Family Court work out to private lawyers on the Family-Law Roster.

It should be noted that the above recommendation, if implemented, will have the added advantage of extending the possibilities of legal representation, for example, to rural districts not presently served by family advocates.

The Commission further recommends that:

Aside from what is provided for in this recommendation, the requirements for an attorney or advocate being listed on the Family Law Roster should be consigned to the regulations of the proposed children's legislation. These requirements should confine the Roster to lawyers who have appropriate interpersonal skills and experience for Child and Family Law work. Specialised courses of training and/or an accredited 80 hours of observation of proceedings in the Child and Family Court should qualify a lawyer for a placement on the Roster.

In order to improve the work of Child and Family Advocates and lawyers on the Family Law Roster, a set of guidelines should be developed 4 legal representatives who work in the Child and Family Courts. These guidelines could include, for example, rules preventing legal representatives from interfering with the work of investigative social workers and preventing them from using adversarial tactics in Court except where it absolutely necessary.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which empowers the Minister of Justice to publish in the regulations a set of guidelines in the form of a Code of Conduct for all lawyers representing parties in the Child and Family Courts. The Minister should also have the power to amend these guidelines.

The purpose underlying the Proposed Family Law Roster is to ensure that only lawyers with appropriate personal orientation and skills and knowledge be the recipients of precious State-funding for appearances in the Child and Family Court or appeals/reviews/referrals therefrom. Research has shown that where appropriate lawyers are not available for children's court work in particular, it is better to have no lawyer at all.

Provision must be made for the removal of lawyers from the Roster where it becomes apparent that they are not appropriate for work in the Child and Family Courts. Failure to do this will result in wastage of state financial resources and considerable disadvantage to vulnerable members of the public who appear in the courts.

It is therefore recommended by the Commission that:

The proposed new children's legislation should include a provision which is to the effect that three separate notations by three different Child and Family Court adjudicators in three separate cases should result in a lawyer being removed from the Family-Law Roster for 3 years. A lawyer should be entitled to challenge whether his\her removal was well-grounded in the High Court.

Lawyers not on the Roster must be eligible to appear or continue to appear when they are appointed privately by clients. Their removal from the Roster should only apply to legal-aid cases.

When it comes to State subsidisation of legal representation of parties (and affected children) in the Child and Family Courts, it is recommended that a distinction must be drawn

between straight-forward matters and more complex or disputed matters. In order to save costs, only the latter should normally be considered appropriate for legal-aid all representation provided by the Child and Family Advocate.

As has been discussed earlier in this Chapter, children who are the focus of Child and Family Court proceedings will usually benefit considerably from a speedy resolution of their cases.[97]

The Commission therefore recommends that:

The proposed State subsidy system for legal representation by Family-Law Roster lawyers should be structured in such a way as to discourage legal representatives from unnecessarily dragging out and/or adjourning Child and Family Court proceedings. Failures in this regard must result in a negative Roster notation being made by the Court adjudicator.

The Commission further recommends that:

When legal representatives on the Family-Law Roster are appointed at State expense in order to represent children, they must come to Court prepared and able to present the hopes and wishes of the child-client (genuine child advocacy), as opposed to merely conveying to a Child and Family Court what certain adult persons feel is best for the child.

As has been indicated earlier in this Chapter, the question of legal representation at State expense for indigent adult parties also needs to be addressed in the proposed new children's legislation.[98]

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97 For further discussion and recommendations in regard to this issue, see Part 20.7.4.3 of this Chapter which is entitled, 'Prompt Services'.

98 See Part 20.8.2 of this Chapter, above.

It is therefore recommended by the Commission that:

A provision should be included in the proposed new children's legislation to allow adult parties to apply, in exceptional cases, for the appointment of a legal representative at State expense. Such applications should be directed to be Child and Family Court Protector. The purpose of any such application should be to make out a case that there are reasonable grounds to consider that substantial injustice might result if legal representation is not provided to the applicant at State expense. On this limited basis, it is recommended that legal-aid be occasionally available to adult parties.

23.8.5 **Career Path and Motivation of Personnel**

Many of the problems currently being experienced in the children's courts can be attributed either to shortcomings in the training of staff or to a lack of the necessary interpersonal skills.

The Commission therefore recommends that:

It is necessary to be able to develop and retain in the Child and Family Court system a sufficient quota of professional persons who are child- and family-oriented, motivated and skilled. It is therefore recommended that a career ladder be opened up. Persons could begin as Child and Family Protectors (Level One Court, then Level Two) and then become eligible to serve as Child and Family Advocates (provided that they have been admitted as an Advocate). The next step up the ladder should be service as a Level One Child and Family Court adjudicator. A Level Two Child and Family Court adjudicator would be the next step. From there, the adjudicator should become eligible to be considered for possible promotion to a specialised family division of the High Court.

It is further recommended by the Commission that:

Private lawyers (attorneys and advocates) in good standing on the Family-Law Roster should, by completion of set numbers of cases involving preparation for and appearance in

the Child and Family Court, become eligible to apply for appointments on the career ladder. Legal aid, private representation or *pro amico* cases (to be encouraged as a community service) should all count. The details concerning the amount of experience required should be discussed by the Minister of Justice with bodies representing advocates and attorneys. The proposed new children's legislation should include a provision to the effect that the Minister of Justice, after consultation with representatives of the legal profession, has the power to issue regulations that indicate the requirements that will need to be met by an advocate or attorney in order to be placed either on the Family-Law Roster or at a specified point on the Child and Family Court career path. Social workers should be eligible for possible appointment as Child and Family Court Protectors. Upon completion of a University law degree, they should be able to apply to move up the ladder in accordance with the normal additional requirements. For any candidate, service as a Child and Family Court assessor or intermediary should also be considered.

By creating such life-time career prospects, it should become more possible to attract high-calibre personnel to appear in and staff our Child and Family Courts. This, in turn, should make these Courts much more cost-effective, in that more appropriate decisions will be given and a higher caseload accommodated. Obviously, children will be the main beneficiaries if more supportive and appropriate services are provided by the courts tasked with making alternative care, child protection and parental responsibilities orders.

The low status accorded to children's courts and the lack of a viable career path within the children's court structure were identified as problems by the Department of Justice in 1996.[99]

The Commission recommends that:

When magistrates and other persons work in the relevant capacity, they should be referred to in the proposed new children's legislation as Level One or Level Two (respectively) Child and Family Court adjudicators.

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99 *National Plan of Action for the children of South Africa and the Role of the Department* (Dept. of Justice 1996) see the attached 'Report back to the NPA Steering Committee on Activities of the Justice Sectoral Working Group' at p.16.

As has been noted in Part 20.7.2 of this Chapter above, the current title of 'Children's Court Assistant' as currently used in the Child Care Act 74 of 1983 implies a low status for these functionaries - that they do no more than 'assist'.

It is therefore recommended by the Commission that:

An appropriate title for those who will work in a reception, screening, and general-support capacity in the Child and Family Courts in the future would be, 'Child and Family Court Protectors'.

In list form, the levels of the proposed career path could be indicated as follows:

1) Child and Family Court Protector: Level One Court;/Intermediary working in any Court with children;
2) Child and Family Court Protector: Level Two Court;
3) Child and Family Advocate/Family-Law Roster Representative/Assessor in Child and Family Court
4) Child and Family Court Adjudicator : Level One Court;
5) Child and Family Court Adjudicator: Level Two Court;
6) High Court Judge : Child and Family Division.

The Commission recommends as follows:

The minimum period of time that would need to be spent working at each of the levels of the career path listed above should be two years. It is not recommended that upward progress should be automatic because additional requirements might apply.

It is submitted that the career path set out in list form above should, if utilised in the proposed new children's legislation, help to provide a career path sufficiently attractive to encourage quality personnel to move into the field of Child and Family Court work.

The Commission further recommends as follows:

Allowing voluntary work to count will save the State costs. It should therefore be encouraged at all levels of the career path where feasible and appropriate.

As has already been recommended, for purely practical reasons and in order to have a system available immediately, the proposed new children's legislation should indicate that those who are currently magistrates are eligible to be selected to serve also as interim Level One Child and Family Court adjudicators. Experienced children's court commissioners should alternatively be rendered eligible to be selected to serve as Level Two Child and Family Court adjudicators. However, in order to encourage the multi-disciplinary training which has been recommended for these positions, it is suggested that additional status and/or pay should be linked to completion of requisite training courses that will enable adjudicators to appreciate and to some extent provide multi-disciplinary assessments of children's and other family members' developmental and therapeutic needs. The aim should be to have staff who interact constructively with dysfunctional/disputing family members.

Lawyers currently designated as 'family advocates' in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 should, in terms of the proposed new children's legislation, be required to carry out the functions indicated for 'Child and Family Advocates' in the proposed new legislation.

Further to the basic model for a career path as listed above, the Commission recommends as follows:

The proposed career path for Child and Family Court work should be opened to certain other persons besides those who have traditionally become magistrates. For example, social workers who have had extensive Child and Family Court experience or academics who have taught Family Law should also be considered for entry into the career ladder. In the next Chapter of this discussion Paper, below recommendations are made in regard to a proposed unit of officers who will monitored Child care services. If such a unit is established, then it

is recommended that service in such a unit for at least two years should render an officer eligible to apply for employment at stage 2) of the proposed Child and Family Court career path as listed above.

This less restrictive approach regarding eligible staff will have the added advantage of helping us to work more quickly towards a Court staff which has the appropriate interpersonal skills and which better represents the demographics of our population.

It is submitted that a broad-based, rather than narrowly-technical approach to employment in the Child and Family Court career path will be more likely to secure applicants who are genuinely child and family oriented and capable in this specialist field. As has been recommended elsewhere in this Chapter, there needs to be full acceptance of the principle that Child and Family Court work requires inter-disciplinary skills and appropriate inter-personal skills, as opposed to merely legal skills alone. However, as has been recommended earlier, a law degree should be treated as an essential qualification for anyone who wishes to work as a Child and Family Court adjudicator. It has also been noted above that Child and Family Advocates will still have to be qualified advocates.

23.9 **Appeals, Reviews and the Role of the High Court**

It has been recommended earlier in this Chapter that a network of 'Child and Family Courts' should be set up in place of the children's courts and accorded jurisdiction to hear cases that may lead to alternative care for children and/or to the reallocation of parental responsibilities where this does not arise as part of divorce litigation. Although the High Court mainly deals with the reallocation of parental responsibilities (in the form of guardianship, custody or access) at divorce, its additional power to allocate these responsibilities between unmarried parents/caregivers will produce some concurrent jurisdiction between the High Court and what has been proposed by the Commission for the 'Child and Family Courts'.

The Commission recommends that:

Any party should be able to appeal against a decision of a Level One or Level Two Child and Family Court. The ground for the appeal should be that the decision was not in the best interests of a child or children who was/were the subject of the order or significantly affected by it. In addition to a party, a Social Work Agency which investigated the circumstances of a child should be able to appeal, as if the Agency were a party, where an alternative care or protection order was sought on behalf of the child.

The Commission recommends that:

With respect to matters heard at Level One Child and Family Courts, Level Two Courts should serve as courts of appeal or review. With respect to matters heard at Level Two Child and Family Courts, the High Court should serve as a Court of appeal or review.

Until the Child and Family Court network is functioning effectively, the High Court should retain all of its present jurisdiction with regard to the reallocation of parental responsibilities and generally in regard to children. However, once the Child and Family Court network is fully operational and working successfully, the question of whether the High Court should have concurrent jurisdiction with Child and Family Courts can be considered.

The question of the role of the High Court will no doubt have to be considered further by the Committee of the Department of Justice which is drafting Family Court legislation. Concerns presented to the Child Care Project Committee at workshops related to a perceived need to reduce the costs and delays associated with High Court litigation and to prevent rich applicants from having an unfair advantage because they can take matters directly to the High Court as a Court of first instance. At present, High Court judges do not specialise in child and Family-Law work and this is a matter for concern.

It is recommended that:

The question of creating a specialist Child and Family-Law division in the High Court merits careful consideration. However, detailed proposals in this regard would be beyond the

jurisdiction of the Child Care Project Committee. If established, such a division could, inter alia, appropriately deal with reviews, appeals and occasional direct referrals from the Child and Family Court.

It is further recommended by the Commission that:

Whilst the proposed Level Two Child and Family Court will usually only consider documents and hear argument from legal representatives in appeals\reviews from the Level One Court, it is recommended that it be accorded the discretion to call for any or all parties or witnesses to give additional direct evidence where it considers, *prima facie*, that this appears to be essential in the best interests of a child.[100]

Expanding the role of children's courts and renaming (and restructuring) them as proposed in this Chapter would be a major undertaking. It is likely that gaps in capabilities will sometimes appear, particularly during the early years of the operation of the proposed new Child and Family Court network. In a Level One Court, it will always be possible to move the matter up to a Level Two Court. However, it is conceivable that even a Level Two Child Family Court might occasionally find that a matter arises which it does not feel equipped to deal with. A cautious formulation of the proposed new children's legislation with 'safety-net' provisions is therefore necessary. It is for this reason that the Commission has not recommended any reduction in the jurisdiction of other courts besides the proposed Child and Family Courts (although the current children's courts would be replaced by them).

Because of the need for a cautious approach with backups in place (as discussed in the previous paragraph, above), the Commission recommends as follows:

A provision should be included in the proposed new children's legislation which renders it

100 The courts in Ireland have this power and it has been recommended by judges within that system as occasionally very useful for protecting children where the evidence furnished to the court *a quo* is found to be inadequate on a point or aspect.

possible for a matter which would ordinarily fall within the jurisdiction of a Level Two Child and Family Court to be referred to the High Court for resolution. It should be possible for a Level Two Child and Family Court to make such a referral where the Level Two Court is able to provide reasons why it does not feel itself qualified to deal with a particularly complex matter and the High Court to which the matter is sent accepts those reasons as sufficient. The High Court would then hear the matter in its capacity as 'the upper guardian of all minors'.

Aside from the question of Level Two Courts sometimes referring individual matters to the High Court as recommended above, there is also the question of whether certain types of case are inherently so complex that they should be expressly excluded from the jurisdiction of the proposed Child and Family Courts and thus always dealt with directly by the High Court.

In this regard, the Commission would welcome responses in regard to whether cases involving international abduction of children, surrogate motherhood, and perhaps other categories of cases which may be suggested, should expressly be designated in the proposed new children's legislation as falling within the jurisdiction of the High Court and not within that of the proposed Child and Family Courts.

23.10 Orders of the Child and Family Courts

23.10.1 Scope of Work

There is a wide range of remedies that children may need from the various South African courts. In order to give an idea of the scope of court decisions that may be needed by children in different circumstances, a list is provided below. The list provides some of the categories of cases that may lead to children needing assistance from courts.[101]

101 Mr D Rothman, Director of the Family Court Centre, Durban, most kindly proposed some of the items on the list and his contribution is appreciatively acknowledged.

a)

Nasciturus, Child-Birth, Conception of Children,

Surrogate Motherhood.

Education and Health\Medical Rights of Children.

Abortion, Sterilization.

Name and Nationality Rights of Children.

Allocation or Termination of Parental Responsibilities (Current terminology: Guardianship, Custody, Access)

Child Aspects of Domestic Violence

Applications by Children for Adult Status

Applications by Children for Special Assistance : for example, for a guardian *ad litem*, or legal representative.

Consent of Child to Marry

Passports for Children

Child Abuse

Child Neglect

Foster Care Placements/Disputes

Residential Care Supervision

Adoption

Family Treatment

Children or Primary Caregivers in Need of Supervision

Referrals of Children or Primary Caregivers to Rehabilitation (for example, because of drug or alcohol abuse).

Assessments of Children or Family Members Who Interact with Children in a Dysfunctional Way.

Early Intervention and Protection for Children

Disability and Other Children in Need of Special Protection (Previously Referred to as Children in Especially Difficult Circumstances).

Child Abduction (Includes international aspects),

Refugee Children.

Child\Domestic Aspects of Immigration.
Early Childhood Development Programmes
Partial Care

b) Financial Aspects:

Child Maintenance to be received from private individuals: (comprises local and foreign/trans-national aspects).
State Grants for Children (includes proposed temporary emergency grants from Child and Family Court budget)
Paternity Testing,
Contribution Orders,
Protection of Property which Belongs to Children.

c) Delictual Damages for Children: arising out of cases under a) and b) above.

In regard to many of the above-listed categories of work, not merely final orders, but also emergency or urgent interim court relief\remedies may also sometimes be needed by children. Court remedies for children is therefore a very wide and important area of service-delivery. In proposing a new system of courts, care must be taken that certain types of remedy do not cease to become available to the children who need them or become more difficult to obtain. It is for this reason that the Commission, in proposing the establishment of Child and Family Courts, has not recommended that the case jurisdiction of any of the other courts be reduced until there has been time to review the success of the proposed new system .[102]

The Commission recommends that:

The most appropriate time to consider whether certain types of Child or Family-related

102 Although, of course, it has been recommended that the present children's courts be completely replaced by the proposed Child and Family Courts.

cases should be removed from the jurisdiction of courts where they are presently dealt with will be after the proposed network of Child and Family Courts become successfully operational. In the short-term, a situation where there is some degree of concurrent jurisdiction will be safer and will allow for a natural testing of the services of the proposed Child and Family Courts. Concurrent jurisdiction in a few categories of cases may even benefit some children by allowing for improved access to court services. The Project Committee preparing Family Court legislation is the appropriate body to recommend the removal of certain types of case from the jurisdiction of some of our courts so that they may be reallocated to other courts.

The basic approach recommended by the Commission is that:

The proposed Child and Family Courts should replace the present children's courts and take over all of their existing functions. Also, the Child and Family Courts should have additional capabilities. The Child and Family Courts should be set up as centres of excellence that specialise in providing legally-binding care, protection and parental responsibilities orders (the latter outside of divorce litigation) on behalf of children.

The main focus of the Child and Family Courts should thus be the overlapping concepts of:
a) alternative care arrangements for children;
b) protection of children;
c) reallocation of parental responsibilities outside of divorce litigation

In accordance with the above three categories of remedies, some specific capabilities for the Child and Family Courts are proposed below. Whilst it is somewhat artificial to try to make the distinction, for convenience and ease of reference, the remedies have been grouped under the 5 headings of:

1. Existing remedies or orders that can be provided by the children's courts;
2. Additional alternative care orders;
3. Additional child protection orders;
4. Parental responsibility orders;

5. Other orders.

23.10.2 Existing Powers of the Children's Courts

It is recommended by the Commission that:

All of the existing functions and powers of the children's courts should be taken over by the proposed Child and Family Courts. However, it should be noted that the Commission has recommended specific improvements and additions in many instances.

23.10.3 Additional Alternative Care Orders[103]

In this section, additions and modifications to existing care order powers are suggested.

It is recommended by the Commission that:

The wording of the current S15(1)(a) of the Child Care Act 74 of 1983 should be amended. The Court should continue to have the power to order that a child be returned to or remain in the custody of the parent/s or other primary caregiver. However, in the alternative, it should be accorded the power to change the child's present custody by placing the child in the custody of any other suitable person designated by the Court.

The order presently allowed for in terms of S15(1)(a) must also be amended to allow for the possibility of a return date when the matter can be brought back to the Court for monitoring purposes. However, this is a general capability which the Commission recommends should be applicable to any order made by the Child and Family Court.

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103 See also the recommendations in 13.3.7 and 19.8.3.1 above where additional court powers are proposed.

It is further recommended by the Commission that:

When making a care order under the present S15 of the Child Care Act, the Court needs the power to reallocate any or all parental an responsibilities and rights. These may need to be divided out between the person designated to have custody of the child and other persons.

The Court should be accorded a power to place any/all caregivers under the supervision of another person such as a social worker, and should have the power to impose any condition or any other requirements the Court deems appropriate. Where supervision is imposed, it is recommended that the order be termed,(as proposed in Kenya), 'a supervision order'.

As can be seen from the above recommendation, in terms of a proposed 'Supervision Order,' a child may be permitted by the Court to remain in the care of a person/s; but that care will henceforth be exercised under the supervision of a social worker or other suitable person designated by the Court.[104]

It is further recommended by the Commission that:

The Court should not be compelled to require supervision as it currently is if it makes an order under S 15(1)(a) the Child Care Act. Other conditions should be available as an alternative.

It is recommended by the Commission that:

104 See the Kenyan Children Bill 1998 S125-127.

- **The Child and Family Court must be empowered to place children with special needs in appropriate facilities registered by the Departments of Health or Education.[105]**

- **Placement with a suitable foster parent as is presently possible under S15(1)(b) of the Child Care Act should continue to be an option. But the Court should have the power to allocate any/all parental responsibilities and rights to the foster parent during the period of foster care. It should no longer be mandatory for all foster care placements to be 'under the supervision of a social worker'. Instead, it is recommended that the Court should have to make a specific decision in this regard.**

The Commission recommends that:

As regards S15(1)(c)-(d) of the Child Care Act, the Child and Family Court should have the power to send a child to any available category of residential child care facility which it deems appropriate for the child concerned. In accordance with previous recommendations in this Discussion Paper, the Court would designate a specified form of residential care programme as offered in a Child and Youth Care Centre.[106]

With regard to a child in need of special protection (such as a disabled child or child infected by AIDS) the Court should have the power, subject to the consent of the person in charge of the Facility or Centre, to designate a specific Facility or Child and Youth Centre as a first-choice placement destination for the child.

The Court should have the power to allocate any/all parental responsibilities and rights (with regard to the child) to the person in charge of the designated child care facility if this is

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105 See 13.4.7 above.

106 See 17.6.4 above.

deemed appropriate.

As an alternative to removing a child into a new form of care, the Child and Family Court should be accorded the power, in an appropriate case, to instigate early intervention services for a child and her family and/or prefer the family to an approved family preservation programme.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that the Child and Family Courts can, in a suitable case, refer a child and her present caregivers to early intervention services and/or an approved family preservation programme.[107] The Court should also have the power to order the removal of another person (such as a perpetrator of child abuse) from the child's home, rather than the child.

Under the Child Care Act in its present form, some of the alternative care orders of the Children's Courts can be administratively altered or terminated.

It is recommended by the Commission that:

As a general principle, orders of the Child and Family Court must be accorded proper, binding status in that it should only be possible to change, reverse or terminate them by going back to the Child and Family Court, or by a process of review or appeal in a higher Court.

However, one exception to this which is proposed is Care Orders which have resulted in a child in need of alternative care being placed in a residential care facility. Where officials designated by the Minister of Social Development decide to change such an Order, this should be permissible without returning to the Court which gave the Order for permission, but only provided that the intention is not to move the child deeper into the care system. In other words, it should be permissible where the

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107 See further 9.6 and 9.9 above.

child will not be moved into a more restrictive or controlled environment -the child would not be facing increased restrictions upon his/her liberty as compared with what was laid down in the Court Order. However, the child must have the right to be returned to the court if she wishes where any change in her placement is proposed. Also, in order to move a child into an environment where she/he will face greater restrictions upon his/her liberty, it must be necessary to go back to the Child and Family Court with ground.
It is recommended by the Commission that:

As regards S15(3) of the Child Care Act 74 of 1983, it should continue to be possible for a child to be kept in a place of safety where necessary and appropriate, pending implementation of an order of the Court. As regards S15(5), it should not be permissible for the Court's order to be administratively altered in a manner which will lead to the child being placed in a more restrictive environment than was ordered by the Court. If it is not possible for officials within the Department of Social Development to implement an Order of the Child and Family Court in a manner that avoids this, they should be obliged to bring the matter back to the Court for reconsideration.[108]

23.10.4 Additional Child Protection Orders

With respect to the child protection powers currently accorded to children's courts under the present wording of the Child Care Act 74/1983, this Part of the Chapter lists some proposed additional or modified powers designed to add to the capabilities of the proposed Child and Family Courts.

Release\Return Order: It is recommended that the Court should have the power to order that a child be released from or returned to the custody of any person. This provision is designed to deal with wrongful holding of children - including children not designated as being in need of alternative care.

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108 See 17.8.1.1 and 17.8.1.7, above.

Consent to medical treatment or a medical operation: Subject to the recommendation in 11.9.5 above, it is recommended that the Child and Family Court should have the power to provide legally-binding consent to any medical treatment of or operation performed on any child. It is further recommended that the Court should be accorded the power to supply such consent in any situation where it decides that this is necessary in the best interests of the child. The proposed power should allow the Court to replace or override consent that would normally be supplied (in law) by another person (including the child concerned). The Court should even have the power to supply consent after medical treatment or an operation has been completed. Any person with an interest in the welfare of the child should have the power to seek such an order from the court.[109]

Counselling Order: the Court should be accorded the power to order a person to seek the assistance of a professional counsellor where this is necessary for the care or protection of a child. The Court may need to designate State funding for this purpose.

An important aspect of Child protection work involves assessments of children and/or their family members. It is necessary that the proposed Child and Family Courts should be accorded the power to send children or their family members for assessments relating to , for example, the risk of abuse to the child. Other assessments, such as psychological assessments and assessments regarding whether a child needs remedial education, may also be useful in certain cases.

The Commission therefore recommends that:

Assessment Order: the Court should be accorded the power to order a child or other person to undergo a professional assessment considered by the Court to be necessary in the best interests of a child and necessary for the proper resolution of a case. The Court should have the discretion to provide for State funds for this if a party involved in the case cannot afford

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109 With regard to street children, see 13.7.5, second recommendation (a), above.

to pay for the assessment.

Hospital Retention Powers: it is recommended that all registered hospitals should be accorded the power to retain custody of a 'suspected child' for up to 72 hours. A 'suspected child' is a child who has injuries which a member of staff of the hospital or any medical doctor believes, on reasonable grounds, are indicative under the circumstances of child abuse. Within 72 hours, the hospital must obtain an order from the Child and Family Court directing it to hold the child for a longer period of time pending further inquiry or else directing another resolution of the matter. Hospital staff or medical doctors who have made bona fide representations under the section, as well as the hospital concerned, should be rendered immune from any legal action against them arising from use of this provision.[110]

In order to protect children, it will sometimes be necessary for the Courts to require persons to undertake programmes required for different purposes -for example, treatment for alcohol dependency or a specified programme for sexual offenders.

The Commission therefore recommends as follows:

Treatment or Service Order: it is recommended that the Court should be accorded the power to order that any person undergo a treatment or training programme (such as a treatment programme for sexual offenders or a parenting skills programme, for example) where this is needed for the protection of any child or children.

Because of the extreme vulnerability of children, it may sometimes be necessary to make other individuals accountable for their actions against children or failure to take action. It will also be remembered that the Child Care Project Committee has been urged by many respondents to equip with the proposed children's legislation with 'teeth' in the form of sanctions against non-compliance. In the light of these considerations, the Commission would like to receive views in regard to whether one or both of the next two orders proposed below should be included as part of the remedies

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110 See further 10.2.11 above.

available to the Child and Family Courts:

Personal Accountability Order: this order would accord to the Court the power to order to appear before it any particular individual who may have failed in his/her obligations towards a particular child. These obligations may have arisen contractually, because of consanguinity or a relationship with child, or simply *ex officio* because of a position which a person occupies. They may have also arisen from a professional obligation towards a child or simply from a profession practised by the person.

It is recommended that in the case of a personal accountability order the obliged person should be required to appear before the Court and to show good reason as to why she/he failed to perform or acted wrongly. The Court, at its hearing, should consider whether there has been a wrongful or negligent failure to provide a service delivery or action to which the child was entitled. If it finds that there has been a failure, the Court may fine the person concerned and/or take such other steps as it considers appropriate.

Service Injunction: This would be relevant where it appears to the Court that an official or Government authority has failed to sufficiently assist a child in getting access to services to which he/she is legally entitled. It is recommended that the Court may order such officials/authority to provide the assistance and/or service by a date set by the Court. Should the official/authority not oblige by due date, the Court should have the power to call the official or a representative of an authority before it to explain the failure. Should the Court find that an official has negligently or otherwise wrongfully failed in his/her duties, then the Court should have the power to issue an appropriate fine. The Court may also\alternatively require the official to pay damages\costs to the person disadvantaged. The Court should have the power to order an official to pay from his\her private funds\through a garnishee order, or require the relevant Department\Provincial\Local or other authority to pay a fine and\or damages\compensation.[111]

111 At the time of writing, reports appeared in the press in Durban to the effect that officials had failed to pay a

A concern which the Commission has with regard to the Personal Accountability Order and Service Injunction as described above is whether the powers accorded under them might be abused by Child and Family Court Adjudicators. The idea is to have adjudicators who are sufficiently well-trained and appropriately selected that they would not abuse their powers. The Commission would like to seek opinion in regard to whether the next recommendation below would provide a sufficient safeguard.

It is recommended by the Commission that:

Any person who is subjected to a personal accountability order or a Service Injunction may appeal against the order to a higher Court. The appeal will be successful if it is established by the appellant that the Order was imposed without sufficient cause.

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disability grant to an applicant despite persistent attempts by the applicant to gain payment and despite the fact that the grant to been approved more than six years ago.

Alternative Remedies Order: This Order would accord to the Court the power, at any stage before or after it issues any other kind of order, to require any person to undergo or participate in counselling, mediation, a family group conference, or any other form of appropriate non-adversarial extra-curial problem-solving or decision-making meeting or forum, where this appears to be necessary in furthering the best interests of a child .[112]

Child Protection Register Order: It is recommended that a person who considers that his or her name has wrongly been listed on the National Child Protection Register should be entitled to challenge that listing by bringing an application in the Child and Family Court.

It is further recommended by the Commission that:

The Child and Family Court ought also to be able to reach a determination, on a balance of probabilities and if necessary *mero motu*, that a person should not be permitted to undertake employment or voluntary services which involve him\her in activities with children. An aggrieved person should have the right to appeal against this determination to a higher Court. A Child and Family Court which reaches such a determination should be required to send the personal particulars of the person to be recorded on a National Child Protection Register. Any person who applies for employment which involves contact with children may be required by the prospective employer to furnish a certificate from any Child and Family Court Protector that she\he is not listed on the register. Failure to supply such a certificate when requested to do so may be treated by the prospective employer as a negative factor when considering the

112 Aspects of this may be found in S83 of the New Zealand, Children, Young Person and Families Act, 1989.

prospective employee.[113]

Child Protection Orders: Although the Child and Family Court is not a Criminal Court, it should have extensive powers in respect of a person whom it finds (on a balance of probabilities) to have perpetrated child abuse, child neglect, or domestic violence. It will need the power, on appropriate occasions, to order the perpetrator to leave the home where the child lives, to order the perpetrator to contribute to an abused child's or other person's treatment, or to provide maintenance.

Orders made by a Child and Family Court in respect of persons found to be perpetrators should not provide immunity for such offenders with regard to a possible criminal court prosecution.

However, it is recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that the prosecution, in considering whether to prosecute any person who has allegedly abused a child, should be required to consider any representations made by a Child and Family Court Protector if these are to the effect that the offender [perhaps conditionally or temporarily] should not be subjected to prosecution. Such representations must only be made where (from the evidence obtained by the Child and Family Court) the best interests of a child will not be served by an immediate prosecution of the offender.

The motivation underlying the above recommendation does not relate to an intention to interfere with the discretion of prosecutors. Rather, the concern is with the child victim in cases where the perpetrator is closely related to the child. Where the perpetrator accepts full responsibility for the abuse and agrees to commit himself to an approved treatment programme (with the prospect of a

113 A similar system is used in the Netherlands. See also Chapter 10 at Part 10.5 above.

criminal case being opened if he deviates in any way from the requirements of the programme) it may sometimes be in the best interests of the child victim to withhold a criminal prosecution. The recommendation would therefore entail a constructive relationship between prosecutors and Child and Family Court Protector's.

It is further recommended by the Commission that:

Where it finds that this is necessary in the best interests of a child, the Child and Family Court should have a power to order a perpetrator of child abuse or any other person to undertake a specified rehabilitation programme and may attach conditions.

As far as requesting the Child and Family Court to change an Order goes, any person should be entitled to make such an application and be permitted to attempt to show that good reasons exist for the requested change. For example, a person might be permitted to show that an Order is no longer in the best interests of a child who was the subject of the Order. It is recommended that technical procedures should not be set up which limit persons who can approach the Child and Family Court. Even persons who were not originally parties to the Order should be permitted to approach the Court. Frivolous applications or ill-motivated applications to interfere with Orders of the Court can be dealt with by the Court making an appropriate Order as to costs or, in extreme cases, issuing a fine and ordering that no branch of the Child and Family Court will entertain repetitions of the application.

Protection for foreign children: the Commission believes that the proposed Child and Family Courts have a role to play in protecting refugee children.

It is therefore proposed by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that, where South African government authorities intend to deport or repatriate any foreign child, they must first obtain an order from the Child and Family Court which is to the effect

that proper and sufficient arrangements have been made for receiving the child at the place to which the South African authorities propose to deport or repatriate the child. The child concerned should have a right to appear before the Court for a hearing which is aimed at establishing whether proper and sufficient arrangements have been made.

In the light of recommendations in regard to refugee children that have been made earlier in this Discussion Paper, the Commission would welcome responses in regard to the above recommendation and whether the proposed Child and Family Courts ought to provide any further remedies for refugee/foreign children.[114]

23.10.5 Reallocation of Parental Responsibilities

In Chapter 8 of this Discussion Paper, it has been recommended that the existing common-law system utilising the three basic parental rights over children of guardianship, custody and access be replaced by a more flexible system utilising a wider range of parental responsibilities. It is often difficult to make appropriate alternative care or protection orders for children without dealing with the related question of which caregiver should exercise parental responsibilities. An inability to reallocate parental responsibilities has therefore left a significant gap in the services which the children's courts are currently able to provide.

It is therefore recommended by the Commission that:

The proposed children's legislation should include a provision which is to the effect that the Child and Family Courts are accorded a power, on behalf of any child, to reallocate parental responsibilities to any suitable person or persons. However, where a reallocation of parental

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114 For discussion and recommendations concerning refugee and undocumented immigrant children, see 22.4 below.

responsibilities needs to occur as part of divorce arrangements in a situation of a pending divorce of caregivers, then such a reallocation must be made by a divorce court or a High Court.

The purpose of the above recommendation is to provide for reallocation of parental responsibilities by the Child and Family Courts, but in a manner which will not allow them to intrude upon the jurisdiction of the courts which currently grant divorces.[115]

It is further recommended that the Child and Family Court should have the following capability:

Parental Responsibilities Undertaking: The Court should have the power to order a person to sign an undertaking with or without sureties to exercise certain parental responsibilities.[116]

The Commission recommends that:

Besides the Child and Family Courts, all other courts which presently allocate guardianship, custody and access should be legislatively empowered to use the proposed new system of parental responsibilities.[117]

23.10.6 **Other Orders**

Ordering a Lay Forum

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115 **See 8.5.3.4 above.**

116 This idea is drawn from article 120(2)(b) of the Kenyan Children's Bill 1998.

117 For the specific powers recommended for foster care cases, see 17.6.5 above.

The Commission recommends that:

The Child and Family Court ought to have the power to instigate extra-curial decision-making systems such as mediation and/or family group conferencing if and when required.[118]

Of the lay forums, mediation by the Child and Family Court Protector would sometimes be a relatively simple and inexpensive option. On the other hand, family group conferences require a thorough preparation process and specialised skills by the facilitator. If inappropriately used, they can result in failure to protect an abused child.

The Commission recommends that:

The proposed children's legislation should contain a provision to the effect that Family group conferences should only be ordered by the Court where they appear to be essential and there is a recognised family group conference programme in place.

The Commission also recommends that:

The proposed children's legislation should contain a provision which is to the effect that the Minister of Justice may, by means of regulations published in terms of the proposed children's legislation, regulates the instigation of exra-curial programmes or services (including lay forums) by Child in Family Courts.

The Commission further recommends that:

The Child and Family Courts should have access to a limited budget to allow them to

118 See further Part 20.6.3.1 of this Chapter above.

provide for expenses that are essential in achieving a proper resolution of certain cases. Some recommended uses for the budget are as follows:

Emergency Maintenance Grant: The Court should be provided with a limited budget from which it may order the payment of short-term maintenance on behalf of a child in urgent need. An example of such a case is where a Court, having heard the evidence, comes to a conclusion that a grant would prevent the removal of a child into (much more expensive) alternative State care. Another case might be where a child with special needs is in dire need of maintenance of some kind. Again, the maintenance could be made on a temporary basis until some other form of financial grant can be accessed or increased or supplemented.[119]

Monitoring and Variation of Orders

It is recommended by the Commission that:

The proposed new children's legislation should include provisions which accord to the Child and Family Court the power to monitor and\or vary any of its orders and to set times at which a party/ies or the child may have to reappear before the court.[120]

In regard to variation of orders of the Child and Family Courts, it should be noted that it has already

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119 See 9.9 above. See also the recommendations at the end of 13.1 above.

120 See *Collation* at pp 102-104. At 19.8.3.2 above it is recommended that the court should have the power to review extensions of placements.

been recommended that the Ministerial powers to alter alternative care child placements as ordered by a court should be reduced the court substituted as the authority for some aspects of this work.[121]

Aside from the power to vary orders, the Commission believes that, where it deems this to be appropriate, the Child and Family Court should also be accorded a monitoring power. What is meant here is a power to do a follow-up on any case which it heard earlier and, if necessary, amend the original Court Order.

It is therefore recommended by the Commission that:

The proposed new children's legislation should contain a provision which is to the effect that the Child and Family Court may, when making its original order, instruct that a party/ies or any other person, be required to reappear before the Court at a date set in the future.

The Court should be encouraged to use this power where it is placing a child in residential care or where it is, for any reason, concerned to monitor the future progress of the child or, occasionally, an adult party (such as an elderly foster parent). From its proposed budget, the Court should have a discretion to decide to pay travel and accommodation costs necessarily required.

Variation of Orders: since the circumstances of any child may change, it should not be procedurally difficult to approach a Child and Family Court in order to apply for a change in the Court's order. For example, a person may wish to approach the Court in order to show that an Order is no longer in the best interests of the child who is the subject of the Order. Frivolous, ill-motivated or unnecessarily repeated applications to interfere with Orders of the Court can be dealt with by the Court making an appropriate Order as to costs or, in extreme cases, issuing a fine and ordering that no branch of the Child and Family Court will entertain repetitions of the application.

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121 See the recommendations in Part 20.10.3 of this Chapter, above. See also the responses considered in Part 20.2, above.

The Commission therefore recommends that:

Any person with an interest in the welfare of a Child who is currently subject to an order of the Child and Family Court should be permitted to apply to the Child and Family Court in order to attempt to show that there are good reasons which indicate that it is in the best interests of the child for the order of the Child and Family Court to be changed.

Except in the case of an application for variation by the child who is subject to the order sought to be varied, or by the parent or sibling of such a child, all applicants will bear an onus to convince the Child and Family Court Protector *in limine* that the application is well grounded.

Where the Court hears an application for variation and considers that the application is ill-motivated or has been unnecessarily repeated, it may take this into account when considering a possible costs order and/or it may fine the applicant. The Court may also order that no branch of the Child and Family Court will entertain repetitions of the application.

Maintenance orders: it is not envisaged by the Commission that the proposed Child and Family Courts should be expected to function as duplicate Maintenance Courts. However, after the evidence in a Child and Family Court has been traversed, it may appear to the Court that it is necessary to give an instruction in regard to payment of maintenance, on behalf of the child, by a private individual. It is submitted that, in such an instance, it would be better to allow the Child and Family Court to make the necessary order, rather than the case having to be sent to another court.

It is therefore recommended by the Commission that:

The proposed children's legislation should contain a provision to the effect that, where it appears to a Child and Family Court that it is necessary to issue an instruction in regard to maintenance, the Court may issue an order in this regard.

Domestic Violence: the Commission is not of the view that the proposed Child and Family Courts should operate as duplicate Family Violence Courts. However, after having heard the evidence in

an alternative care, child protection or parental responsibilities case, the Court may perceive that a Domestic Violence Order is needed.

The Commission therefore recommends that:

Where it finds that this is necessary on behalf of any child, the Child and Family Court should have full powers to issue an interim protection order or a protection order as provided for in the Domestic Violence Act 116/1998.[122]

The Commission recommends as follows:
The proposed new children's legislation should include a provision to the effect that the Minister of Justice may publish regulations in which a power to make additional types of order on behalf of children is accorded to the Child and Family Courts. However, the Minister may only provide for additional orders which are relevant to the reallocation of parental responsibilities or the care or protection of children.

With regard to either existing or new categories of orders to be issued by the Child and Family Courts, the Minister of Justice may, by means of regulations published in terms of the proposed new children's legislation, indicate that certain types of order may be issued only by a Level Two Child and Family Court, and not by a Level One Court.

The motivation for including the above recommendation is a view by the Commission that some flexibility, in the form of an ability to provide new or additional Court services in the light of possible changing needs of children, it is required. The proposed provision is also a 'safety net' one in that it would also allow the Minister to respond to any gaps in Court services relevant to parental responsibilities or care /protection of children.

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122 See especially sections 5-7 of the Domestic Violence Act 116/1998.

Urgent/Interim Orders: with regard to all the types of orders that have been recommended for the Child and Family Courts, it is recommended that, where the urgency of the matter so requires, the Court should have the power to issue and interim order, if necessary, upon an *ex parte* basis combined with use of a return day.

Damages\Compensation Order: It is recommended that, amongst the new powers which ought to be accorded to a Child and Family Court, is the power to award damages (like a regular Civil Court) which have arisen out of a case heard by it. For example, where a child has been raped, it should not be necessary for that child to have to be taken before another Court for damages to be obtained from the perpetrator. Further, it should even be possible for the parent of the child, or a witness or other person, to claim damages. For example, damages might be claimed for *crimen iniuria* by a third person who was compelled to witness abuse of the child. This adds support to the suggestion made earlier that the right to become a party to proceedings in the Child and Family Court should not be overly circumscribed by a barrier of technical requirements.

Openness to multi-party involvement is supported by the above recommendation. The aim of the recommendation is to encourage reparations to victims and not to force them to go to another court, namely, a civil court, in order to obtain such reparations. The capability recommended above might be used for purposes of restorative Justice by, for example, ordering a perpetrator of child abuse to cover the costs of treatment for the child or, in any other way, to compensate financially for the damage done.

It should be noted that other orders for the proposed Child and Family Courts have been recommended in other chapters of this Discussion Paper.

23.10.7 Duration of Orders

As regards duration of orders, S16 of the Child Care Act 74 of 1983 currently provides that a children's court order made on behalf of the child found to be in need of care under S15 ‘shall lapse’ after a maximum period of two years.

The Commission recommends that:

Subject to the recommendation in 17.9.5 above, the present maximum duration of two years should continue to be applicable to Child and Family Court orders directing temporary placements of children into alternative care. However, for other types of order, the Court should have the power to indicate the duration of its order without a two-year limit. It is submitted that this will be necessary because many different kinds of orders will be issued by the Court.

Costs Orders: It is recommended that the proposed new children's legislation should contain an express provision to the effect that, whilst the Child and Family Courts should not normally make costs orders, they have the power to do so.

The purpose of the above recommendation is to allow the Court the power to make a costs award against a party whose behaviour merits this.

23.11 **Evidence**

One of the most serious problems which our present multiple-court system poses for child victims or child witnesses is enhanced possibilities for secondary systemic abuse.[123]

It is therefore recommended by the Commission that the proposed new children's legislation should contain provisions which expressly direct as follows:

Information which emerges at a completed criminal trial may be used at a subsequent Child and Family Court hearing. Information which emerges at a Child and Family Court hearing can only be used at a different court hearing if it will not be to the disadvantage or against the best interests of a child who was the subject of the original Child and Family Court hearing or gave evidence as a witness. In order to use such information, the permission of the Child and Family Court which obtained that information would have to be obtained from the presiding officer in writing.

123 For a discussion of this problem, see Part 20.3.1 of this Chapter, above.

It is further recommended by the Commission that:

Once any other Court has reached an evidential determination - whether it be on the, "beyond reasonable doubt" or merely upon the, "balance of probabilities," evidential test, a Child and Family Court should be able to use such a determination without requiring the same evidence to be produced again before it. The Child and Family Court or any party appearing before it should have the right, however, to add to the record received from the Criminal or any other Court by obtaining or producing additional evidence.

The motivation underlying the above to recommendations is that, by suggesting procedures encouraging the Child and Family Court to use evidence obtained from other Courts, the Commission aims to reduce the need for the child-victim to go through the traumatic process of rehearsing evidence again for a second time.

The Commission also recommends that:

The Child and Family Court requires the power and capability to order that the evidence of a child be taken via an intermediary. Whether or not intermediaries are used to take evidence from a child, the proposed children's legislation should contain a provision which forbids the putting of any 'insulting question', to the child.[124] [See also Part 7.4., above].

23.12. **Court Budget\power to Order Payments**

A number of the capabilities recommended in this Chapter involve the Court ordering limited payments.

It is therefore recommended by the Commission that:

The Child and Family Court should have a power to order such payments from a special budget, subject to availability of funds still remaining in that budget.

124 See also Part 20.7.4.2 of this Chapter, above.

As can be seen in the Chapter, the idea behind the proposed Court budget would be to apply it to cases where limited, short-term or one-off funding, as ordered by the Court, is urgently required in the best interests of a child and\or could save the State much more expenditure in the long-term. The instances recommended are thus mainly those of a cost-saving kind. The aim would also be to meet the best interests of children in dire circumstances and where other resources have, for whatever reason, not been accessed or have not sufficed.

It is further recommended by the Commission that:

The Child and Family Court's power to impose fines should be used to bring funds into the Court's budget.

23.13 Implementation: Should Child and Family Court Work Be Phased in by Stages?

In this Chapter, it has been proposed that the Child and Family Courts, by comparison with the existing Children's Courts, should take on a broader range of work. It would be necessary to ensure that the Child and Family Courts had the resources to cope with this wider range of work. As regards implementation, the legislature might possibly decide that work should be accorded to the Child and Family Courts in stages.

The proposals in this Chapter have been designed in such a way that the legislature could, if it so desires, implement the work of the proposed Child and Family Courts in phases. Aspects which could be separately implemented (although not necessarily in the sequence indicated) are as follows:

1) Select and provide courses of training for staff who are to serve as Child and Family Court adjudicators and protectors.

2) Rename the existing children's courts as Child and Family Courts and allocate the alternative care functions in the proposed new children's legislation.

3) Allocate the protection order functions proposed in the new children's legislation to the Child and Family Courts.

4) Select and provide courses of training for staff who are to serve as Level Two Child and Family Court adjudicators and protectors.

5) Designate certain courts as Level Two Child and Family Courts. Designate the remaining Child and Family Courts as Level One Courts.

6) Staff courts which will serve as Level Two Child and Family Courts.

7) Allocate the parental responsibility order functions proposed in the new children's legislation to the Child and Family Courts.

8) Bring into force the provisions in the new children's legislation which enable and require family advocates (or the renamed 'Child and Family Advocates') to appear in all Child and Family Courts.

9) Allocate a budget to the Child and Family Courts and then bring into force the provisions in the new children's legislation that require such a budget.

10) Accord to all other courts (besides the Child and Family Courts) the power to issue parental responsibilities orders.

11) Accord to Sexual Offences Courts the power to issue alternative care or child protection orders.

As indicated above, if a phasing-in approach is used, the Child and Family Courts could initially, for example, be accorded only the work currently done the by the Children's Courts and thus replace

them only.[125] Related but additional categories of work as recommended earlier in this Chapter could subsequently be added as and when the legislature found this to be appropriate.

The proposed new children's statute could be worded in such a way as to make this possible.

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125 However, it should be noted that, because of the much wider powers recommended in the proposed new children's legislation for child care work, the Child and Family Courts would be able to choose from a much broader range of orders for children in need of alternative care than the present Children's Courts can under the existing Child Care Act 74/1983.