

CHAPTER 2

Protecting and enforcing rights and resolving conflicts



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Outcomes

At the end of this chapter you will be able to:

- Describe the different structures of Government
- Explain the Sources of South African law
- Describe the rights contained in the Bill of Rights
- Explain how South African law is made
- Explain the difference between criminal and civil law
- Describe the structure of the courts
- Understand how citizens can participate in democracy
- Understand how to engage in advocacy and lobbying
- Explain how alternative dispute resolution works.

2.1

Structures of government



CHECKS AND BALANCES

The Constitution provides for checks and balances in the structure of government.

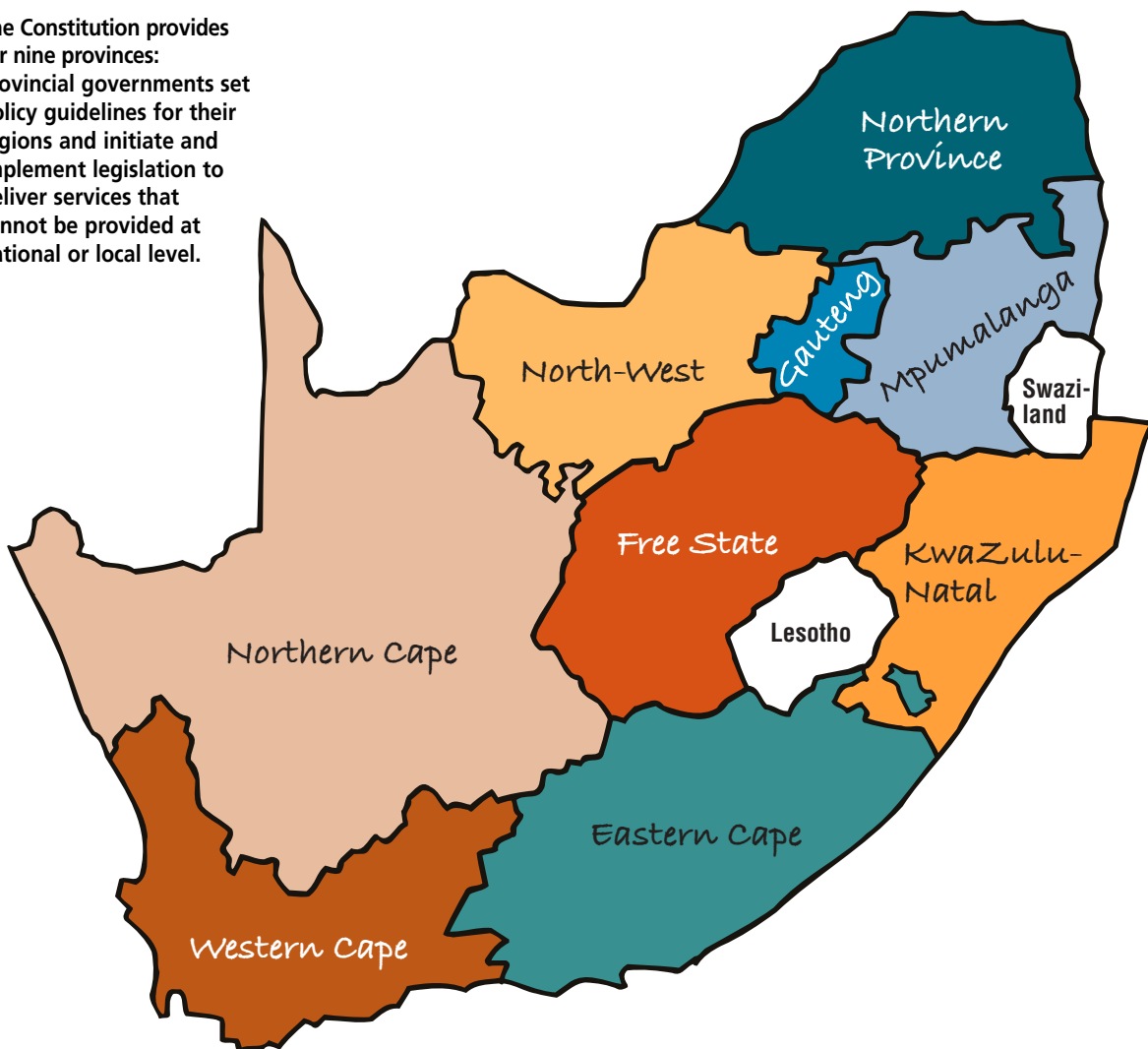
The Constitution provides for checks and balances in the structure of government to ensure good governance and accountability as well as to protect the fundamental rights of citizens. Legal and constitutional rights can be made real by using the law and the courts to enforce them. Citizens can participate in democracy in a number of ways. One very important method is through lobbying and advocacy. Apart from the courts alternative dispute resolution mechanisms can also be used to resolve conflicts.

The Constitution sets out the structures of government applicable in the country. These can be broadly divided into geographical spheres of government and functional branches of government.

2.1.1

Geographical spheres of government

The Constitution provides for nine provinces: Provincial governments set policy guidelines for their regions and initiate and implement legislation to deliver services that cannot be provided at national or local level.



South Africa is a unitary state where central power is concentrated nationally but some powers have been delegated to provincial and local authorities. The Constitution provides for nine provinces: Gauteng, Northern Province, North West Province, Mpumalanga, Free State, Northern Cape, Western Cape, Eastern Cape and KwaZulu-Natal.

The national government is responsible for setting policy guidelines for the country as a whole and initiating and implementing national legislation to ensure uniformity in certain areas. Provincial governments set policy guidelines for their regions, and where they are competent to do so, initiate and implement legislation to deliver services that cannot be provided at national or local level. Local authorities (e.g. cities, towns and rural districts) are responsible for delivering essential services in their areas and are empowered to make policies and by-laws to achieve this purpose.



NATIONAL ASSEMBLY

The National Assembly of Parliament is the supreme law-making body.

Functional branches of government

2.1.2

The National Assembly of Parliament is the supreme law-making body in South Africa, but the different provinces may also make their own laws provided they are consistent with the Constitution.

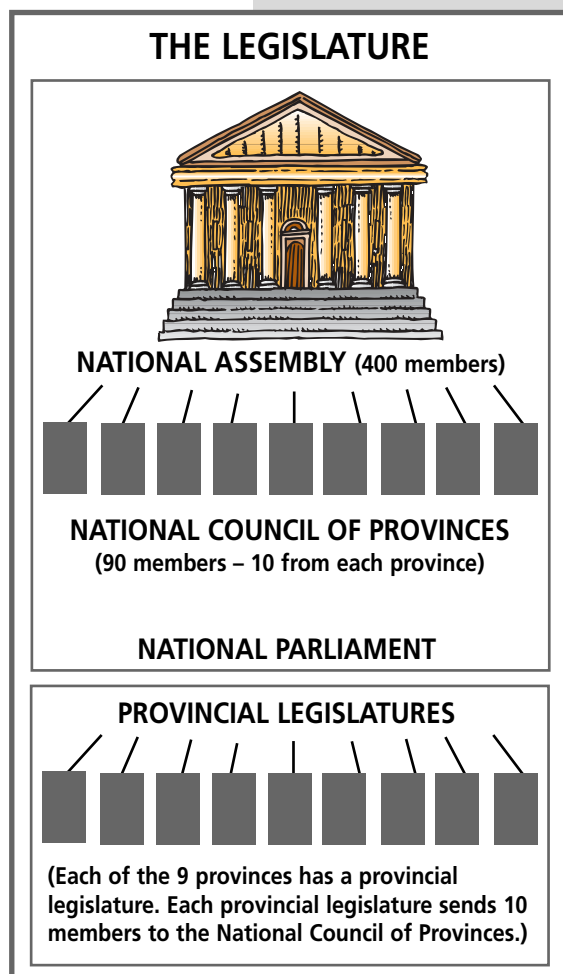
As in other democracies the Constitution provides for a separation of powers between three branches of government: the legislature, the executive and the judiciary. This ensures that the important democratic principles of transparency and accountability are safeguarded by checks and balances.

The legislature

2.1.3

South Africa has a national legislature and provincial legislatures. The former consists of the National Assembly (400 members) and the National Council of Provinces (90 members – 10 from each province) which together constitute the National Parliament, while each province has a Provincial Legislature.

Parliament is the supreme legislative authority for the country and makes laws for the country as a whole. It also monitors the activities of the Executive [See pg 30, para 2.1.4] by using multi-party portfolio committees to scrutinise the performance of the different government departments. It holds Ministers accountable by requiring them to respond publicly to questions in the house. Finally, and most importantly, Parliament is responsible for allocating funds to government departments and scrutinising their budgets and expendi-





AMENDMENT OF THE CONSTITUTION

Parliament has the power to amend the Constitution (by a two-thirds majority).

2.1.4

Definition

POLICY

Policy is what the government has in mind when passing a law or deciding on a course of action. The policy behind a rule of law, statute, decision or some other conduct is its intended or probable effect (e.g. to reduce crime).

ture. Much of Parliament's work is done through committees.

As the supreme legislative authority Parliament has the power to amend the Constitution (by a two-thirds majority); pass legislation applicable both nationally and to the provinces (such as in respect of health, education, housing, welfare and transport); and pass legislation in policy areas where provinces have exclusive responsibility (when this is necessary to maintain national security, economic unity, essential national standards, or to establish minimum standards for the rendering of services, or to prevent unreasonable action by a province that is prejudicial to another province or the rest of the country). It can also delegate its powers of legislation except the power to amend the Constitution.

Executive

The National Executive consists of the President, the Deputy-President, the Cabinet and the Ministries. The function of the Executive is to develop and implement national policy, initiate and implement national legislation, and co-ordinate the functions of national state departments and officials. It implements the policies and legislation passed by Parliament.

Policy is what the government has in mind when passing a law or deciding on a course of action. The policy behind a rule of law, statute, decision or some other conduct is its intended or probable effect (e.g. to reduce crime). Laws are passed and administrative acts usually done in accordance with the government's social, economic or political policy.

The President

The President is elected by Parliament for a period of five years and is head of the Executive. He or she may not be elected for more than two terms. The President's powers include: assenting to and signing bills passed by Parliament; referring bills to the Constitutional Court; appointing commissions of inquiry; making appointments to government bodies; calling national referendums; receiving and recognising diplomatic representatives; pardoning criminals and excusing people from paying fines, penalties and forfeitures; and conferring honours.

The Deputy-President

The Deputy-President is appointed by the President and acts in the latter's place when he or she is away or cannot otherwise act. When both the President and Deputy-President cannot act one of the Cabinet Ministers may be appointed as Acting President.

The Cabinet

The Cabinet is appointed by the President. It consists of Ministers who are the political heads of the different government departments. Ministers are also heads of their Ministries and appoint senior officials

CONTINUED

to supervise the implementation of government policy. The Cabinet is individually and collectively accountable to Parliament and Cabinet members must report regularly to Parliament. Cabinet Ministers may be removed from office by the President and may be appointed in a different capacity.

Ministries and departments

Ministries consist of small teams of ministerial advisers and assistants to assist the Minister. The Minister and the Ministries develop government policy and provide the political management for its implementation. The Departments are much larger than the Ministries and provide the technical management for the implementation of government policy. They may also assist with the development of such policy. The different Departments liaise with each other through interdepartmental committees.

Provinces operate through Executive Councils consisting of the Premier and Members of the Executive Council appointed by the Premier.

The Judiciary

The judiciary is independent from the Legislature and the Executive and acts as a check on the activities of both. The judiciary is responsible for upholding the Constitution and the laws of the country and are given different powers depending on their level of appointment.

The Constitution enables the judiciary to entertain applications by a wide variety of persons and bodies in cases where fundamental rights have been breached. These include people acting in their own interest; associations acting on behalf of their members; people acting on behalf of others who are unable to bring an application in their own name; people acting as members of or on behalf of groups or classes of persons; and people acting in the public interest.

The powers of the judiciary and the nature of the different courts is discussed in the section dealing with the structure of the courts.

Doctrine of separation of powers

The distinction between the powers of the Legislature, Executive and Judiciary is known as the doctrine of 'separation of powers'. It provides checks and balances so that one branch of government does not become so powerful that it subverts or dominates the others and begins to undermine the democratic system. This ensures accountability, transparency and responsiveness.

The Legislature has no power to administer the implementation of laws passed by it, nor does it have judicial powers. The Executive has no legislative or judicial powers, while the Judiciary has no executive or legislative powers. However there is no absolute separation of powers between the Legislature and the Executive as the latter often initiates public policy and legislation and also has limited law-making powers in respect of proclamations and regulations delegated by statute.

2.1.5

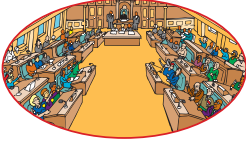
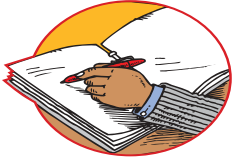

2.1.6



SEPARATION OF POWERS

The distinction between the powers of the Legislature, Executive and Judiciary is known as the doctrine of 'separation of powers'.

SEPARATION OF POWERS

LEGISLATURE	EXECUTIVE	JUDICIARY
		
No executive powers	No legislative powers	No executive powers
No judicial powers	No judicial powers	No legislative powers
	But often initiates public policy and legislation and has limited law-making powers	



TALKING POINT

Fraudulent attorneys

[South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC)]

The Special Investigative Unit headed by Judge Heath was investigating fraudulent practices involving millions of rands by attorneys who were claiming against the Road Accident Fund on behalf of clients injured in motor accidents. The attorneys claimed that as Judge Heath was a judge he should not be involved in investigative work as this meant that a member of the Judiciary was involved in the role of the Executive and undermined the Separation of Powers doctrine. The attorneys approached the Constitutional Court for relief.



1. If you were the lawyers for the attorneys what arguments would you make?
2. If you were the lawyers for Judge Heath what arguments would you make?
3. If you were a Judge in the Constitutional Court what would your judgment be?

Defence contracts and corruption

[The Parliamentary Standing Committee on Public Accounts and the Defence Contracts]

The Parliamentary Standing Committee on Public Accounts (SCOPA), chaired by a Member of Parliament who was not a member of the ruling party, was tasked with investigating alleged corruption in multi-million rand Defence Contracts entered into by the Government. Initially the Committee recommended that the Public Protector, the Auditor General, the National Director of Public Prosecutions and the Heath Special Investigative Unit should investigate the matter and report back to Parliament. The Executive puts pressure on the SCOPA members of the ruling party, (who constitute a majority on SCOPA) to insist that the Heath Unit should not be part of the inquiry. A member of the ruling party who does not agree with the decision is removed from SCOPA.



- Did this interference by the Executive in the work of SCOPA, which is answerable to Parliament, undermine the doctrine of Separation of Powers? Why or why not?



2.2

Sources of South African law

The sources of South African law are Customary law, Roman-Dutch law, English law and most importantly and most recently, the Constitution.

South African law today is a mixture of mainly Roman-Dutch law, with some English law and Statute law influences, together with a recognition of some of the rules of Customary law. All South African law today however must conform to the Bill of Rights in the South African Constitution.

Customary law

Customary law existed before the arrival of the Dutch settlers in South Africa. It is still important in rural areas, especially for family matters. Customary law is recognised by the Constitution, provided it does not conflict with the Bill of Rights.

Roman-Dutch law

Roman-Dutch law was brought to the Cape in 1652. It has remained

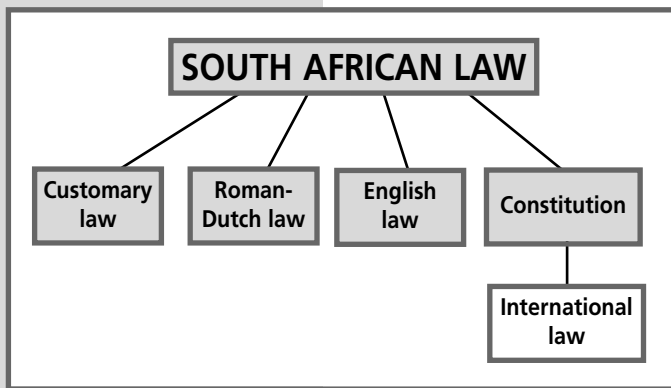


BILL OF RIGHTS

All South African law must conform to the Bill of Rights.

2.2.1

2.2.2



the basis of Common law in South Africa, although its principles must be updated so that they do not conflict with the new Constitution. An example of an updated principle of the Common law is that strict liability may no longer be imposed on the mass media in defamation cases as this conflicts with freedom of expression in the Bill of Rights.

2.2.3 English law

When the British governed South Africa from the early 1800s onwards they never formally did away with Roman-Dutch law. English law, however, had an important influence on the law governing the operation of the Courts and the law effecting the business community. Today, however, English law influences have to be in line with the new Constitution.

2.2.4 Constitution

In 1994 an interim Constitution was introduced in South Africa, and this was followed by the final Constitution in 1996. Both Constitutions introduced international human rights law as part of South African law. This means that all law in South Africa is now governed by the Constitution. [See Chapter 1 pgs 4-5]



TALKING POINT

Sexual orientation discrimination

[National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)]

The National Coalition for Gay and Lesbian Equality brought a case on appeal to the Constitutional Court on the basis that the Common law crime of sodomy, and statutory offences based upon it, were a violation of the right not to be discriminated against on the ground of sexual orientation, as well as the rights to privacy and dignity in the Bill of Rights. The Minister of Justice opposed the application.



1. If you were the lawyers for the National Coalition what would your arguments be?
2. If you were the lawyers for the Minister of Justice what would your arguments be?
3. If you were a Constitutional Court what would your judgment be?

2.3

The Bill of Rights

The Bill of Rights in the Constitution is the cornerstone for the protection of people's rights in South Africa. The Bill of Rights has been influenced by laws protecting rights in other countries, the Universal Declaration of Human Rights and other international documents protecting the rights of people. No laws in South Africa may conflict with the Bill of Rights.

The Bill of Rights includes the following rights for citizens and people who live in South Africa (the rights *in bold italics* are of particular relevance to health care practitioners):

1. ***The right to be treated equally and to be free from discrimination*** (patients and health care practitioners).
2. ***The right to life*** (patients and health care practitioners).
3. ***The right to respect and protection of dignity*** (patients and health care practitioners).
4. ***The right to freedom and security of the person*** (patients and health care practitioners).
5. The right to freedom from servitude and forced labour.
6. ***The right to privacy*** (patients and health care practitioners).
7. ***The right to freedom of conscience, religion***, thought, belief and opinion (patients and health care practitioners).
8. ***The right to freedom of speech, expression, artistic creativity and scientific research*** (medical researchers).
9. The right to assemble, demonstrate and petition peacefully and unarmed.
10. The right to freedom of association.
11. The right to freedom of movement.
12. The right to choose a place of residence.
13. The right to hold and keep citizenship.
14. The right to enter, remain in and leave the country.
15. The right to join and campaign for a political party of choice.
16. The right to vote in secret.
17. The right of access to independent and impartial Courts.
18. ***The right of access to information*** (patients).
19. ***The right to be treated fairly and to be given reasons by administrative bodies*** (patients and health care practitioners).
20. The right to employ a lawyer and to be provided with a lawyer by the state in certain circumstances.
21. The right to be informed of reasons for arrest.
22. The right to remain silent and to be presumed innocent.
23. The right to be brought before a Court within 48 hours of arrest.
24. The right to bail unless the interest of justice requires otherwise.
25. The right to a fair trial.
26. The right to freely engage in economic activity.
27. ***The right to fair labour practices*** (health care practitioners).
28. The right to buy, hold and sell rights in property.
29. ***The right to a healthy environment*** (patients and health care practitioners).
30. The right of children to a name, nationality and parental care.
31. ***The right of children to security, basic nutrition and basic health and social services*** (patients).
32. The right to language and culture of choice.
33. The right to basic education and access to educational institutions.

2.4

How South African law is made

All societies require laws because without law there would be chaos. In democratic countries the laws should be fair and ensure that due process is followed in both the creation of the laws and their implementation.

As has been mentioned South African law is based on a mixture of different legal systems. There are a number of different ways in which law is made. These include Statute law (legislation), the Constitution, Common law and Customary law. All these types of laws are developed by the Judges who interpret and apply the law to individual cases.

2.4.1

Statute law

Statute law or Legislation consists of written laws that are passed by the National or Provincial Parliaments in order to carry out the policy of the government of the day. The National Parliament is the highest law-making body: It obtains its powers from the 1996 Constitution.

The National Parliament consists of two houses: (a) the National Assembly and (b) the National Council of Provinces. Statute laws which affect everyone in South Africa have to be passed by both houses of Parliament. A statute passed by the National Parliament does not become law until it has been signed by the State President.

Sometimes a statute may give power to a person (e.g. a Minister) or a body (e.g. a government department) to make 'regulations' (rules). These regulations are not written in the Act, but are published in the *Government Gazette* and other newspapers.



PROVINCES

The provinces are allowed to make their own statutes in certain areas of the law provided that they are in line with the constitution.

Without law there would be chaos.



The provinces are allowed to make their own statutes in certain areas of the law provided that they are in line with the Constitution (e.g. the KwaZulu-Natal Health Act 4 of 2000). Cities and towns may also make their own statutes and which are known as 'by-laws'.

The birth of a statute

Before a statute becomes law it goes through a number of steps.

STEP 1

Green Paper: In order to make its thinking on a topic known to the public the government publishes a Green Paper in the *Government Gazette* setting out its policy and inviting comments from the public and special interest groups.



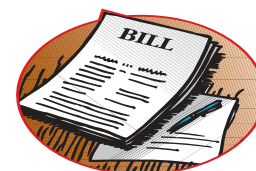
White and Green Papers set out policies and invite comments.

STEP 2

White Paper: After the comments on the Green Paper have been received the government publishes an amended White Paper in the *Gazette* on the subject and invites further comments. Public hearings are usually held between the Green and White Paper stages.

STEP 3

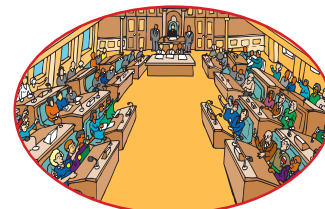
Draft Bill: If the White Paper includes a draft statute or an amendment to an existing statute a draft bill will be drawn up and submitted to the relevant Cabinet committee for approval. The Cabinet will refer it to the state legal advisors who will check that it is consistent with the Constitution and the intention of the legislators.



Draft bills are submitted to Cabinet committees and state legal advisors.

STEP 4

Bill tabled: Once approved by the state legal advisors the draft bill is sent to the Speaker of Parliament who tables it in Parliament. The Speaker tables it by placing it on the Parliamentary order paper and agenda and introducing it at the next sitting of Parliament. Once it is tabled the draft bill becomes a bill. When it is tabled no amendments are allowed.



Once approved by state legal advisors, the draft bill is tabled in Parliament.

STEP 5

Referral to Standing Committee: After the tabling of the bill the National Assembly refers it to the relevant multiparty departmental standing committee for consideration and discussion. A copy of the bill is also published in the *Government Gazette* for public comment.

STEP 6

Representations to Standing Committee by interested parties: Interested parties may make written and oral submissions concerning the bill to the Standing Committee.

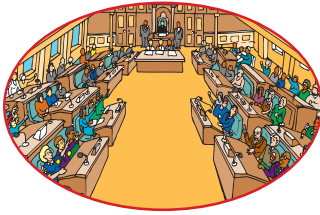


Bills are then referred to multiparty departmental standing committees before being published in the *Government Gazette*.

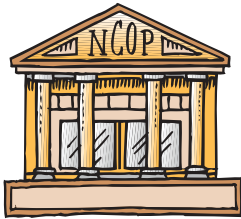
STEP 7

Second reading of Bill: Once the Standing Committee has considered all the representations and suggestions and amended the bill accordingly it refers the bill to the Parliamentary legal advisors. It is then presented to the National Assembly together with the proposed amendments. Members of Parliament may also propose further amendments.

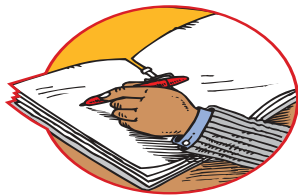
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The National Assembly debates and votes on the bill.



If the National Assembly passes the bill it is referred to the National Council of Provinces.



Once it is signed by the State President the bill becomes law.

STEP 8

Referral back to Standing Committee: The Standing Committee may accept or reject the proposed amendments.

STEP 9

Approval or rejection by National Assembly: The bill is referred back to the National Assembly by the Standing Committee and after debate, is passed or rejected by a simple majority.

STEP 10

Referral to National Council of Provinces: If the National Assembly passes the bill it is referred to the National Council of Provinces for consideration and voting. The National Council refers the bill to the relevant Select Committee for debate. The Select Committee sends the bill to all nine provinces for consideration by them.

STEP 11

Approval or rejection by National Council: The National Council passes or rejects the bill. The bill does not have to be voted on by the provincial legislatures as they are all represented in the National Council.

STEP 12

The Bill becomes an Act: Once the bill has been passed by both Houses of Parliament it is given an Act number and referred to the State President for signature. After signature it is published in the *Government Gazette* as an Act and becomes law. It may come into effect on the date mentioned in the Act, the date of publication in the *Gazette*, or on some future date to be determined by the State President.

2.4.2

The Constitution

The Constitution is the supreme law of the land. This means that the Constitution has a direct effect on the state and statutes passed by Parliament. The Constitution gives the Constitutional Court the power to strike down any statutes that conflict with the Constitution. The High Court may do the same in respect of provincial legislation. The courts must make sure that the Common law and Customary law are interpreted, applied and developed with regard to the 'spirit, purpose and objective' of the Bill of Rights.

The Constitution may only be changed by two-thirds of the members of the National Parliament voting in favour of changing it. Statute law may only be changed by Parliament or the body that made it.

2.4.3

Common law

Common law is not made by Parliament. It is a set of rules developed by the Courts which change according to how society changes over the years. Common law can be regarded as the living law which is an updated version of the old Roman-Dutch and English legal rules, as influenced by the Constitution and the requirements of modern society.



SUPREME LAW

The Constitution is the supreme law of the land.

Common law is found in the written decisions of the Judges in the High Courts and the Constitutional Court.

Judgments and precedents

Precedents and judgments by the Courts are a most important way of making law in South Africa. In law precedents are used to guide the Courts in future cases. The fact that higher Court decisions bind all lower Courts means that there is a system of ranking in the Courts. This is because a judgment made by the High Courts in South Africa must be followed by the lower Courts in similar cases where similar facts are involved. If the facts are not similar then the decision does not have to be followed.

As a general rule all lower Courts are bound by the decisions of higher Courts or Courts of the same rank. This is known as the doctrine of precedent. Whether or not a precedent is binding will also depend upon the number of judges that heard the matter. For instance, a decision by a full bench of three High Court judges in the same Provincial Division will be binding on a High Court consisting of one judge in that Division. Furthermore, judgments by the Provincial Division of one province is not binding on the High Court of another Provincial Division, but are regarded as persuasive.

The precedents of the highest Courts (the Supreme Court of Appeal and the Constitutional Court) must be followed by all other Courts (e.g. the Provincial and Local Divisions of the High Court and the Magistrates' Courts). The decisions of the Provincial and the Local Divisions of the High Court must be followed by all Magistrates' Courts.

2.4.4



LIVING LAW

Common law can be regarded as the living law.



PRECEDENTS

Law precedents are used to guide the Courts in future cases.

Liability for negligence

[St Augustine's Hospital (Pty) Ltd v Le Breton 1975 (2) SA 530 (D)]

A man took his elderly mother into St Augustine's Hospital for treatment for a broken arm. He signed a contractual undertaking that he would be responsible for the expenses involved. The nurses negligently left the side of a cot down and the old lady fell out of bed and broke her leg. The hospital sued the man for the expenses in respect of the treatment for both the arm and the leg. The case came before a single judge in the Durban High Court. In the 1930s three judges of the Natal High Court had held that hospitals were not liable for the negligence of the nurses. According to modern law the decision would be wrong as hospitals are now held liable for the wrongful acts of their nurses if they were acting within the course and scope of their employment. However, the single judge could not overrule the decision by three judges.

The judge solved his dilemma by not deciding the question on the basis of negligence, but on the basis of the contractual undertaking given by the man. He had only agreed to pay for the expenses concerning the broken arm and not for those in respect of the broken leg. Therefore he could not be held liable for the latter.

Customary law

Customary law consists of the indigenous legal system that existed in South Africa before the settlers arrived. Today it applies mainly to family matters and inheritance. It is used in many rural areas of South Africa. Special courts hear Customary law cases, but they can also be heard in the ordinary courts.

2.5

The difference between criminal and civil law

Law can be broadly divided into criminal and civil law.

2.5.1

Definition

CRIME

A crime is a wrong against the state for which the wrong doer is punished by the state.

Criminal law

Criminal law is part of public law - the relationship between the individual and the state. It controls how people in society behave and tells them what they are expected to do. In a criminal case the 'State' brings a legal action against an accused person who is charged with a crime. The case is referred to as e.g. *S v Mills*.

The state has to prove 'beyond a reasonable doubt' that the accused person is guilty. The accused person does not have to prove that he or she is not guilty, but merely has to raise a doubt in the state's case.

Because of the serious consequences of a criminal conviction the Constitution provides some protection for accused persons so they are not completely overpowered by the state. Thus the Constitution provides that an arrested or detained person is guaranteed the right to consult a lawyer and have legal representation during the trial, at state expense (if a substantial injustice would result because they cannot afford one). Also an accused person must be granted bail if he or she is not a threat to society, will not interfere with witnesses and will attend court for the duration of the trial.

A crime can be simply defined as 'a wrong against the state for which the wrong doer (the criminal) is punished by the state'.

2.5.2

Definition

CIVIL WRONG

A wrong against an individual for which the wrongdoer must pay compensation.

Civil Law

Civil law is part of private law which controls how individual people or groups of people behave towards each other. In a civil case one person (the plaintiff) brings an action against another (the defendant) and the state is usually not involved. Civil cases are referred to as e.g. *Jones v Gumedede*.

The aim of a civil case is to give compensation for or prevent

damage without punishing the defendant. The plaintiff has to prove his or her case 'on a balance of probabilities', and if the plaintiff succeeds, the defendant will be made to pay a certain amount in compensation to make up for the plaintiff's losses.

A civil wrong may be simply defined as: 'A wrong against an individual for which the wrongdoer must pay compensation to the injured person'.

Sometimes a person's act may result in both criminal and civil actions: For example, a person who assaults someone can be prosecuted by the State, convicted, and punished for committing a crime. He or she may also be sued for damages by the person injured in the assault, and made to pay compensation for medical expenses, lost wages and pain and suffering.

Appeal: An appeal is when a person is unhappy with the decision of a judge or magistrate in a lower court concerning the facts or the law and takes the case to a higher court in order to persuade the latter that the decision of the lower court was wrong.

Review: A review is when a person believes that the proceedings in a lower court were unfair because they were conducted in an irregular or illegal manner and takes the case to a higher court in order to persuade the latter that the proceedings should be set aside.

Definition

APPEAL

An appeal is when a person who is unhappy with the decision of a judge or magistrate takes the case to a higher court.

Definition

REVIEW

A review is when a person believes that the proceedings in a lower court were unfair because they were conducted in an irregular or illegal manner and takes the case to a higher court in order to persuade the latter that the proceedings should be set aside.

2.6

Structure of the courts

The following courts exist in South Africa: the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates' Courts, and a number of specialist courts.

Constitutional Court

The Constitutional Court is the highest Court in South Africa and is not related to the High Courts. Its powers are given to it by the Constitution.

The Constitutional Court can hear cases for the first time and also as a Court of appeal. It is the highest Court of appeal in Constitutional cases. It also protects the rights of people in South Africa under the Bill of Rights, and ensures that Parliament and the Government comply with the provisions of the Constitution.

The Constitutional Court is situated in Johannesburg and is made up of 11 Judges. The Court is headed by a President and Deputy-President. The Judges are recommended by the Judicial Services Commission and are appointed by the President of South Africa in consultation with the Cabinet and the Chief Justice.

2.6.1



CONSTITUTIONAL COURT

The Constitutional Court is the highest Court in South Africa. Its powers are given to it by the Constitution.

2.6.2



SUPREME COURT

The Supreme Court of Appeal has power over all the Courts in South Africa except the Constitutional Court.

Supreme Court of Appeal

The Supreme Court of Appeal is the highest Court of appeal for cases which do not involve Constitutional matters. The Supreme Court of Appeal is headed by the Chief Justice. It is not a Court which hears cases for the first time or conducts trials. It is a Court of appeal and is located in Bloemfontein.

The Supreme Court of Appeal has power over all the Courts in South Africa except the Constitutional Court. It can hear appeals on any civil or criminal cases except Constitutional cases over which it does not have power. All decisions made by the Supreme Court of Appeal are binding on all Courts in South African except the Constitutional Court.

2.6.3



HIGH COURTS

They can hear any type of criminal or civil case.

High Courts

The High Courts consist of Provincial and Local Divisions. They have unlimited powers in that they can hear trials concerning any type of criminal or civil case. Provincial Divisions hear appeals and reviews from Local Divisions or Magistrates' Courts.

HIGH COURTS

CRIMINAL CASES
Fines over R300 000
Sentences over 25 years

CIVIL CASES
Claims exceeding R100 000
Divorce
Interpretation of wills
Insanity

CONSTITUTIONAL MATTERS
Certain cases
Review of actions/statutes/bills
Certain appeals

Criminal cases

High Courts only hear criminal cases involving very serious crimes which require a fine of more than R300 000 or prison sentences of more than 25 years. Criminal cases are heard by one Judge. Assessors may be appointed to assist the Judges. They are usually retired Lawyers, Magistrates or University Law Teachers.

Civil cases

Civil claims must usually exceed R100 000 before they can be heard in the High Court. Also, cases involving divorce, interpretation of wills or declaring people insane can only be heard by the High Court. However, when Family Courts are introduced, High Courts will no longer hear divorce cases.

Constitutional matters

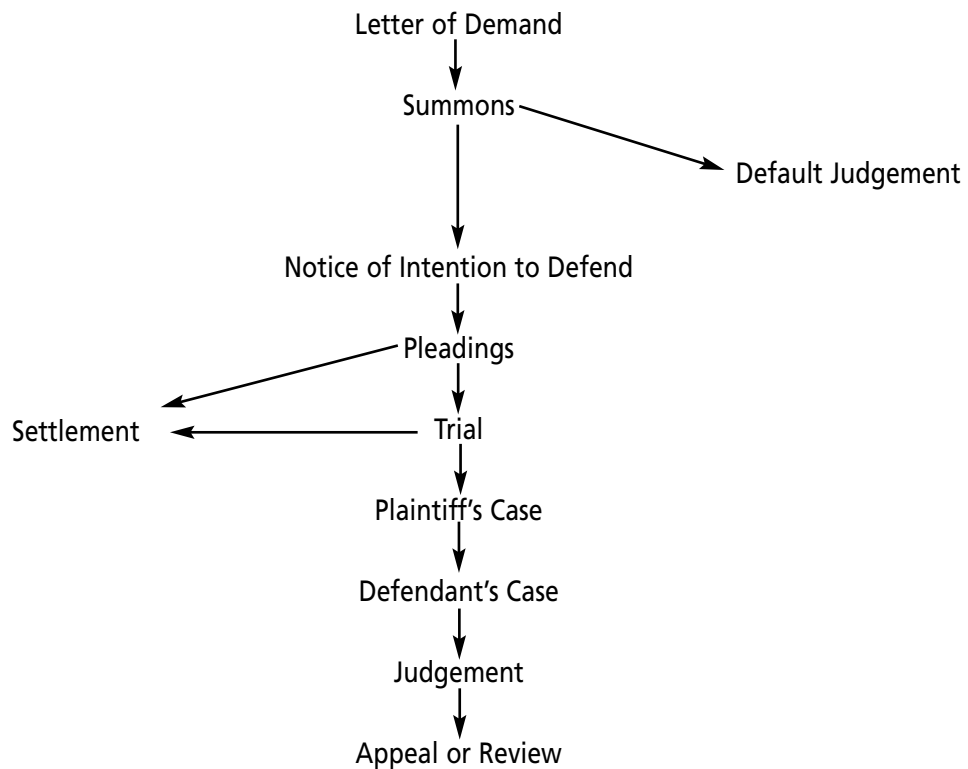
Provincial and Local Divisions can hear certain constitutional cases. They can review administrative actions and provincial Statutes and Bills. However, their decisions are not final because the person bringing the action may appeal to the Constitutional Court. High Courts can also hear appeals relating to Constitutional cases from the Magistrates' Courts.

Magistrates' courts

2.6.4

Magistrates' courts hear less serious criminal and civil cases than the High Court. Criminal cases are heard by Regional and District Magistrates' Courts.

Summary: Steps in a civil case



[Source: *Street Law Book 1 Introduction to South African Law and the Legal System*]

Criminal cases

The Regional Magistrates' Courts hear serious criminal cases and may sentence a person to a maximum fine of R300 000 or 25 years imprisonment. The District Magistrates' Courts may sentence a person to a maximum fine of R60 000 or three years imprisonment.

Civil cases

The Magistrates' Courts cannot usually hear civil claims exceeding R100 000. They also cannot hear certain categories of cases like the interpretation of wills, whether a person is insane or applications to declare a person insolvent.

Magistrates' Courts are presided over by Magistrates who are civil servants. They are usually appointed from people who have previously worked as prosecutors and clerks in the Department of Justice. More recently an attempt has been made to make them more independent by having appointments made by the Magistrates' Commission.

MAGISTRATES COURTS

CRIMINAL CASES

Regional courts:
Fines up to R300 000
Sentences up to 25 years imprisonment

District courts:
Fines up to R60 000
Sentences up to 3 years imprisonment

CIVIL CASES

Claims up to R100 000

2.6.5



SMALL CLAIMS

Small Claims Courts allow civil claims up to R3 000.

Small Claims Courts

Small Claims Courts are found in most of the larger cities in South Africa. They are designed to allow people to go to Court without lawyers for civil claims of less than R3 000. Very few documents are needed. No lawyers are allowed.

There is no appeal against the decision by the Small Claims Court. If, however, the Court showed bias or did not allow one of the parties to give his or her side of the case, it can be taken on review.

2.6.6

Special Courts

There are certain cases that can be heard in special Courts such as Income Tax Courts, Water Affairs Courts, Special Criminal Courts and Family Courts.

More recently special Courts like the Labour Appeal Court and Land Claims Court have been introduced, as well as in some provinces, the Consumer Affairs Court. Pilot Family Courts have been set up in some provinces.

2.6.7



CUSTOMARY LAW

These courts have limited powers and can usually only hear minor disputes.

Customary Law Courts

Certain Customary Law Courts such as Chief's Courts and Headman's Courts are to be found in rural areas, where large numbers of people still live according to Customary Law. These Courts have limited powers and can usually only hear minor disputes between African people. If a person is not satisfied with the decision in a Chief's or Headman's Court he or she may bring a new action in the Magistrates' Courts.

STRUCTURE OF THE COURTS

CONSTITUTIONAL COURT

SUPREME COURT OF APPEAL

HIGH COURTS

MAGISTRATES COURTS

CUSTOMARY LAW COURTS

SMALL CLAIMS COURTS

SPECIAL COURTS

2.7

Citizen participation in democracy

Citizen participation in democracy

Citizens participate in democratic governance in a number of different ways varying from formally participating in elections to working with organs of civil society such as non-governmental and community-based organisations. Civil society plays an important role in helping democratic governments achieve their goals by monitoring their activities, checking human rights abuses and providing services they may not be able to afford. Democratic governments see them as partners not adversaries.

Citizens join or form organisations so that they can have a say, create and see change, have a stake in the change and create a sense of community. Civil society consists of numerous organisations such as neighbourhood watches, religious organisations, women and children's groups, youth groups, environmental organisations, consumer organisations, rate-payer's associations, social and sporting groups, parent-teacher organisations, human rights and legal advice centres and trade unions. There are also organisations for special interest groups such as people living with AIDs, rape survivors, domestic violence victims and people with disabilities.

Citizens can participate in politics besides simply voting for the candidate of the party of their choice. They can also join political parties and seek to influence party policies by engaging in party debates at branch, provincial and national level. They can also assist their party by canvassing support, organising meetings, preparing posters and pamphlets, fundraising and transporting voters on election day. If their candidates are elected they can ensure that they report back regularly to their constituencies.

In order to play an active role in civil society, however, it is important that people are properly informed. If people do not know what their rights are they will not be able to enforce them. Knowledge is power. Citizens can become informed by reading, talking to knowledgeable people (such as teachers, civic leaders, politicians and advice centres), reading newspapers, listening to the radio, watching television, using the internet, and engaging in debates and discussions with fellow citizens.

An important way for citizens to participate in democracy is through advocacy and lobbying.



Civil society plays an important role in helping democratic governments achieve their goals.



In order to play an active role in civil society, it is important that people are properly informed.

2.8

Advocacy and lobbying

Advocacy can be simply defined as pleading a cause on behalf of somebody. It does not only apply to lawyers in court but applies to any attempt to resolve a problem in a non-violent way through negotiation, persuasion, perseverance and by convincing the other person. Advocacy and lobbying are methods used by citizens in a democracy to change and influence public policy.

2.8.1

Advocacy

In democracies advocacy is often used by civil society to persuade government to spend public money more equitably to achieve a just social order. In the South African context this might apply for instance, to issues such as poverty relief, job creation, HIV/AIDS survivors, victims of gross human rights abuses during the apartheid era, rural development, health and welfare.

Definition

ADVOCACY

Advocacy can be simply defined as pleading a cause on behalf of somebody.

Advocacy and lobbying are methods used by citizens in a democracy to change and influence public policy.



Advocacy in the broad sense is characterised by the fact that: it is usually related to a particular cause or issue; it may be aimed at stakeholders both inside and outside government; it is often a group or collective effort; it is aimed at the common good; it maximises public exposure to an issue; it takes the form of verbal support of a cause or policy; and the cause will be argued before anyone who will listen. It may also include aspects of lobbying.

Planning an advocacy campaign

When planning for advocacy the organisers should:

- a) Identify the issues for policy action
- b) Develop solutions
- c) Build political support
- d) Bring issues, solutions and political will together for policy action, and
- e) Evaluate the policy action agreed upon.

While engaged in advocacy advocates should remember to attack the problem not the person; use facts not rhetoric; treat everyone with respect; form coalitions to broaden the support base; conduct briefing sessions for everyone involved (including opponents); dress appropriately; and get written or public statements of support.

Lobbying

Lobbying is used by civil society to put pressure on politicians and government officials to take up their interests and support their cause. It is one of the most common ways that citizens use to try to influence public policy in democracies. This is done through petitions, meetings, telephone calls or letter writing campaigns. Democracies regard lobbying as a legitimate way of allowing citizens to have their voices heard.

Lobbying is characterised by the fact that it is usually done to influence government decisions; it is related to specific legislation or government policy; it may be individual or collective; it is aimed specifically at legislators and government officials; it is aimed at specific interests; it involves meeting government representatives; and it may involve sending communications or petitions to the government official concerned.

People can engage in lobbying by holding community meetings, distributing pamphlets, using newspapers, radio and television; getting petitions signed; organising demonstrations, marches and other protest action; and organising boycotts and strikes. Civil disobedience may also sometimes be used, but if so the persons using it should be prepared to face the legal consequences.

When lobbying to change or develop policy people should:

- a) Identify the policy
- b) Motivate why it should be changed or developed
- c) Suggest what the new policy should be
- d) Work together with others who share the same view
- e) Gather relevant information
- f) Involve people who might be able to influence policy
- g) Identify organisations that support and oppose their views, and
- h) Draw up and carry out a plan of action.

2.8.2



LOBBYING

Lobbying is used by civil society to put pressure on politicians and government officials to support their cause.



A case of AIDS activism

[Smuggling in cheap anti-retroviral drugs for HIV/AIDS survivors]

An AIDS activist believes that the government should provide cheap anti-retroviral drugs for HIV/AIDS survivors. The government has the necessary legislation in place to import or allow the manufacture of cheap generic anti-retroviral drugs but does not implement it. The activist illegally smuggles a quantity of cheap anti-retroviral drugs from Thailand and then publicly announces that he will make them available to HIV/AIDS clinics. The activist is criminally charged with smuggling the drugs.



1. Was the activist's conduct an act of civil disobedience? Why or why not?
2. If you were the Director of Public Prosecutions would you prosecute the activist? Why or why not?
3. If you were the prosecutor in the case what arguments would you make on behalf of the State?
4. If you were the defence lawyer in the case what arguments would you make on behalf of the activist?
5. If you were the judge what would your judgment be?

2.9

Alternative dispute resolution



WIN-WIN RESULT

Alternative methods have been developed to help parties to obtain a win-win result.

The courts are not the only way in which disputes and conflicts can be resolved. Courts are often inaccessible, expensive and time-consuming. Also because they are adversarial their decisions usually result in a win-lose situation with the successful party feeling satisfied and the losing party unhappy.

Alternative methods of dispute resolution have been developed to help parties in conflict to obtain a win-win result so that both of them feel empowered and satisfied at the end of the process. This involves a consensual process whereby the parties appoint their own arbitrator or negotiate their own agreement with or without the assistance of a third party mediator.

This section will deal with arbitration, negotiation and mediation.

2.9.1

Arbitration

Arbitration happens when the parties to a dispute agree to ask a third person of their choice to listen to their arguments and then make a

decision for them. The person acts like a judge but the procedure is much more informal than in a court of law. The process is often shorter but not necessarily cheaper. Lawyers and witnesses are also sometimes used in arbitration proceedings. Arbitration is used extensively in labour disputes. The arbitrator is a person agreed to by both sides who makes the decision for the parties.



ARBITRATION

The procedure is much more informal than in a court of law.

2.9.2

Negotiation

Negotiation is the process where the people involved in a dispute talk to each other about their problem and try to reach a solution agreeable to both sides.

Mediation

Mediation is an extension of negotiation. It takes place when a third person helps the disputing parties talk about their problem and settle their differences. Mediation differs from arbitration because the mediator controls the process not the result. The parties come to their own decision – the mediator does not impose it on them. Mediation avoids blaming anyone and looks to the future. A successful mediation should result in a win-win situation for both sides.

2.9.3

Hospital workers vs the hospital management

[Hospital workers object to being searched when leaving the hospital premises]

A hospital is experiencing massive losses due to theft of drugs, food, equipment and bedding. Despite appeals to hospital workers to assist with preventing the losses, the thefts continue. In desperation the hospital management introduce compulsory searches of all hospital workers when they leave the hospital premises. The hospital workers declare a dispute with the management on the basis that the compulsory searches are an unlawful invasion of their constitutional right to privacy. The hospital maintains that the steps are reasonable and justifiable.



TALKING POINT

1. Prepare to enter into negotiations on behalf of the hospital workers or the hospital management.
2. Prepare to play the role of mediators to assist representatives of the workers and management.
3. Prepare to play the role of arbitrators to decide the dispute between the workers and management.



Arbitration guidelines

Both sides prepare

Representatives from both sides should each tell the story from their point of view. Each side should also have prepared questions to ask the other side about their story.

The complaining side tell their story

The arbitrator asks the first side or their representative to tell the story from their point of view. The arbitrator then asks questions to be sure that the story is clear and complete. The other side can then question the first side about their story.

The other side tell their story

The arbitrator asks the other side or their representative to tell the story from their point of view. The arbitrator then asks them questions to clarify their story. The first side can then question the other side about their story.

The arbitrator makes a decision

After both stories have been heard the arbitrator reviews the facts of the situation and the law that applies. The arbitrator then decides which side has proved its case and makes an award (judgment) in its favour. Usually there is no appeal against an arbitration award, but the award may be reviewed by a High Court if the proceedings were irregular (e.g. the arbitrator acted in bad faith).

Negotiation guidelines

Preparing for the negotiation

Before going into a negotiation the parties should be properly prepared. Each side should understand all the relevant facts and, if necessary, the relevant law applicable. They should decide what their bottom lines are and what is not negotiable. They should also try to put themselves in the shoes of the other side and try to think about the issues the other side is likely to care most about.

The negotiation process

Each side should try to build a good working relationship with the other. They should be friendly and polite. They should speak about themselves using phrases such as 'We think', 'We feel' and 'We would like', rather than phrases like 'You did this' etc. Good negotiators are good listeners and let the other side know that they are listening.

Parties to a negotiation should brainstorm all the different possible solutions or options for solving the problem. They should not look for one answer and should be creative. They should not make unfair or totally unrealistic demands. They should not be abusive, overly emotional or threatening. They should not give away things without getting something in return. They should use 'if then' questions: 'If we give you this, then will you give us that?'

Reaching the agreement

For a negotiation to end in an agreement, one or the other side must show that it is ready to move towards a compromise. If one side does not do this after some time it may be advantageous for the other side to do so. Agreements should be as fair as possible to both sides. Both should feel that they came away with something that they wanted. The agreement should use fair and objective ways of measuring that both sides have kept to the agreement.

Mediation guidelines

Introduction

The mediator sets the parties at ease and explains the ground rules. The mediator's role is not to make a decision but to help the parties reach a mutual agreement. The mediator explains that he or she will not take sides and that everything said will be confidential.

Telling the story

Each party tells his or her story. The person bringing the complaint usually tells his or her story first. No interruptions are allowed. The other party then tells his or her story.

Identifying the issues

The mediator attempts to identify the agreed facts and issues. This is done by listening to each side's story and summarising the main facts and issues. The mediator then checks with the parties to confirm that the facts and issues on each side have been summarised correctly.

Identifying alternative solutions

Everyone thinks of possible solutions to the problem. The mediator makes a list and asks each party to explain his or her feelings about each possible solution.

Revising and discussing solutions

Based on the expressed feelings of the parties, the mediator reviews their possible solutions and attempts to identify a solution to which both parties can agree.

Reaching an agreement

The mediator helps the parties to reach an agreement that both can live with. The agreement should be written down. The parties should also discuss what will happen if either of them breaks the agreement.



Mediation differs from arbitration because the mediator controls the process not the result.

