

SOUTH AFRICAN LAW REFORM COMMISSION

PROJECT 113

**REPORT
THE USE OF ELECTRONIC EQUIPMENT IN COURT PROCEEDINGS
(POSTPONEMENT OF CRIMINAL CASES VIA AUDIOVISUAL LINK)**

JULY 2003

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**TO DR PM MADUNA, MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's interim report on the use of electronic equipment in court proceedings (Project 113) dealing with the postponement of criminal cases against an accused person in custody via audiovisual link.

**JUSTICE Y MOKGORO
CHAIRPERSON: SA LAW COMMISSION
JULY 2003**

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INTRODUCTION

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

The members of the Commission are -

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The Honourable Madam Justice L Mailula (Vice-Chairperson)
The Honourable Mr Justice CT Howie
Professor IP Maithufi (Full Time Member)
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The project leader responsible for this project is the Honourable Mr Justice LTC Harms. The other members of the Project Committee are -

Dr W Seriti (Commission's representative)
The Honourable Mr Justice RW Nugent
Professor L Fernandez
Professor PJ Schwikkard
Mr T Masuku

EXECUTIVE SUMMARY

1. At its meeting held on 13 August 2001 Mr Justice LTC Harms, the Chairperson of the Commission's project committee dealing with the simplification of criminal procedure, proposed that consideration should be given to the review of the rules of evidence, especially as a result of technological developments. During discussion by the committee the question arose whether this should be included in that committee's terms of reference or whether consideration should be given to the inclusion of a new investigation in the Commission's programme.

2. The Chairperson of the project committee suggested that the investigation would be broader than the committee's original terms of reference since it would include the civil law as well. He, for example, referred to the rules relating to hearsay as well as the rules governing computer generated evidence. The members of the committee unanimously supported the need for such an investigation. The committee was also informed that there are a number of investigations already on the Commission's programme which, to a lesser or greater extent, included a review of rules of evidence, namely the investigation into sexual offences, computer related crime and the use of electronic equipment in court proceedings. The committee resolved that it might be advisable to approach the rules of evidence in a holistic manner. Consequently the committee resolved to refer the decision on the inclusion of a new investigation to the Commission.

3. The Commission's Working Committee considered the request at its meeting on 17 September 2001 and approved the inclusion of the investigation in its programme. Since the Commission was at the time already engaged in other investigations relating to the reform of the law, which may have a direct impact on the rules of evidence, the Commission approved the inclusion of the proposed investigation into the review of the rules of evidence in its programme to run concurrently with the other relevant investigations on its programme. The Commission also resolved that a project committee should be appointed for the investigation and recommended that the same project committee should also direct the investigation into the use of electronic equipment in court proceedings. A project committee, chaired by Mr Justice LTC Harms, was appointed by the Minister during February 2003.

4. With regard to the Commission's investigation into the use of electronic equipment in court proceedings it must be pointed out the office of the National Director of Public Prosecutions identified the transportation of accused persons awaiting trial to the courts for the purpose of postponements as a problem area in that great costs are incurred in the

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process and it also provided opportunities for prisoners to escape. The office of the National Director therefore embarked on a process to promote the use of video-conferencing to postpone cases of prisoners awaiting trial. Since the Law Commission included the investigations into the review of the law of evidence and the use of electronic equipment in court proceedings in its programme, the Commission was requested to expedite the investigation and to conduct a separate investigation into the possibility of postponement of cases via video conferencing. The project committee approved the request. In view of the urgency of the matter the project committee also approved a departure of its normal processes for the conclusion of an investigation and resolved that the investigation should be completed in the following manner:

- * preparation of a short discussion document examining the existing legislation, a short comparative study reflecting the position in a few foreign jurisdictions and proposals for legislative amendments;
- * the hosting of a consultative meeting with relevant role players; and
- * completion of a short report reflecting the Committee's recommendations.

5. It has been proposed by role-players in the criminal justice system that South Africa should introduce legislation that will make it possible that criminal cases against accused persons who are in custody awaiting trial may be postponed via audiovisual link. This will mean that accused persons will not have to appear physically in courts for the purpose of a mere postponement of the case. The proposal will allow for the use of modern technology and the set up of "video-conference courts" to remand criminal cases against persons who are in custody awaiting trial. In terms of the proposal, audiovisual equipment will have to be installed at the courts and the prison. According to the proposal, the system is intended to be used for postponements only and then only after the first appearance of the accused person for purposes of further remands. The National Director of Public Prosecutions, with regard to the equipment necessary to facilitate the procedure, approached the firm Protea Electronics. Protea Electronics indicated that it could provide the equipment for the implementation of a pilot project facilitating the process; it arranged for a practical presentation of the use of the equipment on 19 February 2003; and it provided the Commission with information on the equipment necessary for the implementation of a process of video-conferencing.

6. After considering the constitutional implications of the proposed amendment, the legal opinions submitted by both the State Law Advisers and Mr G Nel, the comments received during the Commission's consultative meeting, and having due regard to its own

research, the Commission is of the view that the proposed procedure is not unconstitutional. The Commission endorses the view of Mr Nel on the constitutional issue. The Commission is, however, sympathetic to the view that the procedure would introduce an innovation which should be implemented incrementally, and although convinced of the major advantages to the criminal justice system, recommends that it be introduced for limited purposes initially but with the reservation that it be expanded later. The Commission accepts that the comments that the legislation should be uncomplicated, that technical matters should be provided for in regulations (especially because of the changes in technology), that the prison or place of detention should be defined, that juveniles should initially be excluded from the process, that the point of departure should be to allow the procedure unless, in the discretion of the presiding officer, the accused must in the interests of justice be brought to court and that the procedure should be broadened to include bail applications, both before conviction and after conviction pending an appeal, but that it should be in the discretion of the presiding officer to order the accused's physical presence in court.

7. Another matter for consideration is whether or not the proposed procedure should not also be made applicable to appeal proceedings. In this regard the Constitutional Court has already considered the matter. In *S v Pennington and Another* (1999 (2) SACR 329 (CC)), the Constitutional Court considered the issue of appeals and the right to a public hearing and to be present in court in appeal proceedings. In this case oral argument on the relevant issues was heard in open court. Counsel were asked to consider and to address argument on the question whether section 34 of the 1996 Constitution, on which the appellants rely, applies to applications for leave to appeal in criminal cases, and if it does, whether the Constitutional Court in regulating its own process has the power to lay down a practice which permits such matters to be dealt with in chambers and not in open court.

8. The court ruled that:

[46] Section 34 provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

The words “any dispute” may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that section 35 of the Constitution deals specifically with

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the manner in which criminal proceedings must be conducted.

[47] Section 35(3) sets out what is required for a fair trial in criminal proceedings. Sections 35(3)(c) and (e) provide that every accused person shall have the right

“(c) to a public trial before an ordinary court;
(e) to be present when being tried.”

In contrast section 35(3)(o) which deals with appeals provides only for the right “of appeal to, or review by, a higher court”.

There is no express requirement that the appeal be in open court or that the accused person be entitled to be present at the appeal...

And:

[48] The settled practice of our courts has always been for appeals to be heard in public. Applications for leave to appeal are not ordinarily heard in open court, though a hearing may be called if the application raises issues on which it is considered desirable to hear oral argument. In most cases, however, the applications are dealt with in chambers and are either granted or refused on the basis of the judgment of the Court *a quo* and the reasons advanced in the application in support of the submission that such judgment was wrong. There are sound practical reasons for this. If such matters had to be dealt with in open court, the court rolls would be clogged and the result would be additional expense and delays...

[51] I am accordingly of the opinion that applications for leave to appeal do not need to be heard in public.

9. The Commission therefore concluded that the inclusion of appeal hearings would not present constitutional problems. In fact in the light of the decision referred to above the Commission is satisfied that the procedure would be constitutional and having regard to the major advantages of the proposed procedure recommends that it be included in the proposed procedure with reference to applications for leave to appeal and appeals in respect of accused persons in custody in prison.

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CHAPTER 1

INTRODUCTION AND BACKGROUND TO THE INVESTIGATION

1.1 The review of the law of evidence was included for research in the Commission's programme soon after its establishment in 1973. The Commission's original intention was to codify the South African law of evidence in its entirety and to consolidate it in one Act. The reasons for this were, mainly, that the rules of evidence are contained in various Acts and that a large part of the law of evidence is not codified, but is contained in case law built up over a long period. An important consideration which gave rise to the idea of codification was the fact that the English law is still referred to in some cases as a source of the law of evidence. There were also certain aspects of the law of evidence which were considered to be in need of reform.¹

1.2 Research with a view to the eventual codification of the law of evidence was embarked on. During 1979 the stage was reached where the fundamental principles on which the contemplated Code would have to be based were formulated. The Commission gradually came to realise that the codification of the law of evidence as a whole was an enormous task which would take years to complete. The Commission noted that attempts elsewhere (for instance Canada) to codify the law of evidence had entailed much more manpower and money than was available to the Commission. It was therefore necessary to plan the investigation anew.²

1.3 The Commission considered the question whether there was really an urgent need for codification. It found that the law of evidence was reasonably accessible. There were standard textbooks and specialised works from which the practitioner and the judiciary could readily ascertain the current rules of evidence. The most important rules, which are contained in different Acts, might, if need be, be consolidated in one Act. It was of the view that the law of evidence is a branch of the law with which legal practitioners and the judiciary are mainly concerned. It concluded that the law of evidence affects the general public to a lesser degree since knowledge of the rules of evidence is of no great importance to the public. It also concluded that the fact that English law is still a source of the South African

¹ The above comments are recorded in the South African Law Commissions Report, Project 6 *Review of the Law of Evidence* (October 1986) paras 1.1-1.2.

² Ibid para 1.4.

Law of evidence should be seen in its historical perspective. And even if codified, the rules incorporated in a Code could not be wrenched from their historical origin. The Commission was also concerned that codification might present fresh problem on interpretation resulting in legal uncertainty.³

1.4 In the light of all the considerations mentioned above, the Commission decided to abandon the codification of the law of evidence. It decided to ascertain through research which aspects of the law of evidence were unsatisfactory or do not meet current needs, and to formulate suggestions for their reform. The Commission came to the conclusion that reform was desirable in respect of the following matters: judicial notice of customary law and of foreign law, copies of documents, the marital privilege and hearsay evidence.⁴ The recommendations formulated in the Commissions Report formed the basis of the Law of Evidence Amendment Act 45 of 1988.

1.5 At its meeting held on 13 August 2001 Mr Justice LTC Harms, the Chairperson of the Commission's project committee dealing with the simplification of criminal procedure, proposed that consideration should be given to the review of the rules of evidence, especially as a result of technological developments. During discussion by the committee the question arose whether this should be included in that committee's terms of reference or whether consideration should be given to the inclusion of a new investigation in the Commission's programme.

1.6 The Chairperson of the project committee suggested that the investigation would be broader than the committee's original terms of reference since it would include the civil law as well. He, for example, referred to the rules relating to hearsay as well as the rules governing computer generated evidence. The members of the committee unanimously supported the need for such an investigation. The committee was also informed that there are a number of investigations already on the Commission's programme which, to a lesser or greater extent, included a review of rules of evidence, namely the investigation into sexual offences, computer related crime and the use of electronic equipment in court proceedings. The committee resolved that it might be advisable to approach the rules of evidence in a holistic manner. Consequently the committee resolved to refer the decision on the inclusion of a new investigation to the Commission.

³ Ibid para 1.5.

⁴ Ibid paras 1.6-1.8.

1.7 The Commission's Working Committee considered the request at its meeting on 17 September 2001 and approved the inclusion of the investigation in its programme. Since the Commission was at the time already engaged in other investigations relating to the reform of the law, which may have a direct impact on the rules of evidence, the Commission approved the inclusion of the proposed investigation into the review of the rules of evidence in its programme to run concurrently with the other relevant investigations on its programme. The Commission also resolved that a project committee should be appointed for the investigation and recommended that the same project committee should also direct the investigation into the use of electronic equipment in court proceedings. A project committee, chaired by Mr Justice LTC Harms, was appointed by the Minister during February 2003.

1.8 Professor Schwikkard from the University of Cape Town, a co-opted member of the project committee on the simplification of criminal procedure, was requested to conduct a preliminary investigation to determine the scope of the investigation to enable the Law Commission to proceed with the investigation and to make final recommendations concerning the review of the rules of evidence. The preliminary investigation was required to:

(A) identify and analyse the investigations currently on the Commission's programme and the extent to which they deal with a review of the rules of evidence;

(B) conduct research on the current legal position with the view to identify shortcomings in the existing rules of evidence relating to both civil and criminal law over and above those dealt with in investigations already on the Commission's programme; and

(C) make recommendations on the scope of the investigation and on how the overlap between the different investigations already in progress should be dealt with.

1.9 Professor Schwikkard pointed out that given that in 1986 the Commission concluded that the law of evidence required no major reforms, it is necessary to ask what has changed since then. The new constitutional dispensation has impacted on the law of evidence in a number of ways. For example, the right of access to information,⁵ the entrenchment of fair

⁵ Section 32 of the Constitution.

trial rights⁶ and the exclusion of unconstitutionally obtained evidence⁷ have all had a direct impact on the law of evidence and have given rise to a large body of new case law. Additionally, the right to equality has not only required a re-examination of evidence in so far as it departs from the requirements of formal equality⁸ but has also required a reconsideration of the rules of evidence in so far as they relate to effective equal access to justice.⁹ This has not only resulted in a substantial body of new case law and a number of new policy considerations but it also requires a departure from the Commission's previous view that "the law of evidence is a branch of the law with which legal practitioners and the judiciary are mainly concerned" and not something of great importance to the public. It is in the public interest to know the extent of constitutionally enforceable rights and it is becoming increasingly apparent that knowledge of the law of evidence is essential for case preparation. This may impact on parties in civil cases as well as the accused, prosecution and the police in criminal cases. The law of evidence is also integral to the enforcement of substantive law and consequently has also attracted the interest of non-governmental organisations working in specific fields such as child justice and the abuse of women. Consequently, the Commission's previous conclusion that "knowledge of the rules of evidence is of no great importance to the public" is no longer valid.

1.10 The last decade has also seen a rapid development in technology and with it unforeseen forms of evidential problems and attendant difficulties in determining admissibility. This has also placed additional demands on the legislature.¹⁰

1.11 The developments outlined above also call the Commission's 1986 conclusion that the law of evidence is reasonably accessible into question. The Commission was no doubt correct in concluding that codification would be a lengthy and costly exercise. Nevertheless the merits of codification need to be considered as well as alternative and/or interim measures.

⁶ Section 35(3) of the Constitution.

⁷ Section 35(5) of the Constitution.

⁸ See South African Law Commission, Report on the Application of the Bill of Right to Criminal Procedure, Criminal Law and the Law of Evidence and Sentencing (2001)

⁹ See for example, the South African Law Commissions' reports on Juvenile Justice, Review of the Child Care Act, and its discussion paper on Sexual Offences.

¹⁰ See for example the Electronic Communications and Transactions Act, 25 of 2002 and the Interception and Monitoring Act.

1.12 Finally the increases in crime and increasing pressure on the criminal justice system has made it imperative that measures be adopted to simplify criminal procedure and evidence in order to improve efficiency.

1.13 With regard to the Commission's investigation into the use of electronic equipment in court proceedings it must be pointed out the office of the National Director of Public Prosecutions identified the transportation of accused persons awaiting trial to the courts for the purpose of postponements as a problem area in that great costs are incurred in the process and it also provided opportunities for prisoners to escape. The office of the National Director therefore embarked on a process to promote the use of video-conferencing to postpone cases of prisoners awaiting trial. Since the Law Commission included the investigations into the review of the law of evidence and the use of electronic equipment in court proceedings in its programme, the Commission was requested to expedite the investigation and to conduct a separate investigation into the possibility of postponement of cases via video conferencing. The project committee approved the request. In view of the urgency of the matter the project committee also approved a departure of its normal processes for the conclusion of an investigation and resolved that the investigation should be completed in the following manner:

- * preparation of a short discussion document examining the existing legislation, a short comparative study reflecting the position in a few foreign jurisdictions and proposals for legislative amendments;
- * the hosting of a consultative meeting with relevant role players; and
- * completion of a short report reflecting the Committee's recommendations.

CHAPTER 2

THE LEGAL POSITION IN SOUTH AFRICA - RELEVANT CONSTITUTIONAL AND LEGISLATIVE PROVISIONS REGARDING POSTPONEMENTS VIA VIDEO LINK OF CRIMINAL CASES AGAINST ACCUSED PERSONS IN CUSTODY AWAITING TRIAL

THE PROPOSAL FOR INVESTIGATION

2.1 It has been proposed by role-players in the criminal justice system that South Africa should introduce legislation that will make it possible that criminal cases against accused persons who are in custody awaiting trial may be postponed via audiovisual link. This will mean that accused persons will not have to appear physically in courts for the purpose of a mere postponement of the case. The proposal will allow for the use of modern technology and the set up of "video-conference courts" to remand criminal cases against persons who are in custody awaiting trial. In terms of the proposal, audiovisual equipment will have to be installed at the courts and the prison. According to the proposal, the system is intended to be used for postponements only and then only after the first appearance of the accused person for purposes of further remands. The National Director of Public Prosecutions, with regard to the equipment necessary to facilitate the procedure, approached the firm Protea Electronics. Protea Electronics indicated that it could provide the equipment for the implementation of a pilot project facilitating the process; it arranged for a practical presentation of the use of the equipment on 19 February 2003; And it provided the Commission with information on the equipment necessary for the implementation of a process of video-conferencing.

2.2 According to Protea Electronics the following equipment, as used in other countries, needs to be set up in our courts and the Department of Correctional Services to allow for audio-visual links between a court and a remote point, such as a prison:

Courts

- (1) A video link consisting of a video camera and two visual display devices, (television monitors, plasma displays);
- (2) An audio link consisting of an audio conferencing facility, which is interfaced with the video-conferencing unit.
- (3) A telephone, which will be linked to the prison, for a secure conference

between the prisoner and the defence team.

- (4) A fax machine connected to the prison.
- (5) In certain cases a confidential interview booth has been suggested so that the defence team can confer with the prisoner in the Prison Court via another video link in private.

Department of Correctional Services

2.3 The following equipment is required for the remote premises (a demarcated and proclamation room), which is designated as a courtroom at the prison, to which a prisoner will go to attend the postponement of the case:

- (1) A video link consisting of a video camera and two visual display devices (television monitors or plasma displays);
- (2) An audio conferencing system to accommodate up to 4 prisoners. The audio conferencing facility is interfaced into the video-conferencing unit;
- (3) A telephone will be linked to the court for a secure conference between the prisoner and the defence team;
- (4) A fax machine will be connected to the court.
- (5) The video can be routed from the Prison Court to the secure booth at the Magistrates' Court, enabling the defence team to confer with the prisoner via a video and audio link in private.

2.4 In order to determine whether legislative intervention is necessary to allow for the procedure, it is necessary to evaluate existing legislation as well as the applicable constitutional principles. In what follows a brief outline is given of relevant constitutional principles as well as relevant legislative provisions. It is submitted that, if the procedure is to be used for postponement of cases, two constitutional principles are applicable and should be evaluated in the process, namely the right of the accused person to be brought before court and the right of the accused person to a fair trial, which includes the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing

before a court or independent and impartial tribunal. Consideration should also be given to section 36 of the Constitution, which provides for the limitation of Constitutional rights.

BRINGING A PRISONER AWAITING TRIAL TO COURT - THE CURRENT PROCEDURE

2.5 Court lists are printed in the prison the previous day and remand warrants are drawn up for all awaiting trial prisoners who are due to attend court on the following day. Awaiting trial prisoners are kept separate from sentenced prisoners. In large prisons awaiting trial prisoners are collected the previous day and kept in separate holding cells for the following day. On the day of the trial all the personal belongings of the prisoners are handed over to them and they are required to sign for them. Prisoners must take all their belongings with them, as it is not certain whether or not they will return to the prison after the remand as cases may be finalised. Property is kept in two registers, one for personal property and another one for cash. On the day of the trial all prisoners are identified before they are handed over to the police. This is done by comparing their thumbprints with those appearing on the remand warrant. All the information regarding the prisoner's belongings and cash is duplicated on the computer system. The prisoner is in addition asked a few questions to ensure that he or she is the person mentioned. This is necessary as thumbprints may be unclear and cannot be used for comparison.

2.6 The police will then receive the prisoners from Correctional Services. It is required of the police to identify them again by means of their thumbprints, although in practice this seldom happens due to time constraints. When a large number of prisoners are to be transported, either different vehicles are used or the same vehicle must make repeated trips. Prisoners are then transported to the various courts. This can be over any distance from walking distance to more than 200 km – such as when prisoners are transported to regional courts in rural areas. The number of prisoners varies from a few individuals to more than 200 a day in large centres such as Pretoria, Cape Town, Durban and Johannesburg. Prisoners are often transported from one prison to various different courts; for example, the prisoners kept at the Pretoria prison have to be transported to the courts in Pretoria, Soshanguve and Pretoria-North. They must therefore be separated in the prison and handed over to the police according to the court that they must attend.

2.7 At court the particulars of each prisoner is entered into a cell register at the court cells. Personal belongings are not confiscated and the prisoner must keep them for the duration of the court day. At court prisoners from different prisons, places of safety and police stations are kept in the same cells. This is irrespective of whether awaiting trial

prisoners were just received from the police stations for a first appearance or whether their case has been remanded previously. In Pretoria, prisoners are received from the Pretoria prison and 23 other places of detention. The court orderlies collect the prisoners for each court and escort them to the holding cells at each individual courtroom. The case may be finalised or remanded to another day. When the case is remanded, the presiding officer signs a warrant for further detention, which is taken to the court cells with the prisoner. If bail is granted, the relevant particulars will be indicated on the warrant. It may be that the prisoner is to be detained in a different facility than the one he or she came from. The particulars of the prisoners are entered on a "body receipt" that will accompany them to the prison where they are to be kept until their next hearing. Their thumbprints are attached for identification purposes. The police then transport the prisoners back to prisons as indicated on the warrant.

2.8 At the prison the prisoners are taken up anew in the system. Where a prisoner is taken back to the prison where he or she came from that morning only the new trial date will be entered on the computer system. The prisoner's personal belongings have to be handed in again, cash separate from other items, and it has to be duplicated on a computer system.

2.9 It is a commonly known fact that the transportation of prisoners from prison to court and back has established a smuggling route between the prison and the outside world. According to Mr Kriek, a senior manager in the Department of Correctional Services, they already accept electronic warrants at the prisons that are part of the Court Centre Project. A fax machine is installed next to the monitor in the prison and when the case is remanded the warrant is faxed through immediately. The thumb-prints of the accused are placed on it and it serves as the warrant until the original is received later the same day.

CONSTITUTIONAL IMPERATIVES AND RELEVANT PROVISIONS OF THE CRIMINAL PROCEDURE ACT

THE RIGHT TO BE BROUGHT BEFORE A COURT AFTER ARREST

2.10 Section 35(1) of the Constitution provides that:

Everyone who is arrested for allegedly committing an offence has the right-

(d) to be brought before a court as soon as reasonably possible but not later than-

- (i) 48 hours after arrest; or
- (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.

2.11 Steytler¹¹ at 126 notes:

“The right of an arrested accused to be placed promptly under the authority of a court, with 48 hours being the outer limit, determines the lawful duration of detention in the hands of the police. After the expiry of this period the detention becomes unconstitutional. A positive obligation is thus imposed on the detaining authority to bring an arrestee before a court within that period. The right to be brought to court is circumscribed, first, by a general standard that it must be done ‘as soon as reasonably possible’ and, second, by an outer limit of 48 hours.

...

The right need not be realised immediately on arrest, but within a reasonable period thereafter, with 48 hours being the outer limit. To put it differently; before the expiry of the 48 hours a detention may become unconstitutional if it was reasonably possible for the police to have brought an accused to court but failed to do so.

What is reasonably possible must relate both to the legitimate concerns and capacities of the police as well as the interests of an accused. Where the police have not completed identification procedures or collected evidence for the bail inquiry, it would be unreasonable to require that an accused be taken to court. At the same time it is clearly in the interests of an accused to be brought before a court as soon as possible in order to determine the necessity of his or her detention. Reasonableness will depend on the circumstances of each case giving due consideration to the interests of both parties.”

SECTION 50 OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977 - ARREST

2.12 Section 50(6)(b) reads: An arrested person contemplated in paragraph (a)(i) is not entitled to be brought to court outside ordinary hours.

2.13 Section 50(1)(c) & (d)(i) contains essentially the same provisions as s 35(1)(d) of the Constitution. Prior to the insertion of s 50(6)(b), it was recognised that accused persons were entitled to bring bail applications outside of court hours and before the expiration of the 48 hours period.¹²

¹¹ N Steytler *Constitutional Criminal Procedure A commentary on the Constitution of the Republic of South Africa*, Butterworths, Durban 1998, at 126.

¹² See *Twayie v Minister van Justisie* 1986 (2) SA 101 (O); *Garces v Fouche* 1998 (2) SACR 451 NmHC.

2.14 The constitutional right to be brought before a court as soon as reasonably possible means precisely that; the 48-hour (during court days) limitation simply reinforces the right to freedom and security of person. And even if it is not reasonably possible to bring the accused before the court within 48 hours, the accused must be released on the expiration of the 48-hour period. Consequently, it can be argued that the meaning of ‘reasonably possible’ will depend on the circumstances of each case. For example, when an arrested person is found to suffer from some chronic medical ailment, it is reasonable to demand that public officials make a greater effort to bring that person to court before the expiration of the 48 hour period than would be the case with accused without ‘peculiar personal’ circumstances.¹³

2.15 It has been argued that the blanket prohibition on bail outside of court hours contravenes both section 12 and section 35(1)(d) and should either be deleted or qualified so as to permit bail outside of normal working hours where grounds for urgency exist.

THE RIGHT TO A FAIR TRIAL WHICH INCLUDES THE RIGHT TO A PUBLIC TRIAL

2.16 Section 35(3)(c) of the Constitution provides that:

Every accused person has the right to a fair trial, which includes the right to a public trial before an ordinary court.

2.17 Steytler¹⁴ describes the content of the right to a public trial as follows:

“A trial is public when members of the public, including the media, have access to the courtroom and may report on the proceedings. A prerequisite for a public hearing is that the public knows when the proceedings are scheduled...”

¹³ Hannah J in *Garces supra* at 457e noted: ‘to my mind justice dictates that in the appropriate case a person should have a right to apply for bail outside normal hours.’ However, at 457j he stated: “I must emphasise, however, that real grounds for urgency must exist before a court will hear a bail application outside normal hours. This is a matter which must be decided by magistrates on a case by case basis.”

¹⁴ Op cit 251.

**SECTIONS 152, 153, 158 AND 159 OF THE CRIMINAL PROCEDURE ACT -
CIRCUMSTANCES IN WHICH CRIMINAL PROCEEDINGS SHALL NOT TAKE PLACE IN
OPEN COURT AND PROCEEDINGS IN THE PRESENCE AND ABSENCE OF AN
ACCUSED**

2.18 Section 152 of the Criminal Procedure Act provides that criminal proceedings shall be conducted in open court except where otherwise expressly provided for by the Act or any other law, and may take place on any day.

2.19 The Act also provides for exceptions to this general rule. Section 153, for example, provides that if it appears to a court that it would, in any criminal proceedings pending before the court, be in the interests of –

- the security of the State;
- good order;
- public morals; or
- the administration of justice

that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof. This may, for example, be the case where there is a likelihood that harm might result to any person, other than an accused, if he or she testifies at such proceedings. In such cases the court may direct that such person testify behind closed doors and that no person may be present when such evidence is given unless his or her presence is necessary in connection with such proceedings or is authorized by the court; and that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court.

2.20 Section 158 provides that criminal proceedings must take place in the presence of the accused except as otherwise expressly provided for by the Criminal Procedure Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.

2.21 However, section 159 provides for circumstances in which criminal proceedings may take place in absence of accused.

If an accused at criminal proceedings conducts him or herself in a manner, which makes the continuance of the proceedings in his or her presence impracticable, the court may direct that the accused be removed and that the proceedings continue in his or her absence.

If two or more accused appear jointly and the court is at any time after the commencement

of the proceedings satisfied, that –

the physical condition of that accused is such that he or she is unable to attend the proceedings;

it is undesirable that the accused should attend the proceedings;

circumstances relating to the illness or death of a member of the family of that accused make absence from the proceedings necessary; or

any of the accused is absent from the proceedings,

the court, if it is of the opinion that the proceedings cannot be postponed without undue prejudice, embarrassment or inconvenience to the prosecution or any co-accused or any witness in attendance or subpoenaed to attend, may authorize the absence of the accused concerned from the proceedings for a period determined by the court and on the conditions which the court may deem fit to impose and direct that the proceedings be proceeded with in the absence of the accused concerned.

2.22 Where an accused becomes absent from the proceedings in the circumstances referred to above, the court may, instead of directing that the proceedings be proceeded with in the absence of the accused, upon the application of the prosecution direct that the proceedings in respect of the absent accused be separated from the proceedings in respect of the accused who are present. Thereafter, when such accused is again in attendance, the proceedings against him or her continues from the stage at which he or she became absent.

2.23 If an accused, who is in custody in terms of an order of court cannot, by reason of a physical indisposition or other physical condition, be brought before a court for the purposes of obtaining an order for further detention, the court before may, upon application made by the prosecution, supported by a certificate from a medical practitioner, order, in the absence of such an accused, that he or she be detained at a place indicated by the court and for the period which the court deems necessary in order that the accused can recover and be brought before the court so that an order for a further detention for the purposes of the trial can be obtained. Section 160 provides for the procedure where an accused is absent as contemplated in section 159.

EXISTING LEGISLATION WHICH PROVIDES FOR VIDEO-CONFERENCING OR THE USE OF ELECTRONIC EQUIPMENT IN COURT PROCEEDINGS

2.24 A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, give evidence by means of closed circuit television or similar electronic media. A

court may make a similar order on the application of an accused or a witness. A court may make such an order only if facilities are readily available or obtainable and if it appears to the court that to do so would-

- (a) prevent unreasonable delay;
- (b) save costs;
- (c) be convenient;
- (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or
- (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

2.25 The court may, in order to ensure a fair and just trial, make the giving of evidence subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

2.26 Provision is also made for video-conferencing in a number of existing Acts in South Africa, for example, section 4 of the International Co-operation in Criminal Matters Act, 75 of 1996, section 25(2)A of the Competition Act, Act 89 of 1998, the Schedule to The Implementation of the Rome Statute of the International Criminal Court Act, Act 27 of 2002 and section 158(3) of the Criminal Procedure Act.

2.27 Section 170A of the Criminal Procedure Act 51 of 1977 provides for the use of intermediaries in cases of sexual abuse involving children under the age of 18 years and it also provides for the use of closed circuit television as medium to give evidence against an accused. In this instance the witness is not in the same room as the accused and evidence can be given in the "absence" of the accused. Although this provision goes broader than the current proposal it is nevertheless important for purpose of considering the constitutionality of the current proposal. The section provides:

(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person such as an intermediary in order to enable such witness to give evidence through the intermediary.

(2)(a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that

intermediary.

(b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his evidence at any place-

(a) which is informally arranged to set the witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.

2.28 Therefore, where such an intermediary has been appointed, the court may also direct that electronic and other measures may be employed to ensure that the accused or any other person whose presence may upset the complainant is outside the sight and hearing of the complainant. This allows for the use of systems relying on closed circuit television or one-way mirror screens.¹⁵

2.29 On evaluating the constitutionality of section 170A of the Criminal Procedure Act, the question to be addressed is whether or not this section infringes the accused's right to a fair trial. The aspect of the right to a fair trial in question here would be the right to adduce and challenge evidence. This right is entrenched in the 1996 Constitution as sections 35(3)(e) and 35(3)(i) respectively.

2.30 In *Klink v Regional Court Magistrate NO and Others*¹⁶ a constitutional challenge was made to section 170A on the basis that this section deprived the accused of his right to a fair trial and limited his right to cross-examine state witnesses. While the court (*per* Melunsky J) recognised the right to confront and cross-examine as part of a fair trial, it was held that it was still necessary to balance the rights of the accused with the rights of witnesses not to be subjected to further traumatising events in their pursuance of justice.¹⁷

¹⁵ Section 170A (3)(a), (b) and (c).

¹⁶ 1996 (3) BCLR 402 (E).

¹⁷ Steytler points out that the test applied by the Court in the *Klink* judgement (i.e. the balancing of interests between the accused and the child witness) is essentially 'a limitation enquiry'. This step usually follows after a finding that a right has in fact been violated in order to establish whether this violation is reasonable and justifiable. The court's conclusion that the right to cross-examination is not limited is therefore at odds with this limitation enquiry.

2.31 It is significant that Melunsky J found that constitutional interpretation required more than an attempt to ascertain the intention of the legislature from the language used. He held that constitutional questions ‘must be examined in their broader political, social and historical context in order to attempt any kind of meaningful constitutional analysis’.¹⁸ The learned judge then added that section 170A should be considered in this light and emphasised that -

Nothing in this section precludes an accused from representing himself or from having the right to legal counsel. Nor is an accused person, either personally or where represented through Counsel, prevented from asking questions in cross-examination. When the section is applied, the cross-examiner’s questions are put to the witness by the intermediary. This does not appear to me to be a limitation of the right to cross-examine.¹⁹

2.32 As a result, the court concluded that the provision did not deny the accused a right to a fair trial. Even if one were to give a broad and liberal interpretation to the fundamental rights of the accused to a fair trial, the court was satisfied that the right to cross-examine had not been violated by the provisions of section 170A of the Act.⁶

¹⁸ At 411 F - H.

¹⁹ At 411 H - I.

CHAPTER 3

VIDEO-CONFERENCING - A COMPARATIVE PERSPECTIVE

COMMONWEALTH DRAFT MODEL LAW ON ELECTRONIC EVIDENCE

3.1 It is important to note that, while not specifically dealing with postponements via video-conferencing, the Law Ministers and Attorneys-Generals of small Commonwealth jurisdictions recognised that the common law rules of evidence are not adequate to deal with technological advances and need to be modernised. An expert group was accordingly convened to develop model legislation on the modernisation of the laws of evidence to address the needs of small Commonwealth jurisdictions. The expert group *inter alia* considered the rules relating to hearsay evidence (including business and computer records), corroboration and evidence by video-link of both vulnerable witnesses and witnesses in foreign jurisdictions, and proposed a model law which contains provisions on evidence by technology. The draft model law contains provisions which allow that the evidence of a person other than the accused be received in legal proceedings via technology unless the person conducting the legal proceedings is satisfied that there is no justification for the receipt of the evidence in this manner or the reception of the evidence would be contrary to the interests of justice. The model law, however, does not deal with the issue of postponing criminal cases via video link, but it goes further in that it allows the giving of evidence via electronic link. These developments are of significant importance to the Commission's current investigation.

VIDEO-CONFERENCING ARRANGEMENTS IN AUSTRALIAN JURISDICTIONS:

3.2 The following information was extracted from submissions made to the Victorian Parliamentary Law Reform Committee in relation to the Law and Technology Project.²⁰

VICTORIA

- * The Evidence Audio Visual and Audio Linking Act came into operation in Victoria in December 1997. It enables the judiciary to direct that a person

²⁰ Kathya Martyres Victorian parliamentary law reform committee law and technology project: an examination of video-conferencing and electronic evidence presentation
<http://www.parliament.vic.gov.au/lawreform>.

appear by audio or audio visual link from any place within or outside Victoria or outside Australia.

- * Currently in Victoria a point to point macro link exists between the Melbourne Magistrates Court and the Melbourne Remand Centre.
- * A pilot video-conferencing program was run in 1997 at some Magistrates Courts,
- * During the course of 1998 video-conferencing facilities were to be installed at the Melbourne County Court (22 criminal courtrooms and 4 civil courtrooms), Melbourne Magistrates Court (4 civil courtrooms), the Supreme Court, the Children's Court and the Coroners Court as well as at some county courts.
- * The Department of Justice installed equipment at the Police Forensic Science Laboratories and at three private prisons.
- * The Family Court was in the process of introducing a pilot Video-conferencing Arrangement between Victoria and Tasmania which was to be extended to the whole court by the conclusion of 1998.
- * Court proceedings in Victoria are recorded using audio and video technology. Video and audio signals are transmitted to the Victorian Government Reporting Service (VGRS) which acts as a separate hub.

The Victorian Act, No 4 of 1997, provides as follows with regard to the appearance of an accused person and the postponement of cases against an accused who is in custody awaiting trial:

42G. Technical requirements

(1) The technical requirements for an audio visual link are as follows:

- (a) both the court point and the remote point are equipped with facilities that--
 - (i) enable all appropriate persons at the court point to see and hear the person appearing before the court or giving the evidence or making the submission; and
 - (ii) enable all appropriate persons at the remote point to see and hear appropriate persons at the court point; and
- (b) any requirements prescribed by rules of court for or with respect to--
 - (i) the form of audio visual link;
 - (ii) the equipment, or class of equipment, used to establish the link;
 - (iii) the layout of cameras;
 - (iv) the standard, or speed, of transmission;
 - (v) the quality of communication;
 - (vi) any other matter relating to the link;
- (c) any requirements imposed by the presiding judge or magistrate.

(2) The technical requirements for an audio link are as follows:

- (a) both the court point and the remote point are equipped with facilities that--

(i) enable all appropriate persons at the court point to hear the person appearing before the court or giving the evidence or making the submission; and

(ii) enable all appropriate persons at the remote point to hear appropriate persons at the court point; and

(b) any requirements prescribed by rules of court for or with respect to--

(i) the form of audio link;

(ii) the equipment, or class of equipment, used to establish the link;

(iii) the standard, or speed, of transmission;

(iv) the quality of communication;

(v) any other matter relating to the link; and

(c) any requirements imposed by the presiding judge or magistrate.

(3) Requirements imposed by the presiding judge or magistrate under sub-section (1)(c) or (2)(c) must not be inconsistent with any provision made by this Part or any rules of court.

...

42K. Appearance of adult accused person before court

(1) Unless the court otherwise directs, an accused person, other than a child, being held in custody who is required to appear, or be brought, before a court--

(a) in a proceeding with respect to bail not including a proceeding referred to in sub-section (3); or

(b) having previously been remanded in custody, in a subsequent proceeding with respect to his or her remand in custody; or

(c) on a status hearing or committal mention hearing held in connection with a committal proceeding; or

(d) on an application for the adjournment of a proceeding; or

(e) for his or her arraignment on a day other than a day on which the trial is to take place--

is not required to appear, or be brought, physically before the court but may appear before it by audio visual link.

(2) Unless the court otherwise directs, an accused person, other than a child, being held in custody who is required to appear, or be brought, before a court--

(a) on a committal proceeding; or

(b) on an inquiry into his or her fitness to stand trial; or

(c) on the trial (apart from the arraignment of the accused person) or hearing of the charge; or

(d) on a sentencing hearing; or

(e) on an appeal arising out of that trial or hearing--

is required to appear, or be brought, physically before the court.

(3) An accused person, other than a child, who has been taken into custody and who is required to be brought before a bail justice or the Magistrates' Court within a reasonable time of being taken into custody to be dealt with according to law is, if being brought before the Magistrates' Court, required to be brought physically before the court unless he or she consents to appear before the court by audio visual link.

(4) In any proceeding to which this Division applies (other than one referred to in sub-section (1), (2) or (3)), a court may, on its own initiative or on the application of a party to the proceeding, direct that an accused person, other than a child, appear before it by audio visual link if it is satisfied that appearance by audio visual link is consistent with the interests of justice.

42L. Making of direction for physical appearance in section 42K(1) proceedings

(1) A court may direct that an accused person appear, or be brought, physically before it in a proceeding in which, by virtue of section 42K(1), physical appearance would not otherwise be required if it is satisfied, on an application made in accordance with this section, that--

(a) physical appearance is required in the interests of justice; or

(b) it is not reasonably practicable for the accused person to appear before the court by audio visual link.

(2) An application for a direction referred to in sub-section (1) may be made by or on behalf of the accused person or the prosecution at any time up to 3 days before the day on which the accused person is due to appear or any shorter period before that day that is fixed by the court because of the existence of a good and sufficient reason.

(3) An application is made by filing with the court a notice in the form (if any) prescribed by rules of court and stating the grounds on which it is made and serving a copy on any other party in accordance with any rules of court.

(4) An application is to be determined by the court on the basis of the written application and any written submissions on the application filed with the court by any other party without giving the applicant or any other party an opportunity to be heard.

(5) With leave of the court, an application for a direction referred to in sub-section (1) may be made by or on behalf of the accused person or the prosecution at any time in the course of the proceeding to which the direction being sought relates, irrespective of whether an application by a party for such a direction has previously been refused by the court.

(6) Sub-sections (3) and (4) do not apply to an application made in accordance with sub-section (5).

(7) A court may also make a direction referred to in sub-section (1) on its own initiative at any time in the course of the proceeding to which the direction relates, irrespective of whether an application made in accordance with this section has previously been refused by it.

(8) The exercise of the power conferred on a court to make a direction referred to in sub-section (1) is subject to any practice directions.

42M. Making of direction for audio visual appearance in section 42K(2) proceedings

(1) A court may direct that an accused person appear before it by audio visual link in a proceeding in which, by virtue of section 42K(2), physical appearance would otherwise be required if it is satisfied, on an application made in accordance with this section, that--

(a) appearance by audio visual link is consistent with the interests of justice; and

(b) is reasonably practicable in the circumstances.

(2) Unless an application for the making of a direction referred to in sub-section (1) is made with the consent of all parties to the proceeding, the court may only grant such an application if satisfied that exceptional circumstances exist.

(3) An application for a direction referred to in sub-section (1) may be made by or on behalf of the accused person or the prosecution at any time up to 14 days before the day on which the accused person is due to appear or any shorter period before that day that is fixed by the court because of the existence of a good and sufficient reason.

(4) An application is made by filing with the court a notice in the form (if any) prescribed by rules of court and stating the grounds on which it is made and serving a copy on any other party in accordance with any rules of court.

(5) With leave of the court, an application for a direction referred to in sub-section (1) may be made by or on behalf of the accused person or the prosecution at any time in the course of the proceeding to which the direction being sought relates, irrespective of whether an application by a party for such a direction has previously been refused by the court.

(6) Sub-section (4) does not apply to an application made in accordance with sub-section (5).

(7) A court may also make a direction referred to in sub-section (1) on its own initiative at any time in the course of the proceeding to which the direction relates, irrespective of whether an application made in accordance with this section has previously been refused by it, if the court is satisfied that exceptional circumstances exist.

(8) Any victim of the offence which the accused person is alleged to have committed may address, or make a written submission to, the court in opposition to the making of a direction referred to in sub-section (1).

(9) The exercise of the power conferred on a court to make a direction referred to in sub-section (1) is subject to any practice directions.

42N. Application for making of direction under section 42K(4)

(1) An application for a direction referred to in section 42K(4) may be made by or on

behalf of the accused person or the prosecution at any time up to 14 days before the day on which the accused person is due to appear or any shorter period before that day that is fixed by the court because of the existence of a good and sufficient reason.

(2) An application is made by filing with the court a notice in the form (if any) prescribed by rules of court and stating the grounds on which it is made and serving a copy on any other party in accordance with any rules of court.

(3) With leave of the court, an application for a direction referred to in section 42K(4) may be made by or on behalf of the accused person or the prosecution at any time in the course of the proceeding to which the direction being sought relates, irrespective of whether an application by a party for such a direction has previously been refused by the court.

(4) Sub-section (2) does not apply to an application made in accordance with sub-section (3).

(5) A court may also make a direction referred to in section 42K(4) on its own initiative at any time in the course of the proceeding to which the direction relates, irrespective of whether an application made in accordance with this section has previously been refused by it.

(6) The exercise of the power conferred on a court to make a direction referred to in section 42K(4) is subject to any practice directions.

42O. Appearance before court of an accused person who is a child

Unless the court otherwise directs, an accused person who is--

- (a) a child; and
- (b) being held in custody; and
- (c) required to appear, or be brought, before a court in a proceeding to which this Division applies--

is required to appear, or be brought, physically before the court.

42P. Making of direction for audio visual appearance by child

(1) A court may direct that a child referred to in section 42O appear before it by audio visual link if it is satisfied, on an application made in accordance with this section, that appearance by audio visual link is--

- (a) consistent with the interests of justice; and
- (b) reasonably practicable in the circumstances.

(2) Unless an application for the making of a direction referred to in sub-section (1) is made with the consent of all parties to the proceeding, the court may only grant such an application if satisfied that exceptional circumstances exist.

(3) An application for a direction referred to in sub-section (1) may be made by or on behalf of the child or the prosecution at any time up to 14 days before the day on

which the child is due to appear or any shorter period before that day that is fixed by the court because of the existence of a good and sufficient reason.

(4) An application is made by filing with the court a notice in the form (if any) prescribed by rules of court and stating the grounds on which it is made and serving a copy on any other party in accordance with any rules of court.

(5) With leave of the court, an application for a direction referred to in sub-section (1) may be made by or on behalf of the child or the prosecution at any time in the course of the proceeding to which the direction being sought relates, irrespective of whether an application by a party for such a direction has previously been refused by the court.

(6) Sub-section (4) does not apply to an application made in accordance with sub-section (5).

(7) A court may also make a direction referred to in sub-section (1) on its own initiative at any time in the course of the proceeding to which the direction relates, irrespective of whether an application made in accordance with this section has previously been refused by it, if the court is satisfied that exceptional circumstances exist.

(8) In determining whether the making of a direction referred to in sub-section (1) is consistent with the interests of justice, the court must take into consideration the effect of the direction on the child's ability--

(a) to comprehend the proceeding; and

(b) to communicate with his or her legal representative and give instructions, or express wishes, to that representative.

(9) Any victim of the offence which the child is alleged to have committed may address, or make a written submission to, the court in opposition to the making of a direction referred to in sub-section (1)--

(a) on the trial (apart from the arraignment of the child) or hearing of the charge; or

(b) on a sentencing hearing.

(10) The exercise of the power conferred on a court to make a direction referred to in sub-section (1) is subject to any practice directions.

42Q. Practice directions

(1) The senior judicial officer of a court may from time to time issue practice directions, statements or notes relating to the exercise by the court of its discretion in relation to an application made in accordance with section 42L, 42M, 42N or 42P.

(2) In this section, "**senior judicial officer**"--

(a) in relation to the Supreme Court, means the Chief Justice;

(b) in relation to the County Court, means the Chief Judge;

(c) in relation to the Magistrates' Court or the Children's Court, means the Chief Magistrate.

42R. Requirements for audio visual appearance by accused

(1) An accused person appearing before a court by audio visual link must do so from a place at which the technical requirements specified--

(a) in section 42G(1), as modified by sub-section (2) of this section; and

(b) in sub-section (3)--

are met.

(2) Section 42G(1)(a)(i) applies as if the reference to the person appearing before the court or giving the evidence or making the submission included a reference to the accused person entering a plea to a charge or stating an intention to reserve their plea.

(3) Both the court point and the remote point must be equipped with facilities that, in accordance with any rules of court, enable private communication to take place (at any time during the hearing or any adjournment of the hearing or at any time on the day of a hearing shortly before or after the hearing) between the accused person and any legal practitioner at the court point representing him or her in the proceeding and documents to be transmitted between both points by those persons.

42S. Protection of communication between accused and legal representative

Without limiting any other protection applying to it, a communication by audio link or audio visual link, or a document transmitted, between an accused person and his or her legal representative in accordance with this Part is as confidential and as inadmissible in any proceeding as it would be if the communication took place or the document was produced while they were in each other's presence.

42T. Application of Listening Devices Act 1969

The **Listening Devices Act 1969** applies to a communication by audio link or audio visual link, or a document transmitted, between an accused person and his or her legal representative in accordance with this Part as if--

(a) the communication were a private conversation within the meaning of that Act to which the parties were the accused person and his or her legal representative; and

(b) any data, text or visual images in the transmitted document were words spoken to or by a person in a private conversation within the meaning of that Act to which the parties were the accused person and his or her legal representative; and

(c) references in that Act to the use of a listening device to overhear, record, monitor or listen to a private conversation included, in relation to a transmitted document, references to reading the document.

QUEENSLAND

- * The Queensland statute book contains rules that enable the court to take evidence or submissions from parties, counsel or witnesses remote from the court. Rules permit the taking of evidence by video link or any other form of new technology that may become available in future.
- * The Evidence (Audio and Video Links) Bill (1998) was designed to facilitate the giving of evidence or making of submissions to the courts by audio link or audio visual link and to clarify particular uncertainties and issues not addressed by the various rules of the Court. The use of technology will in all cases be subject to the court's ability to control the transmission and only utilised if the court considers it more convenient and in the interests of justice that evidence be taken by audio link or audio visual link. The proposed bill also ensures that a person giving evidence from a remote location is subject to the laws of evidence and the laws relating to court procedure, contempt of court and perjury. This is achieved by deeming the remote location to be a part of the courtroom.
- * Currently there are 11 teleconferencing units in the higher courts and 34 in the Magistrates courts, which are used primarily for civil matters but also for receiving expert evidence in criminal trials.
- * In Brisbane there are two videoconferencing sites in the Supreme and Magistrates Courts. These are linked to sites around the world and can be used for taking evidence from remote witnesses. In the Magistrates' Courts, video-conferencing is used mainly to hear applications and pleas from offenders in the Arthur Gorrie Correctional Centre.
- * It has been proposed that the Department for Public Works and Housing conduct a statewide survey of tele and video-conferencing needs for agencies within the Department of Justice, the Queensland Corrective Services Commission and the Queensland Police Service.

NORTHERN TERRITORY

- * The Northern Territory Ministry for Communications and Advanced Technology advises that video-conferencing has been introduced to courts in Darwin and Alice Springs. Video-conferencing has been used to interview interstate witnesses and will be used on arraignment days with a link to Northern Territory Prisons.

SOUTH AUSTRALIA

- * The Attorney General of South Australia advises that video links are currently being used for remand hearings. A separate video service provides access to the courts for the residents of Victor Harbour.

WESTERN AUSTRALIA

- * Western Australia has conducted an extensive inquiry into court technology. The Western Australian Information Plan Final Report (1996) extensively outlines a strategy which aims to position the courts to meet the Ministry of Justice's mission of "a fair and cost effective system of justice which protects the right of individuals and is responsive to community needs."
- * The first era of the plan, which began in 1988, had as its primary aim the automation of court processes. The focus was internal and restricted to the boundaries of the court. The second era aimed to improve communication and information exchange across the entire justice system, including both public and private sectors; the Ministry of Justice, other Governmental agencies and private legal practitioners.
- * In December 1994, a Video Technology in Courts Steering Committee was established which
 - a) examined the feasibility of various applications for using video technology in a court environment-
 - b) endorsed policy and procedures for using video technology in courts; and
 - c) examined legislative requirements, and made recommendations to the government.

Video-conferencing was seen as a strategy for augmenting messaging by providing alternate modes of communication between courts, vulnerable witnesses and expert witnesses, as well as allowing for other court processes such as remand hearings, bail applications and status conferences. Currently a steering committee chaired by a Judge of the Supreme Court oversees planning in respect to all video technology related initiatives in court.
- * In March 1996, a pilot project was implemented and video-conferencing systems were installed in the Supreme Court, Central Law Courts and the Campbell Remand Centre.
- * The videoconferencing system at the Campbell Remand Centre constitutes a stand-alone system. There are daily connections between the Perth Magistrates Court and the Campbell Remand Centre as well as monthly connections between Supreme and District Courts and the Remand centre.
- * A small number of prisoners have so far been sentenced through video-conferencing where their legal representative consented to the use of the technology.

Videoconferencing technologies have also been utilised in the taking of evidence from interstate and overseas witnesses.
- * There are special provisions in the Western Australian Information Plan Final Report (1996) for the provision of vulnerable witness facilities. Where no facilities exist there is provision for the use of screens to enable the taking of evidence from vulnerable witnesses. An opaque screen is placed in the line of sight between the accused and witness in the courtroom. A camera captures the image of the witness giving evidence and transmits this image to a television monitor viewed by the accused. All persons in the court are able to see the accused and witness live.
- * Future proposed applications in Western Australian courts include
 - a) criminal proceedings between city and country locations, for example status conferences, bail applications, remands, election dates and pleas of guilty.

b) civil proceedings between city and country locations including interlocutory matters such as interrogatories, discovery and other matters.

THE BENEFITS OF VIDEO-CONFERENCING TECHNOLOGIES

3.3 K Martyres ²¹ describes the benefits and limitations of video-conferencing in the following terms:

* There are many advantages to be gained in using video-conferencing technologies. The Judicial Council of California Report on the Application of Video Technology in the Californian Courts outlines the purposes underlying the Californian legislation. These include:

- a) the reduction of inmate transportation costs;
- b) the elimination of security problems in prisoner transportation;
- c) a reduction in the number of jail personnel needed for inmate movement;
- d) a reduction in tension by eliminating inmate movement and waiting in holding cells;
- e) allowing inmates to be released more quickly after the court hearing;
- f) saving of travel time and costs;
- g) saving of court time spent on awaiting the arrival of inmates.

* The report focuses upon cost benefit advantages to those departments responsible for the management of prisoners. It found a substantial advantage.

* The cost benefit advantages of video-conferencing also apply to civil proceedings. For instance, the South Australian Attorney General in a submission to the Victorian Parliamentary Law Reform Committee reported that one major benefit of the existence of a separate video service which provides access to courts for the residents of Victor Harbor, is that in processing civil arrest warrants, time travel for both the sheriff and the defendant is eliminated, thus reducing costs for the plaintiff.

* The Western Australian Information Plan Final Report, which provides a comprehensive overview of the benefits of new technologies, indicated that by overcoming the problems of distance and communication, particularly in country areas, video-conferencing increases access to justice. This is important in cases where witnesses give expert evidence. Remote conferencing in these situations reduces travel time and costs of transporting expert witnesses to the courtroom to the benefit of both parties.

* Another potential use of video arraignment projects is in mental health proceedings. Transporting the severely mentally ill or the developmentally disabled from state institutions for periodic court appearances can be difficult and traumatic. The use of

²¹ Kathya Martyres Victorian parliamentary law reform committee law and technology project: an examination of video-conferencing and electronic evidence presentation.

video technology to reduce costs and minimise disruption to these persons is potentially beneficial for all concerned.

* Video-conferencing can also be used for interpreting purposes. The Californian Court Technology Advisory Committee reported that Wisconsin allows interpreters to act via video-conferencing in any criminal proceeding permissible by statute. Potential savings are high particularly in rural areas where considerable funds are expended on travel expenses bringing interpreters to court.

* The Californian Court Technology Advisory Committee maintained that legal argument in the Court of Appeal lends itself well to video technologies. Each Court of Appeal in California serves a large geographic area. Once documentation and legal briefs have been submitted and only oral argument remains to be completed, argument can be successfully presented by video. Several Californian Districts currently conduct legal argument by telephone. It is suggested by the Californian Court Technology Advisory Committee that use of videos should be investigated as a viable alternative. In rural areas of Australia where courts are serving large geographic locations, video-conferencing ought similarly be explored as an alternative.

* In an address to the Australian Institute of Judicial Administration Technology for Justice Conference, the Honourable Daryl Williams referred to the importance of video-conferencing in the context of international legal relations. He stated that the "facilitating of electronic evidence might well become a general form of international co-operation." He observed that Australia's Mutual Assistance in Criminal Matters Act (1987) already made provision for a Magistrate to permit examination and cross examination of a witness via video in response to a request from a foreign country. The Hon. Daryl Williams stated "It may now be time to make a determined effort to pursue an international consensus on this important new form of co-operation."

LIMITATIONS OF VIDEO-CONFERENCING

3.4 K Martyres ²² describes the benefits and limitations of video-conferencing in the following terms:

In spite of the efficiency and cost benefit arguments made in favour of the use of videoconferencing technology, there are limitations and certain disadvantages in using these methods of communication that need to be accounted for.

psychological effects of video-conferencing

* Fredric Lederer suggests that the fact that the American population are a "visually oriented group" means that "a person on television may be received very sympathetically - more sympathetically than if they were actually in the courtroom." There is an interesting question especially in the context of jury trials. The extent to which remote testimony would be more or less persuasive to a fact finder than in-court testimony is an issue to which there is no readily available answer.

²²

Kathya Martyres Victorian parliamentary law reform committee law and technology project: an examination of video-conferencing and electronic evidence presentation.

*Another obvious psychological issue to be considered in taking evidence by video link, is false testimony. Lederer refers to the opinion of several legal experts who maintain that the most constructive method of ensuring witnesses tell the truth is by placing them in a courtroom amongst the formal paraphernalia of justice, rather than at a remote location where they might be tempted to dismiss the importance of the situation. Alternatively it could be argued that the witness may feel less intimidated outside the courtroom and therefore more comfortable and more responsive to the situation, thus facilitating the process of justice rather than hampering it. The impact of remote witness testimony in this regard also requires further exploration.

How far should the scope of video-conferencing extend?

* There is an issue of concern in the US in situations where suspects are arraigned before a Judge who wishes to deal with pleas video-conferencing. It is unclear whether the defendant's lawyer should be at the remote location with the client, leaving the prosecutor alone with the Judge, or with the prosecutor and the Judge, leaving the defendant alone. If defendant and counsel are at separate locations there is a question of whether the defendant is receiving adequate legal representation and whether or not s/he is disadvantaged by the inability to confer in person with counsel. Defendants often need to consult with counsel during arraignment. To confer with a client during a remote conferencing session, counsel would need to disrupt the proceedings and contact the client with subsequent private communication. Although some courts have telephone lines these are inconvenient in comparison with the advantage of the unobtrusive nudge made possible through immediate communication. There are arguments that those who choose to appear remotely in such circumstances only do so because they are unable to retain legal representation or cannot be released on bail. This suggests that the system operates to disadvantage those of lower socio-economic backgrounds. If this were the case a disproportionate percentage of lower socio-economic clients would be appearing remotely. Public policy concerns of this type have been sufficient to defer the temporary implementation of pilot videoconferencing sites in Minnesota.

* There is also concern that clients who receive minimal advice from counsel under the present system, would be disadvantaged even more by remote proceedings which allow defence counsel to cut corners further. Lederer addressed this potential problem and believes it can be avoided through close judicial scrutiny and periodic re-evaluation.

* The Judicial Council of California Report on the Application of Video Technology in the Californian Courts reported that video-conferencing is not a cost-effective mechanism for all courts. Situations where video technologies may be unnecessary are in cases where the volume of prisoners needing transportation is small or where the courthouse is relatively close to the jail. Whether or not video-conferencing is appropriate depends upon the unique circumstances of each particular court or remand centre.

CHAPTER 4

VIDEO-CONFERENCING - EVALUATION AND RECOMMENDATION

THE RIGHT OF THE ACCUSED TO BE PRESENT IN COURT AND THE RIGHT TO A PUBLIC TRIAL - EVALUATION

4.1 Section 158 of the Criminal Procedure Act provides that all criminal proceedings must take place in presence of accused except as otherwise expressly provided by the Criminal Procedure Act or any other law. This would include postponement of cases against the accused. Furthermore the right to a public trial also attaches to an accused person.²³ Steytler states that a trial is public when members of the public, including the media, have access to the courtroom and may report on the proceedings. A prerequisite for a public trial is that the public must know when the proceedings are scheduled. Unscheduled hearings aimed at circumventing public access fall foul of this principle.²⁴ In addition, a public hearing requires that all proceedings should be conducted in open court. However, section 170A, which provides for a juvenile complainant in a sexual abuse case, may give evidence in a separate room while a video monitor conveys the evidence in the courtroom does not violate this principle.²⁵ Steytler²⁶ points out that a 'public trial' should not be interpreted literally and the openness of the proceedings should be assessed as a whole. In *Nel v Le Roux NO*²⁷ the Constitutional Court noted that there are well recognised exceptions to the general rule that criminal proceedings should be conducted in open court. These exceptions, as provided for by statute or the common law are *prima facie* unconstitutional but may be justified in terms of the limitation clause.

4.2 Steytler²⁸ identifies five broad areas of justification for *in camera* proceedings which

²³ See N Steytler *Constitutional Criminal Procedure A commentary on the Constitution of the Republic of South Africa*, 1996 Butterworths Durban 1998 at 250.

²⁴ N Steytler *Constitutional Criminal Procedure A commentary on the Constitution of the Republic of South Africa*, 1996 Butterworths Durban 1998 at 251.

²⁵ See *Klink v Regional Court Magistrate NO* 1996 3 BCLR 402 (SE).

²⁶ *Constitutional Criminal Procedure A commentary on the Constitution of the Republic of South Africa*, Butterworths Durban 1998 at 251.

²⁷ 1996 4 BCLR 592 (CC) 11.

²⁸ N Steytler *Constitutional Criminal Procedure A commentary on the Constitution of the*

override the right to a public trial and which are recognised internationally in criminal proceedings, namely if it is in the interests of the security of the state, good order, public morals, or the administration of justice. In such cases the court may direct that the proceedings should be held behind closed doors and the public or a class thereof should not be present. The security of the state as ground to override the right to a public trial is well recognised but should be construed narrowly. Public morals are also accepted as a legitimate ground. According to Steytler good order is more contentious and unless concrete content can be given to the concept, it is open to abuse. In his view the concept of the administration of justice is the broadest category and should be reserved for exceptional circumstances.

4.3 Press freedom is regarded as one of the core values of a democratic society and includes access to the proceedings of courts and the publication of events witnessed there. In this regard the media play an indispensable role in informing the general public about the administration of justice. The method of reporting on court proceedings falls within a court's discretion and in exercising its inherent power of controlling the proceedings and the people inside the courtroom, the court may exclude, for example, television cameras.

4.4 Section 153 constitutes a prima facie infringement of section 35(3)(c) of the Constitution - the right to a public trial before an ordinary court. However, the grounds enumerated in section 153 for holding criminal proceedings *in camera* coincide with interests internationally recognised as overriding the right to a public trial.²⁹

4.5 In order to determine whether it would be acceptable to legislate for a procedure facilitating the postponement of criminal cases against accused persons awaiting trial it is advisable to briefly refer to relevant provisions in foreign jurisdictions. From the brief outline in chapter 3 it appears that the procedure allowing for the postponements of criminal cases against accused persons in custody awaiting trial is provided for in a number of foreign jurisdictions. In those jurisdictions, legislation already provides for a broader application of the principle currently under consideration. In terms of South African law, the Criminal Procedure Act also allows for the trial and therefore also the postponement of the case against an accused person in his or her absence.³⁰ It is submitted that the circumstances under which the trial may continue in the absence of an accused can be justified in terms of

Republic of South Africa, Butterworths Durban 1998 at 247.

²⁹ Generally see Steytler *op cit* 247-249.

³⁰ Section 159 of the Criminal Procedure Act.

the limitation clause of the Constitution. However, the proposal under consideration is much narrower and limited to allow for the postponement of a case against an accused person in custody without him or her being brought to court or being physically present in court. It does not extend to the trial itself but concerns the pre-trial phase only. It is submitted that the procedure would not infringe an accused person's right to a fair trial as outlined in the Constitution. The only infringement of the Constitution may possibly be found in the right to a public trial and in this instance the proposal does not exclude the public from the proceedings. Even though the accused will be absent from court, the proceedings will still be open for the public and the media would still have access to the proceedings to report on as outlined earlier.

4.6 In many cases where an accused person is in custody and the case is remanded for further investigation the accused also applies for bail. If the procedure of postponements via audiovisual link is not extended to also cover applications for bail it would mean that the accused would have to be brought to court to apply for bail. However, since it is proposed that the procedure apply for further remands after the accused's first appearance in court, an accused may want to renew an application for application for bail. This application may be a follow up of the first application, which has already been considered by the court, and may be one where no new facts can be submitted or it may be one where the prosecutor has no objection in principle and evidence will not be required. If these circumstances cannot be dealt with in terms of the proposed procedure it would mean that whenever an accused decides to apply for bail during remand proceedings, the accused has to be brought to court even if the circumstances do not justify it. It is therefore proposed that the procedure be widened to include an application for bail where the court may consider whether the application is justified. In most cases where an application for bail is made, which requires evidence, the hearing thereof would in any event not be dealt immediately and the matter would have to be postponed for hearing. This, however, does not obviate the need to allow for an application for bail to be made via audiovisual video link. An application for bail may already have been finalised but an accused might seek to renew the application. The use of audiovisual equipment for such purposes may also be useful for such applications.

THE COMMISSION'S RECOMMENDATION IN ITS DISCUSSION DOCUMENT

4.6 In its discussion document the Commission recommended that the Criminal Procedure Act, 51 of 1977 be amended to allow for the postponement of criminal cases against and accused person who is in custody awaiting trial can take place via the use of

audio visual link and without the need for the accused person to be physically present in court. The proposal did not affect the accused's first appearance and the accused would still have to appear physically in court within 48 hours of his or her arrest. The postponements, which would be affected by the proposal, relate to postponements after a first appearance only. It was furthermore recommended that the provisions be wide enough to include an application for bail while it should not include the actual hearing of evidence as part of a bail application. In this regard it was proposed that the amendment be based on the provisions of the Evidence Audio Visual and Audio Linking Act of Victoria, Act No 4 of 1997.

4.7 In the discussion document the Commission recommended the insertion of the following section in the Criminal Procedure Act, 51 of 1977:

159A REMANDS IN CRIMINAL PROCEEDINGS VIA AUDIOVISUAL LINK

(1) A person, in custody in respect of the alleged commission of an offence, who has appeared before a court within 48 hours of his or her arrest as contemplated in section 50 and has been remanded in custody pending his or her trial and who is required to appear or be brought before a court in a subsequent proceeding for the purpose of-

- (a) a further remand of the case; or
- (b) an application to be released on bail;

is not required to appear or brought physically before the court but may, subject to the provisions of this section, sections 159B, C and D appear before court by audiovisual link.

- (2) The court may consider an application to be released on bail made in terms of subsection (1)(b): Provided that evidence may only be heard if the accused appear or is brought before the court.
- (3) Any proceedings in terms of subsection (1) shall for all purposes be regarded as having been held in the presence of the accused if, during the proceedings -
 - (a) he or she is held in custody in prison; and
 - (b) whether by means of a live television link or otherwise, he or she is able to see and hear the court and to be seen and heard by it.
- (4) The court may in any proceedings contemplated in subsection (1), on its own initiative or on the application of a party to the proceeding, direct that an accused person appear before it by audiovisual link if it is satisfied that

appearance by audiovisual link is consistent with the interests of justice and is reasonably practicable in the circumstances.

- (5) An application for a direction referred to in subsection (4) may be made by or on behalf of the accused person or the prosecution at any time before the day on which the accused person is due to appear.
- (6) A court may direct that an accused person appear or be brought physically before it in proceedings contemplated in subsection (3) if it is satisfied, on an application made in accordance with subsection (7), that -
 - (a) physical appearance is required in the interests of justice; or
 - (b) it is not reasonably practicable for the accused person to appear before the court by audiovisual link.
- (7) An application for a direction contemplated in subsection (6) may be made by or on behalf of the accused person or the prosecution at any time before the day on which the accused person is due to appear or, with leave of the court, at any time in the course of the proceeding to which the direction being sought relates, irrespective of whether an application by a party for such a direction has previously been refused by the court.

159B Requirements for audio visual appearance by accused

- (1) An accused person appearing before a court by audiovisual link must do so from a place at which the technical requirements specified in section 159 C and as modified by subsections (2) and (3) of this section are met.
- (2) The Minister may, subject to the provisions of this section, designate any room which is situated within the precincts of the place of detention and which has been suitably equipped, as a court room for the purposes of proceedings in terms of section 159A.
- (3) Both the court point and the place of detention must be equipped with facilities that, in accordance with any requirements prescribed by regulations and any directions of the presiding officer, enable private communication to take place at any time during the proceedings or any adjournment of the hearing or at any time on the day of a hearing shortly before or after the hearing, between the accused person and any legal practitioner at the court point representing him or her in the proceeding and documents to be transmitted between both points by those persons.

159C Technical requirements for the use of audio visual link

- (1) The technical requirements for an audio visual link are as follows:
 - (a) both the court point and the remote point are equipped with facilities

- that -
- (i) enable all appropriate persons at the court point to see and hear the person appearing before the court or making the submission; and
 - (ii) enable all appropriate persons at the remote point to see and hear appropriate persons at the court point; and
- (b) any requirements prescribed by regulations with respect to--
- (i) the form of audio visual link;
 - (ii) the equipment, or class of equipment, used to establish the link;
 - (iii) the layout of cameras;
 - (iv) the standard, or speed, of transmission;
 - (v) the quality of communication;
 - (vi) any other matter relating to the link;
- (c) any requirements imposed by the presiding judge or magistrate.
- (2) The technical requirements for an audio link are as follows:
- (a) both the court point and the remote point are equipped with facilities that-
 - (i) enable all appropriate persons at the court point to hear the person appearing before the court or making the submission; and
 - (ii) enable all appropriate persons at the remote point to hear appropriate persons at the court point; and
 - (b) any requirements prescribed by regulations with respect to--
 - (i) the form of audio link;
 - (ii) the equipment, or class of equipment, used to establish the link;
 - (iii) the standard, or speed, of transmission;
 - (iv) the quality of communication;
 - (v) any other matter relating to the link; and
 - (c) any requirements imposed by the presiding judge or magistrate.
- (3) Requirements imposed by the presiding judge or magistrate under subsection (1)(c) or (2)(c) must not be inconsistent with any provision of this Act or any regulation issued in terms of this Act.
- (4) The Minister may make Regulations concerning the technical requirements for the audiovisual or audio link equipment including the requirements contemplated in subsections (1)(b) and (2)(b).

159D Protection of communication between accused and legal representative

Without limiting any other protection applying to it, a communication by audio link or audio visual link, or a document transmitted between an accused person and his or her legal representative in accordance with this Act, is as confidential and as inadmissible in any proceeding as it would be if the communication took place or the document was produced while they were in each other's presence.

CHAPTER 5

THE COMMISSION'S CONSULTATIVE MEETING WITH ROLE PLAYERS

INTRODUCTION

5.1 The Commission consulted with role players on the proposed amendment of the Criminal Procedure Act to introduce a procedure for the postponement and consideration of bail applications by accused persons in custody awaiting trial via the use of audiovisual equipment. The meeting was held on 2 June 2003 and was attended by relevant role players and included the judiciary, the legal profession, the National Prosecuting Authority, the Department of Justice, the South African Police Services and the Department of Correctional Services.

5.2 During the course of the consultation the Commission's attention was drawn to the fact that in 1998 the Department was in the process of establishing a pilot project which would facilitate the postponement of cases in respect of accused persons who are in custody by means of video link. The system was intended to be used only after an accused already appeared in court. In essence it is the same proposal under consideration by the Commission at present. In order to facilitate the pilot project the Department requested a legal opinion from the State Law Advisers on the question whether the proposed procedure could be entertained in terms of the Constitution and the Criminal Procedure Act. The State Law Advisers provided a legal opinion³¹ and concluded:

The word "present" where it appears in section 35(3)(e) of the Constitution, means, amongst others, "being in a specified place". [See *Collins: English Dictionary*.] The word "trial" ..., in turn, means "the proceedings before conviction or acquittal". See *S v Tieties* 1990(2) SA 461 (A) on page 557. We are therefore of the opinion that bail and remand proceedings are part of the "proceedings" before conviction or acquittal.

Apparently the project is aimed at saving costs, and to limit the possible escape of an accused in transit to and from the court. Also, the procedure will be more convenient. However, in our opinion those considerations are not of such a reasonable and justifiable nature as to generally limit an accused's right to physically appear in court when being remanded or applying for bail.

³¹ Legal opinion 467/98 dated 15 October 1998.

...

In view of our opinion that the proposed procedure will infringe on an accused's right to be present at his hearing, we have not considered the other possible constitutional implications.

5.3 The Commission was also provided with a legal opinion prepared by Mr G Nel of the Office of the National Director of Public Prosecutions in which he comprehensively considers the legal opinion provided by the State Law Advisers. Because of its impact on the Commission's investigation the legal opinion of Mr Nel is quoted in full hereafter:

CONSTITUTIONALITY OF VIDEO HEARINGS

1.1 The enactment of legislation to provide for video arraignment and the hearing of bail applications and the postponement of cases by way of electronic equipment, may have an impact on some fundamental rights, including the following:

(a) The right of access to courts. In this regard section 34 of the Constitution provides as follows:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a **fair public hearing before a court** or, where appropriate, another independent and impartial tribunal or forum."—(My emphasis).

(b) The right of every arrested person to be brought before a court within 48 hours (section 35(1)(d) of the Constitution).

(c) The right of every accused person to a **fair trial**. In this regard section 35(3) provides as follows:

"(3) Every accused person has a right to **a fair trial**, which includes the right—

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) **to a public trial before an ordinary court;**

(d) **to have their trial begin and conclude without unreasonable**

delay:

- (e) **to be present when being tried;**
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court.”. (My emphasis)

2.2 With reference to section 35(3)(e) of the Constitution, in other words the right “**to be present when being tried**”, the State Law Advisers argued as follows:

“4.2 The word 'present' where it appears in section 35(3)(e) of the Constitution, means, amongst others, 'being in a specified place'. [See Collins: *English Dictionary*] The word 'trial' in relation to the word 'tried', in turn means 'the proceedings before conviction or acquittal'. [See **S v Tieties** 1990(2) SA 461 (A1) on p. 567.(should be 467)] We are of the opinion that bail and remand proceedings are part of the 'proceedings, before conviction or acquittal'.”.

Based on the above arguments, the State Law Advisers held the view “that the proposed procedure will infringe on an accused's right to be present at his hearing”.

2.3 For the following reasons we do not agree with the opinion of the State Law Advisers:

2.3.1.1 Section 35(3)(e), the right to be present when being tried, should be read in context with the rest of section 35(3), section 35(1) and (2), as well as section 34. Section 35(1) deals with matters relating to **the rights of arrested persons**. Section 35(2) deals with the **rights of detained persons**, which include sentenced detainees. Section 35(3) deals with the **rights of a person to a fair trial**.

2.3.1.2 In *Sanderson v Attorney-General, Eastern Cape* 1998(1) SACR 227(CC), the Constitutional Court considered the interpretation of section 25(3)(a) of the Interim Constitution. That section provided that every accused person shall have the right to a fair trial, which shall include the right to a public trial before an ordinary court of law within a reasonable time after having been charged. On page 238, paragraph 21, the Court remarked as follows:

“[W]e have to enquire whether **non-trial-related interests** are catered for in the section. Textually, the argument for their exclusion is persuasive. Not only is s 25(3)(a) expressly `include[d]' as one of several incidents of a fair trial, but what `fair trial' means in this context is suggested by paras (b) to (j) of s 25(3), **all of which relate directly to the conduct of the trial itself**. Furthermore, the trial emphasis in s 25(3) marks a clear contrast from 25(1) and (2); the former covering the custodial situation, the latter covering the arrest situation-”. However, in paragraph 22, the Court held that despite the persuasiveness of this textual argument, it appears that all three kinds of interests, in other words also detention and arrest issues, should be regarded as being protected under the rubric of section 25(3)(a).

2.3.1.3 The opinion is held that the Court's decision as to the covering of “**non-trial-related interests**”, only applies to section 25(3)(a) and not to all the other rights mentioned in section 25(3)(b) to (j). In this regard, see for example *S v Pennington and Another* 1999 (2) SACR 329 (CC), where the Constitutional Court held on page 346, paragraph 47, that “**(t)here is no express requirement that the appeal be in open court or that the accused person be entitled to be present at the appeal**”.

2.3.1.4 Furthermore, the elements contained in section 25(3)(a) of the Interim Constitution are at present contained in two different provisions, namely, section 35(3)(d) and section 34 of the 1996-Constitution. Section 35(3)(d) of the Constitution provides that every accused person has a right to a fair trial, which includes the right “**to have their trial begin and conclude without unreasonable delay**”. On the other hand section 34, amongst others, provides that everyone has the right “**to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court**”. Taking into account the wording of the new Constitution, the opinion is held that the Constitutional Court's decision is, in particular, applicable to section 34, because “a public hearing” does not only refer to “a trial” but to all

“hearings” which may include hearings in respect of bail applications, postponements, applications for submission of documents in possession of the State, the furnishing of further particulars, applications relating to exhibits, etc. All these matters can be regarded as “**non-trial-related interests**” which may impact on an accused person's right “to have the trial begin and conclude without unreasonable delay”.

2.3.1.5 In view of the above, the opinion is held that the provisions of section 35(3) of the Constitution do not refer to “**non-trial-related interests**” but only to trial issues. On the other hand, the provisions of section 34 relate to all disputes which include “**non-trial-related interests**”. Section 34 may therefore have an impact on -the trial in so far as the provisions thereof may supplement the rights contained in section 35(3) of the Constitution.

2.3.2.1 It is also important to compare section 34 with section 35(3)(c) of the Constitution. Section 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a “**fair public hearing before a court**” or, where appropriate, another independent and impartial tribunal or forum. Section 35(3)(c), on the other hand, provides that every accused person has a right to “**a fair trial**”, which includes the right to “**a public trial before an ordinary court**”. These provisions clearly distinguish between a “**fair public hearing**” and a fair “**public trial**”. A public hearing includes any legal proceedings before a court, whereas public trial refers to the actual trial before a court and not to non-trial-related proceedings and hearings such as bail applications and postponements.

2.3.2.2 All the rights set out in section 35(3)(a) to (n), relate to an accused person's right in the trial itself. It is conceded that some of these rights are also applicable in respect of proceedings other than the trial itself. However, most of these rights refer to a situation which is only applicable during the actual trial. See for example, the right “**to be informed of the charge**”(paragraph (a)); the right to have adequate time and facilities “**to prepare a defence**”(paragraph (b)); the right “**to a public trial before an ordinary court**”(paragraph (c)); the right “**to be present when being tried**”(paragraph (e)); the right “**to adduce and challenge evidence**”(paragraph (i)); the right “**not to be convicted for an act or omission that was not an offence**”(paragraph (l)); the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted(paragraph (m)); and the right to the benefit of **the least severe of the prescribed punishments** if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing(paragraph (n)). Section 34, on the other hand, is a general provision applicable to all law related disputes, which may include a trial.

2.3.3 We are also of the opinion that the decision of **S v Tieties** 1990(2) SA 461 (A1) on p. 567, does not support the argument of the State Law Advisers. The Court's decision is not relevant to the question under consideration. In that case the Court had to decide whether section 123(b) of the Criminal Procedure Act, 1977(Act 51 of 1977), authorised the Attorney-General to instruct that “a trial” in the lower court be converted into a preparatory examination “after conviction”. The question therefore

was whether the proceedings “after conviction” could be regarded as “trial” proceedings for purposes of converting the case into a preparatory examination. On page 465(C) the Court referred to similarly worded earlier enactments meaning proceedings “before conviction or acquittal”. On page 467(H and I), the court held that “(t)here is no reason why the Legislature should have sought to use the word in a different sense in s123(b).”- The Court did not reach any decision as to whether the proceedings at a bail application (before the accused has pleaded) and a postponement, form part of the trial proceedings. The opinion that “bail and remand proceedings are part of the 'proceedings, before conviction or acquittal'”, is not supported by any legislation or case law. What is the position for example in respect of bail applications and postponements “after conviction”?

2.4 As mentioned above, section 35(3)(e) provides that a fair trial includes the right “**to be present when being tried**”. With reference to the dictionary meaning of “present”, the State Law Advisers held the opinion that “present” means, amongst others, “being in a specific place”. Assuming the correctness of the State Law Adviser's opinion that bail and remand proceedings are part of the proceedings before conviction or acquittal, and therefore of the trial, the opinion is held that “being in a specific place”, does not mean that the accused is not present “when being tried”. The question is not whether the accused is present at a specific place, but whether the accused is present during the proceedings when his or her trial is in progress. To illustrate this by way of an analogous situation: When A and B are busy with a television debate where A is sitting in the Cape Town studio of the SABC and B is sitting in the Johannesburg studio, can one say that neither were present during the debate? Surely they were both present during the debate. It is not their presence at a specific place which determines whether it was a fair debate, but the presence of the parties at all times when the debate was in progress and the opportunities they have to observe the proceedings and to actively participate in the debate. Therefore, provided that-

- (a) an accused is present at all times when his bail application is being heard;
- (b) the accused is at all times in a position to observe the bail proceedings;
- (c) the accused is afforded the opportunity to participate in the bail proceedings and to fulfil all his or her other constitutional rights; and
- (d) the proceedings are open for the public and the constitutional procedures regarding such proceedings are applied,

the opinion is held that the proposed video proceedings will not be inconsistent with the accused's right to a fair trial as prescribed by section 35(3)(e).

2.5 The South African Law

2.5.1 Section 158 of the Criminal Procedure Act, 1977, provides, amongst others as follows:

“(1) **Except as otherwise expressly provided by this Act or any other law, all**

criminal proceedings in any court shall take place in the presence of the accused.

(2) (a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.

(b) A court may make a similar order on the application of an accused or a witness.

(3) A court may make an order contemplated in subsection (2) only if facilities therefor are readily available or obtainable and if it appears to the court that to do so would—

(a) prevent unreasonable delay;

(b) save costs;

(c) be convenient;

(d) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or

(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

(4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.”
(My emphasis)

2.5.2 In **S v F** 1999 (1) SACR 571 (C) on page 575 the Court remarked as follows:

“As for the accused being present at criminal proceedings, it is to be observed that in terms of s 158(1) of the Act, all criminal proceedings must take place in the presence of the accused 'except where otherwise expressly provided'. **The right to be present at criminal proceedings is, however, also not an absolute right. (See in this regard ss 159 and 160 of the Act.)** There can be little doubt that the provisions of s 158(2) allow for a witness to give evidence outside the presence of the accused. The section, it may be observed, is not limited to criminal proceedings involving specific types of offences: it applies to any criminal proceedings.

The very application by the State to lead evidence through the medium of a closed circuit television system is demonstrative of the fact that the State proposes to lead

the evidence of JH outside of the physical presence of the accused.”-

2.5.3 The above provisions were inserted in the Act during 1996 and the constitutionality thereof has not been successfully challenged. Furthermore, it is important to note that the factors- prescribed in section 158(2), which the court must take into account in exercising its discretion, are the same as the advantages set out in paragraph 2.6.3.2(b) *infra*, namely, to prevent unreasonable delay; to save costs; to be convenient; to be in the interest of the security of the State or of public safety or in the interests of justice or the public; or to prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

2.5.4 In view of the above, the opinion is held that there is little distinction between the situation provided for in section 158(2) and the proposed video hearings. The trial through the medium of a closed circuit television system undoubtedly provides for the trial to be conducted at no “specific place”. The place where the presiding officer, the accused and the prosecution are present, together with the place where the witness is present, constitutes the “place where the trial is conducted” and not only the place where the first-mentioned persons are present.

2.6 Application of limitation clause (section 36 of the Constitution)

2.6.1 Assuming that section 35(3)(e) in fact requires the accused person's physical presence in court at all times, the next question to consider is whether the accused's right cannot be limited by way of section 36 of the Constitution. Section 36(1) provides as follows:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”.

2.6.2 In ***Director of Public Prosecutions: Cape of Good Hope v Bathgate*** 2000 (1)

SACR 105 (C), on page 124, paragraph 70, the Court held that “(n)one of these fundamental rights may be regarded as absolute and unconditional. Section 36 of the Constitution provides expressly for the limitation of any such right”.

- 2.6.3.1 In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) the Constitutional Court held that the approach to limitations established by Chaskalson P in *S v Makwanyane and Another*, 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraph [104], applies to cases heard under the 1996 Constitution, notwithstanding the changed language of the limitation clause. The approach in *Makwanyane’s* case was set out as follows:

“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances **can only be done on a case-by-case basis**. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.”. (My emphasis)

- 2.6.3.2 In applying section 36 to a provision providing for bail applications and postponements by way of video proceedings, the following aspects are important:

(a) **The nature of the right**

As mentioned above, for purposes of arguing the limitation clause, it is assumed that the accused's right to a fair trial is in fact infringed. However, the opinion is held that it is not an invasive infringement. In *S v Manamela and Others* 2000 (1) SACR 414 (CC) the Constitutional Court held on page 442, paragraph 69, as follows:

“The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be. It is important to recognise that not every reverse onus offends the presumption of innocence in the same manner or to the same extent. To assess the extent of the limitation it is necessary to examine carefully the legislative provision in question.”. (My emphasis)

As explained in paragraph 4.4 above, the proposed legislation will not exclude the accused from the bail proceedings. The accused is afforded the same rights as an accused on trial. The only difference is that the accused is not physically present at the place where the presiding officer is. The infringement, if any, is therefore minimal.

(b) The importance of the purpose of the limitation

In ***S v Manamela and Others*** 2000 (1) SACR 414 (CC) the Constitutional Court on page 447, paragraph 86, emphasised that “(i)t is important in this regard to denote precisely the area in which” the limitation operates to assist the State. The advantages of such video hearings are the following:

- (i) Time will be saved. Prof Frederic Lederer, of the William & Mary School of Law, Virginia, in an article titled “*Courtroom Technology from the Judge's Perspective*” alleges that anecdotal evidence suggests that “electronically presented trials save from one-fourth to one-third of the time normally taken to try a similar case in a traditional fashion”. The time saved at such bail applications and postponements will enable the courts to attend to other trials and to assist in better handling heavy caseloads and working down the overloaded court rolls. In general it will improve the accessibility of our courts.-
- (ii) The hearings will assist in alleviating the problem in respect of the overcrowding of prisons. If bail be granted early in the morning, the accused may be released immediately.
- (iii) Video hearings will in the long run be more cost effective. Less transportation and personnel (drivers and wardens) are required to transfer the prisoners to court. As indicated in paragraph 2.4 above, in Nevada only three officers operate the video equipment necessary to handle 1400 prisoners per week. In a monthly report published on 21 May 2001 by the Northern Ireland Prison Service, this Prison Service pointed out that it has consistently taken initiatives aimed at approving the efficiency and effectiveness of its systems and operations and that one of their most efficient measures was the introduction of video links between the HM Young Offenders Centre and the Magistrates and High Courts for certain remand hearings.
- (iv) It will improve security by avoiding the movement of prisoners outside secure facilities. Recently, presiding officers were threatened and even killed by accused persons and the proposed procedure may also alleviate this problem. In general, it will prevent escapes and ensure the safety of the court personnel and the public at large.
- (v) It will improve prisoner health care. In order to get prisoners in time for court hearings, prisons have to begin feeding and transporting the prisoners during early mornings. Video hearings will reduce the movement of inmates considerably.

- (vi) It will reduce the overcrowding of court cells and reduce the risk associated with handling such large number of prisoners at the court rooms.
- (vii) The installed equipment can be used for other purposes than hearings. For example to enable the prisoners to communicate with a magistrate or judge regarding a complaint relating to his or her detention. Some countries have already introduced such complaint procedures.

Although not one of the abovementioned advantages may be regarded as crucial to the introduction of the limitation, the cumulative effect may have a considerable impact on the administration of justice and access to the courts.

(c) The nature and extent of the limitation

See paragraph (a) above under the heading “The nature of the right”.

(d) The relation between the limitation and its purpose

In respect of this requirement one should weigh the scope of the infringement of a fair trial against the purpose, importance and effect of the proposed legislation. Taking into account the insignificance of the infringement, if any, and the advantages achieved by the proposed legislation, the opinion is held that the scale tilted in favour of the enactment of the provision.

(e) Less restrictive means to achieve the purpose

In *S v Manamela and Others* 2000 (1) SACR 414 (CC) the Constitutional Court remarked as follows on page 450, paragraph 94:

“It is clear that the question whether there are less restrictive means to achieve the government's purpose is an important part of the limitation analysis. However, it is as important to realise that this is only one of the considerations relevant to that analysis. It cannot be the only consideration. It will often be possible for a court to conceive of -less restrictive means...”.

In paragraphs 95 and 96 the Constitutional Court, amongst others, remarked as follows:

“[95] The problem for the Court is to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature in a specific area. The Legislature when it chooses a particular provision does so not only with regard to constitutional rights, but also in the light of concerns relating to cost, practical implementation, the prioritisation of certain social demands and needs and the need to reconcile conflicting interests. The Constitution entrusts the task

of legislation to the Legislature, because it is the appropriate institution to make these difficult policy choices. When a court seeks to attribute weight to the factor of 'less restrictive means' it should take care to avoid a result that annihilates the range of choice available to the Legislature. In particular, it should take care not to dictate to the Legislature unless it is satisfied that the mechanism chosen by the Legislature is incompatible with the Constitution.

[96] In our view, the question whether the purpose of a specific legislative provision can be achieved through less restrictive means requires a careful analysis of the purpose of the provision.”.

The opinion is held that the proposed legislation would in itself not be very restrictive and the inclusion of balancing provisions and limiting it to bail applications and postponements, would even make it less restrictive.

2.7 COMPARATIVE RESEARCH

2.7.1 Section 39(1) provides, inter alia, as follows:

“When interpreting the Bill of Rights, a court, tribunal or forum-

- (a) . . .
- (b) must consider international law; and
- (c) may consider foreign law.”.

2.7.2 In *Sanderson v Attorney-General, Eastern Cape* 1998(1) SACR 227(CC), the Constitutional Court considered the application of comparative research and on page 240, paragraph 26, remarked as follows:

“In this context I wish to repeat a warning I have expressed in the past. Comparative research is generally valuable **and is all the more so when dealing with problems new to our jurisprudence but well-developed in mature constitutional democracies.** Both the interim and the final Constitutions, moreover, indicate that comparative research is either mandatory or advisable...Nevertheless the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management...”.

2.7.3 Taking into account the above warning of the Constitutional Court, the following pieces comparative legislation are regarded as relevant:

2.7.3.1 THE UNITED STATES OF AMERICA

(a) The position in the USA, –relating to a fair trial, is regulated by the U.S. Constitution and the Constitutions of the various States. The Sixth Amendment of the United States Constitution guarantees, *inter alia*, the right of an accused “to be confronted with the witnesses against him”. This right has been interpreted by the United States Supreme Court to bear the following meaning:

(i) In ***Rushen v. Spain***, 464 U.S. 114, 117 (1983), the United States Supreme Court recognises “the right to personal presence **at all critical stages of the trial**”.

(ii) In ***Gomez v. United States***, 490 U.S. 858, 872(1989) the United States Supreme Court explain the significance if the Sixth Amendment and the meaning of a “critical stage”, as follows:

“Even though it is true that a criminal trial does not commence for purposes of the Double Jeopardy Clause until the jury is empanelled and sworn, ***Serfass v. United States***, 420 -U.S. 377, 388(1975), other constitutional rights attached before that point, see, e.g., ***Brewer v. Williams***, 430 U.S. 387, 389(1977)(assistance of counsel). Thus in affirming voir dire as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present, the Court wrote: '[W]here the indictment is for a felony, the trial commences at least from the time the work of empanelling the jury begins.'....Jury selection is the primary means by which a court may enforce the defendant's right to be tried by a jury from ethnic, racial, or political prejudice,...., or predisposition about the defendants culpability...”.

(b) Rule 43 of the Federal Rules of Criminal Procedures provides, *inter alia*, as follows:

“(a) Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impanelling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued presence not required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever the defendant, initially present at the trial, or having pleaded guilty or *nolo contendere*,

(1) is voluntary absent after the trial has commenced(whether or not the defendant has been informed by the court of the obligation to remain during the trial)...;or

- (2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom. ”.
- (c) Presence Not Required. A defendant need not be present in the following situations:
 - (1) A corporation may appear by counsel for all purposes.
 - (2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.
 - (3) At a conference or argument upon a question of law.
 - (4) At a reduction of sentence under Rule 35.”.

The United States Supreme Court has ruled that Rule 43 “prohibits the trial *in absentia* of a defendant who is not present from the beginning of the trial,” but permits the trial to proceed if the defendant voluntarily absents himself or herself after the trial has commenced. (See **Crosby v. United States**, 506 U.S. 255, 261-262(1993))

- (c) The Ninth Circuit Jury Procedural Manual, amongst others, contains the following notes regarding the defendant's presence at trial:
 - (i) “The safer and better practice is to have the defendant present at all times unless the defendant waives the right to be present.”-
 - (ii) “A defendant does not have the right to be present at a pretrial conference concerning legal issues.”
- (d) Already in 1983 the Legislature of California amended its Penal Code to permit the establishment of two-year pilot projects for the arraignment of defendants in municipal courts on felony charges by two-way audio-video communication between a defendant in county jail and the courtroom. Today there are more than 130 state courts using video-conferencing for first appearances. Twenty six States use video arraignment technology to ease the pressure facing judicial systems, and almost all state courts have a policy that allows for video-conferencing in the court systems.(See *Paralegal Services: Video-conferencing comes in the Law Office Mainstream*) The States and Counties allowing video hearings have enacted specific provisions regulating such hearings. By way of illustration the rules for the State Court of Fulton, Georgia, provide, inter alia, as follows:

“The Superior, State and Magistrate Courts of the Atlanta Judicial Circuit are authorised to conduct hearings with the defendant (and counsel if appropriate) remaining in the jail, and the Judge remaining at the courthouse. Only the following matters will be handled by audiovisual means:

(a)-(d)...:

(e) Entry of pleas in criminal cases;

(f) Imposition of sentences upon pleas of guilty or nolo contendere. However the sentence may not require additional confinement, but may include time already served plus appropriate probation;

(g)-(i)...:

(h) Extradition hearings.

Notwithstanding any other provision of this rule, a Judge may order a defendant's personal appearance in court for any hearing.”-

These rules were approved by the United States Supreme Court with effect 1 February 1991.

- (e) As indicated above, in spite of a well established constitutional right in the USA, the conducting of bail applications, postponements, appeals and even minor criminal trials have been introduced all over the USA. We could not find any case where the constitutionality thereof, and in particular because the defendant was not present at the trial, has been challenged. A study of the USA decisions also indicates that proceedings pertaining to bail applications, postponements, pretrial conferences, and appeals are not regarded as part of the trial.

2.7.3.2 CANADA

- (a) Section 127 of the Canadian Criminal Code, read with the Constitution of Canada, which guarantees the right to a fair trial, provides that an accused person has the right to be present at the trial.
- (b) In *R. v. Barrow*, (1987) 2 S.C.R., the Court held:

“Section 577 of the *Criminal Code* should be given an expansive reading; the words “whole of the trial’ mean just that. Because of the fundamental importance of the selection of the jury, and because the *Criminal Code* gives

the accused the right to participate in the process, the jury selection should be considered part of the trial for the purposes of s.577(1).”-

- (c) In a letter received by Judge J J Fagan during February 2001 from Judge Patrick Sheppard from Ontario, Canada, it is stated that during 2000 and 2001, in Ontario alone, 25 courts have been equipped with video facilities within 100 days. The aim is to establish video remand hearings and video conferences. Video Remand Committees have been established to organise the process and Local Implementation Plans have been worked out to implement the project.
- (d) In spite of the established constitutional right that the accused must be present at the trial, we could not find any indication in Canadian Law that video hearings are regarded unconstitutional. It seems that the emphasis is not on whether that accused is present in court, but whether the provision **“gives the accused the right to participate in the process”**. In other words a fair procedure.

2.7.3.3 Requirements prescribed by Amnesty International

- (a) The Fair Trials Manual of Amnesty International deals in Chapter 21 with the right to be present at the trial. Paragraph 21.1 reads as follows:

“Everyone charged with a criminal offence has the right to be tried in their presence so that they can hear and challenge the prosecution case and present a defence.”.

- (b) Amnesty International pointed out that the following exceptions to the general rule have internationally been recognised:

- (i) If the accused person disrupts the court proceedings to such an extent that the court deems it impractical for the trial to continue in his or her presence.
- (ii) If the accused fails to appear in court after having been duly notified of the proceedings.
- (iii) If the accused waives his or her right to be present at hearings, but such a waiver must be established in an unequivocal manner, preferably in writing.

- (c) With reference to the international exceptions, Amnesty International holds the following view in paragraph 21.2:

“The organization believes that the sole exception to this should be if the accused have deliberately absented themselves from the proceedings after they have begun or has been so disruptive that they have had to be removed

temporarily. ***In such cases video or audio links should be employed to allow the accused to follow proceedings.***” (My emphasis)

The opinion is held that Amnesty International thereby recognises that video hearings do not make invasive inroads in the accused's right to be present at the trial.

2.7.3.4 European Convention

- (a) Although the right to be present at trial is not expressly mentioned in the European Convention, the European Court has stated in ***Colozza and Rubinat***, 12 February 1985, 89 Ser. A. 14, paragraph 27, that the object and purpose of Article 6 mean that a person charged with a criminal offence is entitled to take part in the hearing.
- (b) The Select Committee on the European Union, in its Twelfth Report, Article 10, provides for the possibility of introducing hearings by video conference.
- (c) Furthermore, as far as we could ascertain, video hearings have been introduced in many European countries. For example, in Northern Ireland remand and bail hearings began between the Young Offenders Centre and Belfast Magistrate's Court on 23 August 1999. High Court bail application at the Royal Courts began a week later on 14 September 1999. In the UK, similar pilot projects have been introduced in Manchester, Bristol and Hydebank Wood.

3. CONCLUSION

>From the above comparative study it is clear that bail applications and postponements by way of video equipment have been introduced and accepted all over the world and that the constitutionality thereof, if a fair procedure is provided for, is not an issue. Provided therefore that-

- (a) an accused is present at all times when his or her bail application is being heard;
- (b) the accused is at all times in a position to observe the bail proceedings;
- (c) the accused is afforded the opportunity to participate in the bail proceedings and to fulfil all his or her other constitutional rights; and
- (d) the proceedings are open for the public and the constitutional procedures regarding such proceedings are applied,

we are of the view that the proposed video proceedings will not be inconsistent with

the accused's right to a fair trial as prescribed by section 35(3). Furthermore, the opinion is held that the above arguments are *mutatis mutandis* applicable to the other rights of an accused to a fair trial.

5.4 The constitutionality of the proposed amendment to the Criminal Procedure Act was discussed at length during the Commission's consultative meeting. Mr J Gresse, representing the Law Society of the Northern Provinces and the Law Society of South Africa, although supporting the proposal in principle, was of the view that the constitutionality of the amendment should be referred to the Constitutional Court before enacting the proposed legislation. Others pointed out that this procedure is not available and that the Commission will not propose an amendment that is of doubtful constitutionality. Support for the proposed amendment came from the judiciary, the National Prosecuting Authority, the Department of Justice, the SA Police Services and the Department of Correctional Services. It was pointed out that provision is already made for video-conferencing in existing South African legislation, for example, section 4 of the International Co-operation in Criminal Matters Act, 75 of 1996, section 25(2)A of the Competition Act, Act 89 of 1998, the Schedule to The Implementation of the Rome Statute of the International Criminal Court Act, Act 27 of 2002 and section 158(3) of the Criminal Procedure Act. In addition thereto the procedure is well known in a large number of constitutional democracies, which include countries such as the USA and Australia. As pointed out by Mr Nel above the procedure has not been declared unconstitutional in any of these countries.

5.5 Most respondents were of the view that the requirement of "being present in court" should not be read too literally. Instead the emphasis should be on the accessibility of the court to the accused, the accused's legal representative and the public (including the press). Attention was also drawn to the fact that since 1994 the Constitutional Court Rules provide for the Constitutional Court to consider appeals without oral hearings. In this regard the question was posed whether the proposed procedure should not be extended to include the hearing of appeals, especially the so-called prisoner appeals where it is common knowledge that appeals are noted to enable a prisoner to get out of prison for the hearing of the appeal with the accompanied risk of escapes.

5.5 Mr Du Rand of the Department of Justice supported the proposed amendment. He pointed out that the Department undertook the pilot project in 1998 in Johannesburg. It was stopped because a Regional Court held that there was no legal framework for the proposed procedure. Mr Bradley Smith of the Office of the National Prosecuting Authority supported the proposal and pointed out that their office tried to kick-start the project in Johannesburg

but ran into problems because of the views taken on constitutionality thereof. He is of the view that to build confidence in the system it should initially be limited to an amendment to the Criminal Procedure Act while a broader view and an amendment to the Supreme Court Act to include appeals could be considered later. Participants unanimously supported the extension of the procedure to include appeals and pointed to distinct advantages the process could have for the backlog in finalisation of appeals by the Courts of Appeal. Mr Nel of the National Prosecuting Authority pointed out that there is no constitutional requirement that an appeal should be heard in open court. He also referred to his opinion of the proposed amendment which he prepared in response to the legal opinion provided by the State Law Advisers. He was of the view that there is no constitutional impediment to the proposed procedure.

5.6 Mr Kriek of the Department of Correctional Services pointed out that the Department would welcome the proposed amendment and that there does not appear to be any legal objections or foreseeable practical problems which could not be addressed should the proposal be enacted. Mr Du Rand of the Department of Justice pointed out that there are no problems as far as the accessibility of courts held in prisons are concerned. These courts primarily deal with crimes committed in prison. Mr Dreyer van der Merwe, Magistrate Pretoria supported this viewpoint. Mr Kriek furthermore pointed out that the procedure would make identification of the right person on the warrant for detention easier as the person will be in prison.

5.7 Mr Eksteen, Regional Court Johannesburg, pointed out that the pilot project was started in Johannesburg in 1998 and was stopped because of the lack of provisions in the Criminal Procedure Act for such a procedure. He supported the idea in principle but foresees practical problems, which may occur if more than one accused is to appear via video link and they are in different detention centres. Should all be dealt with simultaneously or separately? This is, however, not a matter for legislation but may cause practical problems. He also referred to the duty of presiding officers to investigate allegations of assault by prisoners. Mr Pruis, Regional Court President, Pretoria supported the proposal and was of the view that it is a move in the right direction. A major problem may be the initial installation cost implications of the proposed procedure. It was pointed out that the procedure will result in major cost savings which will outweigh the initial cost implications. In addition it was pointed out that the equipment will initially only be installed in the major centres.

5.8 Mr Bhayat, attorney representing the Law Society of the Northern Provinces, was concerned about the security of the system and pointed out that safety measures should be built in to prevent fraud and to prevent the disclosure of communication between lawyer and client. Mr Gerald Newport of the firm Protea Electronics pointed out that a number of measures are available to secure the communication and video link. After discussion the meeting was in agreement that the technical requirements should be prescribed by regulations. Mr Mudau, Magistrate, Johannesburg, questioned whether the term 'prison' included places of safety and proposed that juveniles would be included in the system. The same concern was raised by Adv K Strydom of the SA Police Services and she sought clarification of the term 'place of detention'. The question was raised whether the procedure should be applicable to police cells as well. After discussion the meeting was in agreement that police cells should be excluded and not incorporated in the definition of prison or detention. The meeting was also in agreement that detention should be defined in the proposed legislation. The meeting was also in agreement that the process should not be applicable to juveniles. Mr Du Rand pointed out that a new dispensation is currently under consideration for juveniles and special provisions concerning them will be enacted. Mr SP Dlepuma of the Department of Justice ensured the meeting that sufficient technology is available to prevent fraud and to secure the system that is used.

5.9 Mr D van der Merwe, Magistrate Pretoria, pointed out that there may be intimidation at prisons and it may present practical problems. The meeting discussed the question of access to courts in prison at length and was of the view that such courts are accessible although teething problems may occur when the system is implemented. The meeting discussed the issue of bail applications at length. Mr D van der Merwe was of the view that the legislation should differentiate between various kinds of bail applications. He mentioned, for example, opposed bail applications against unopposed bail applications and the instances involving Schedule 6 offences. In his view unopposed bail applications should be included in the proposed procedure whereas Schedule 6 cases should come to court. After discussion the meeting was in agreement that bail applications should be included in the procedure but it should be left in the presiding officer's discretion to decide whether or not the matter should be heard with the accused appearing before court.

THE COMMISSION'S EVALUATION

5.10 After considering the constitutional implications of the proposed amendment, the legal opinions submitted by both the State Law Advisers and Mr G Nel, the comments

received during the Commission's consultative meeting, and having due regard to its own research, the Commission is of the view that the proposed procedure is not unconstitutional. The Commission endorses the view of Mr Nel on the constitutional issue. The Commission is, however, sympathetic to the view that the procedure would introduce an innovation which should be implemented incrementally, and although convinced of the major advantages to the criminal justice system, recommends that it be introduced for limited purposes initially but with the reservation that it be expanded later. The Commission accepts that the comments that the legislation should be uncomplicated, that technical matters should be provided for in regulations (especially because of the changes in technology), that the prison or place of detention should be defined, that juveniles should initially be excluded from the process, that the point of departure should be to allow the procedure unless, in the discretion of the presiding officer, the accused must in the interests of justice be brought to court and that the procedure should be broadened to include bail applications, both before conviction and after conviction pending an appeal, but that it should be in the discretion of the presiding officer to order the accused's physical presence in court.

5.11 Another matter for consideration is whether or not the proposed procedure should not also be made applicable to appeal proceedings. In this regard the Constitutional Court has already considered the matter. In *S v Pennington and Another*³², the Constitutional Court considered the issue of appeals and the right to a public hearing and to be present in court in appeal proceedings. In this case oral argument on the relevant issues was heard in open court. Counsel were asked to consider and to address argument on the question whether section 34 of the 1996 Constitution, on which the appellants rely, applies to applications for leave to appeal in criminal cases, and if it does, whether the Constitutional Court in regulating its own process has the power to lay down a practice which permits such matters to be dealt with in chambers and not in open court. The court ruled that:

[46] Section 34 provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

The words “any dispute” may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That section 34 has no

³² 1999 (2) SACR 329 (CC).

application to criminal proceedings seems to me to follow not only from the language used but also from the fact that section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted.

[47] Section 35(3) sets out what is required for a fair trial in criminal proceedings. Sections 35(3)(c) and (e) provide that every accused person shall have the right

- “(c) to a public trial before an ordinary court;
- (e) to be present when being tried.”

In contrast section 35(3)(o) which deals with appeals provides only for the right “of appeal to, or review by, a higher court”.

There is no express requirement that the appeal be in open court or that the accused person be entitled to be present at the appeal.

[48] The settled practice of our courts has always been for appeals to be heard in public. Applications for leave to appeal are not ordinarily heard in open court, though a hearing may be called if the application raises issues on which it is considered desirable to hear oral argument. In most cases, however, the applications are dealt with in chambers and are either granted or refused on the basis of the judgment of the Court *a quo* and the reasons advanced in the application in support of the submission that such judgment was wrong. There are sound practical reasons for this. If such matters had to be dealt with in open court, the court rolls would be clogged and the result would be additional expense and delays.

[49] The European Court of Human Rights has held that an application for leave to appeal is a special procedure which does not necessarily call for a public hearing under the provisions of article 6(1) of the European Convention for the Protection of Human Rights. Article 6(1) provides that

- “[i]n the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing”

That requirement is met by the holding of the criminal trial in public, and

- “[t]he limited nature of the subsequent issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal appearance of the [accused] before the court of appeal.”³³

[50] Section 35(3)(c) refers to the right to a public *trial* which is narrower than the right under the European Convention to a public hearing in the *determination of a*

³³

Monnell and Morris v United Kingdom 10 EHRR 205 at para 58.

criminal charge – language which is wide enough to include appeals.

[51] I am accordingly of the opinion that applications for leave to appeal do not need to be heard in public. Counsel for the appellants contended that applications for leave to appeal need to be dealt with by a quorum of the Court and not by a panel. It is not necessary to say more than that it is the practice of this Court to consider applications for leave to appeal at conferences at which at least eight justices are present, and not to refuse the application unless a majority of those justices take the view that there are no reasonable prospects of success. In urgent matters the President of the Court or a justice designated by him or her in terms of rule 1(2) may grant leave to appeal. In that event, however, the appeal follows and is heard in open court. The grant of leave is purely procedural and does not lead to the determination of the matter. In my view this practice is not inconsistent with any provision of the Constitution and there is no need for it to be changed.

[52] I would make the following order in regard to the procedure to be followed in appeals from the Supreme Court of Appeal to this Court:

Pending the enactment of legislation or rules dealing specifically therewith the following procedure must be followed where a party wishes to appeal to this Court against a decision of the Supreme Court of Appeal on a constitutional matter:

- (a) Appeals in such matters may only be brought with the leave of this Court.
- (b) Applications for leave to appeal must be brought in terms of rule 10 within 14 days of the decision of the Supreme Court of Appeal and shall set out sufficient information to enable this Court to determine whether or not the issue is one of substance on which a ruling by this Court is desirable and whether there is a reasonable prospect that this Court will reverse or materially alter the decision.
- (c) If leave to appeal is granted the provisions of rule 19 shall be applied *mutatis mutandis* to such appeals.
- (d) This procedure shall be followed for as long as there is no legislation or rule governing such appeals.

5.12 The Commission has carefully considered the proposal to include appeal hearings in the proposed procedure. The Commission is convinced that the inclusion of appeal hearings would not present constitutional problems. In fact in the light of the decision referred to above the Commission is satisfied that the procedure would be constitutional and having regard to the major advantages of the proposed procedure recommends that it be included in the proposed procedure.

RECOMMENDATION

5.10 The Commission recommends the insertion of the following section in the Criminal Procedure Act, 51 of 1977:

159A REMANDS IN CRIMINAL PROCEEDINGS VIA AUDIOVISUAL LINK

(1) A person over the age of 18 years, who is in custody in prison in respect of the alleged commission of an offence and has appeared before a court, has been remanded in custody pending his or her trial, and who is required to appear or be brought before a court in a subsequent proceeding (whether before, during or after the trial or conviction and sentence) for the purpose of-

- (a) a further remand of the case;
- (b) an application to be released on bail in terms of sections 60, 307, 308A or 321;
- (c) an application for leave to appeal; or
- (d) an appeal or a review,

is not required to appear or be brought physically before the court but may, subject to the provisions of this section, sections 159B, C and D appear before court by audiovisual link unless the court directs that he or she appear or be brought physically before it.

(2) For purposes of this section "prison" means any place established under the Correctional Services Act, Act No 111 of 1998, but does not include a police cell.

(3) A court may direct an accused person contemplated in subsection (1) to appear or be brought before the court if his or her physical appearance is required in the interests of justice.

(4) Any proceedings in terms of subsection (1) shall for all purposes be regarded as having been held in the presence of the accused if, during the proceedings-

- (a) he or she is held in custody in prison; and
- (b) by means of audiovisual link he or she is able to follow the court

proceedings and the court is able to see and hear the accused.

159B Requirements for audiovisual appearance by accused

- (1) An accused person appearing before a court by audiovisual link must do so from a place at which the requirements specified in section 159C and as modified by subsections (2) and (3) of this section are met.
- (2) The Minister may, subject to the provisions of this section, designate any prison which has been suitably equipped, as a place where proceedings in terms of section 159A can be held.
- (3) Both the court point and the remote point in the prison designated in terms of subsection (1) must be equipped with facilities that, in accordance with any requirements prescribed by regulations and any directions of the presiding officer, enable private communication to take place at any time during the proceedings; or any adjournment of the hearing; or at any time on the day of a hearing shortly before or after the hearing, between the accused person and any legal practitioner at the court point representing him or her in the proceeding and documents to be transmitted between both points by those persons.
- (4) The remote point in the prison designated in terms of subsection (1) must be open and accessible to the general public and the accused's legal representative.

159C Technical requirements for the use of audio visual link

- (1) For the purpose of proceedings in terms of section 159A both the court point and the remote point must be equipped with facilities that -
 - (a) enable all appropriate persons at the court point to see and hear the person appearing before the court or making the submission and to follow the proceedings; and
 - (b) enable all appropriate persons at the remote point to see and hear appropriate persons at the court point and to follow the proceedings.
- (2) The Minister may make regulations concerning the technical requirements of the audiovisual link to meet the requirements contemplated in subsection (1).
- (3) The presiding judge or magistrate may, in order to ensure a fair trial, impose any requirement or condition it may deem necessary.

- (4) Requirements or conditions imposed by the presiding judge or magistrate under subsection (3) may not be inconsistent with any provision of this Act or any regulation issued in terms of this Act.

159D Protection of communication between accused and legal representative

Without limiting any other protection applying to it, a communication by audio link or audiovisual link, or a document transmitted between an accused person and his or her legal representative in accordance with this Act, is as confidential and as inadmissible in any proceedings as it would be if the communication took place or the document was produced while they were in each other's presence.

REPUBLIC OF SOUTH AFRICA

**CRIMINAL PROCEDURE
AMENDMENT BILL**

(As introduced)

(MINISTER OF JUSTICE)

[B -2003]

REPUBLIEK VAN SUID-AFRIKA

**STRAFPROSESWYSIGINGS-
WETSONTWERP**

(Soos ingedien)

(MINISTER VAN JUSTISIE)

[W -2003]

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

{ } Words in bold type in these brackets indicate an alternative proposal.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Criminal Procedure Act, 1977 so as to make provision for the postponement of criminal cases against an accused person in custody awaiting trial via audiovisual link or audio link; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

1. The following sections is hereby inserted in the Criminal Procedure Act, 51 of 1977, after section 159:

159A REMANDS IN CRIMINAL PROCEEDINGS VIA AUDIOVISUAL LINK

(1) A person over the age of 18 years, who is in custody in prison in respect of the alleged commission of an offence and has appeared before a court, has been remanded in custody pending his or her trial, and who is required to appear or be brought before a court in a subsequent proceeding (whether before, during or after the trial or conviction and sentence) for the purpose of-

- (a) a further remand of the case;
- (b) an application to be released on bail in terms of sections 60, 307, 308A or 321;
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subject to the provisions of this section, sections 159B, C and D appear before court by audiovisual link unless the court directs that he or she appear or be brought physically before it.

- (2) For purposes of this section "prison" means any place established under the Correctional Services Act, Act No 111 of 1998, but does not include a police cell.
- (3) A court may direct an accused person contemplated in subsection (1) to appear or be brought before the court if his or her physical appearance is required in the interests of justice.
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 - (a) he or she is held in custody in prison; and
 - (b) by means of audiovisual link he or she is able to follow the court proceedings and the court is able to see and hear the accused.

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- (2) The Minister may make regulations concerning the technical requirements of the audiovisual link to meet the requirements contemplated in subsection (1).
- (3) The presiding judge or magistrate may, in order to ensure a fair trial, impose any requirement or condition it may deem necessary.
- (4) Requirements or conditions imposed by the presiding judge or magistrate under subsection (3) may not be inconsistent with any provision of this Act or any regulation issued in terms of this Act.

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LIST OF RESPONDENTS

SA Police Services

Ms K Strydom; (Representing Commissioner Alberts)
Mr P Senekal (Representing Commissioner PC Jacobs)

Magistrates

Mr WG Pruis (Regional Court President Pretoria)
Mr C Eksteen (Regional Court President Johannesburg)
Mr D van der Merwe (Magistrate Pretoria)
Mr TP Mudau (Magistrate Johannesburg)

Department of Correctional Services

Mr EJ Kriek

National Prosecuting Authority

Me A Smith
Mr SG Nel
Mr B Smith

Department of Justice

Mr P du Randt
Mr K Vos
Mr SP Dlepuma

Legal Profession

Mr A Bhayat (Law Society of the Northern Provinces)
Mr J Gresse (Law Society of South Africa and Law Society of the Northern Provinces)