



DISCUSSION PAPER 170

**PROTECTION OF THE RIGHTS OF VICTIMS OF
CRIME IN CRIMINAL PROCEEDINGS (REFLECTIONS
ON PREVIOUS INVESTIGATIONS PERTAINING TO
VICTIMS OF CRIME)**

**PROJECT 151: THE REVIEW OF THE CRIMINAL
PROCEDURE ACT 51 OF 1977
(A SUB-PROJECT OF THE REVIEW OF THE
CRIMINAL JUSTICE SYSTEM)**

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INTRODUCTION

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

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PREFACE

1 This discussion paper forms part of a series of discussion papers that have been developed by the Commission in the quest to overhaul the Criminal Procedure Act 51 of 1977 (CPA). The investigation is intended to result in the enactment of a new law of criminal procedure that will address the myriad of challenges facing the criminal justice system. Among the identified gaps is the exclusion and marginalisation of the victims of crime in the very criminal proceedings that had caused them harm, be it physical, emotional, and financial.

2 The Criminal Procedure Reform Investigation (The CPR Investigation) was borne out of the request by the then Minister of Justice and Correctional Services, Minister Ronald Lamola, in 2020, that the South African Law Reform Commission (Commission) include, in its investigation programme, the Review of the Criminal Justice System, inclusive of the review of the CPA.

3 This paper is in response to the specific requirement in the Terms of Reference that accompanied the Minister's request, that the contemplated legislation should *encompass broad policy principles that provide that:*

- (d) ***the rights of victims be promoted, protected and enforced in order to create a victim-centric criminal justice system;***

4 The research pertaining to the investigation commenced in earnest during the term of the Commission prior to the current Commission. This research commenced under the various themes, which in turn were under the broad thematic areas described below:

- (a) The pre-trial phase - which focuses on the reform of the procedures and processes that take place prior to the instituting of charge(s) and the trial phase. This phase largely involves the reporting of crime, detection, police investigation, arrest, pre-trial detention and pre-trial release on bail or own cognisance. During this phase, courts have a limited role except during bail proceedings.
- (b) The trial phase - which focuses on the conduct of the trial from commencement (pleading stage) until the verdict and sentence stage.
- (c) The post-trial phase - which involves incarceration including correctional supervision, parole and rehabilitation, which are the responsibility of the Department of Correctional Services (DCS); as well as expungement of criminal records.
- (d) Cross-cutting thematic areas - which are processes that straddle across the pre-trial, trial and post-trial phases. Among the cross-cutting thematic areas are aspects concerning the modernisation and use of technology; crime

information management and analysis, concerns of delays experienced across each stage of the criminal justice value chain, the processes and participation of victims of crime; legal representation, access to language rights; and the governance and oversight of the CJS. Cross-cutting thematic areas also include the reform of the general provisions of the criminal procedural law underpinned by democratic principles and rights jurisprudence.

5 The research under the above thematic areas was assigned, first, to the identified researchers of the Commission who are required to develop discussion papers on the assigned themes of the CJS. The discussion papers are then validated by the sub-projects committees established by the Advisory Committee of Criminal Procedure Reform Investigation (Advisory Committee), whose members are listed under the Introduction to this paper. The Advisory Committee would, if satisfied that a discussion meets the required standard set out in the Commission's Style Guide¹ and that it would advance the desired transformation of the criminal procedural law, recommend that such a paper be considered by the Commission.

6 The Commission, in order to augment the research capacity required for this magnitude investigation, resolved to request Commissioners and members of the Advisory Committee to contribute to the development of discussion papers in the thematic areas in which they have demonstrable experience and/or expertise.

7 It is in that context that this paper was developed by Adv JB Skosana, member of the Commission and the Commissioner designated to this Investigation.

This discussion paper and other discussion papers under the various themes form part of the comprehensive reform of the criminal procedural law that will culminate in the reform of the CPA.

¹ Style Guide of the SALRC (2018).

ABBREVIATIONS AND ACRONYMS

CPA	Criminal Procedure Act 51 of 1977
CPR	Criminal Procedure Reform
CJ	Chief Justice
CJA	Child Justice Act 75 of 2008
DCJ	Deputy Chief Justice
DCS	Department of Correctional Services
DHA	Department of Home Affairs
DoH	Department of Health
DoJ&CD	Department of Justice and Constitutional Development
DSD	Department of Social Development
DPME	Department of Planning, Monitoring and Evaluation
DVA	Domestic Violence Act
4IR	Fourth Industrial Revolution
ICCPR	International Covenant on Civil and Political Rights
ICT	Information and Communication Technology
IT	Information Technology
JP	Judge President
IJS	Integrated Justice System Programme
JCPS	Justice, Crime Prevention and Security cluster
NDP	National Development Plan
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
PEEC	Provincial Efficiency Enhancement Committee
RAF	Road Accident Fund
SDG	Sustainable Development Goals
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SCA	Supreme Court of Appeal
Stats SA	Statistics South Africa
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
USA	United States of America

EXECUTIVE SUMMARY

1 The South African criminal justice system (CJS), similar to some of the common law systems, is still largely adversarial in nature and places less emphasis on the victims of crime across the criminal justice value chain. The victim is not regarded as a party or an active participant in the various stages of the system. The victim is effectively a third party whose input or contribution in the proceedings is confined to that of being a mere witness for the state. Therefore, the right of victims to actively participate in the criminal justice process has conventionally been second to that of accused persons.

2 In recent times, the role of the victim in the criminal trial processes has evolved considerably across many jurisdictions. Internationally, the first step towards the recognition of victims' rights was taken in 1985 through the adoption of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power² (UN Declaration for Victims of Crime). The Declaration states that victims should get access to justice, fair treatment, restitution, compensation, and assistance. It further requires that victims be treated with compassion and respect for their dignity, be given access to the mechanisms of justice so as to obtain redress through expeditious, fair, inexpensive and accessible procedures and be informed of these rights.³

3 The UN Declaration for Victims of Crime was followed, in 1998, by another global radical reform in the form of the adoption of the Rome Statute of the International Criminal Court⁴ (Rome Statute) which established the International Criminal Court (ICC). The establishment of the ICC affirmed a new set of victim rights in criminal proceedings. Primarily, the ICC grants victims of crime participatory rights as well as the right to reparations. Victims' legal representatives ensure that at all stages of the proceedings, their views and concerns are heard on matters where their personal interests are affected. Victims have legal representations, but they may also attend hearings and, subject to rulings by the Court, make oral and written submissions, or even be allowed to question witnesses.

² United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted under General Assembly resolution 40/34 of 29 November 1985.

³ UN Declaration for Victims of Crime, para's 4-5.

⁴ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998.

4 The Rome Statute formed the basis for the establishment of the Trust Fund for Victims, which implements reparations ordered by the court. This is laid down in Article 79 of the Rome Statute of the International Criminal Court.

5 In modern criminal justice systems, the recognition of the rights of victims of crime varies from state to state. While in some jurisdictions the role of victims is confined to testifying in court as a witness and making a victim impact statement, in others, victims play a more dominant role in proceedings.

6 Although South Africa has acceded to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Rome Statute, there has not been any concerted effort to incorporate the Declaration and the Statute into the CPA. This comprehensive reform of the CPA presents an opportunity to do so.

7 This discussion paper is structured into five chapters: Chapter 1 gives the general background to the CPR Investigation and its terms of reference (TOR). It reflects on the approach adopted by the Commission in undertaking this investigation, including the work undertaken under various sub-themes under the broad thematic areas. Chapter 2 examines how the Constitution lays the basis for the protection of the rights of victims of crime. It also refers to applicable international law, which is binding on South Africa. Chapter 3 reflects on previous investigations and recommendations that are relevant to the protection of the rights of victims of crime. Chapter 4 locates the protection of victims of crime within the realm of the right of access to justice. It postulates the inclusion of the right of access to justice as well as the express inclusion of the rights of victims in the contemplated new Criminal Procedure Act. Chapter 5 gives a synopsis of recommendations that seek to advance the protection of the rights of victims.

8 Each chapter incorporates comparative research and applicable case law that guide and influence the desired reforms.

CHAPTER 1: BACKGROUND TO THE REFORM OF THE CRIMINAL PROCEDURE ACT, 1977

A Criminal Procedure Reform as part of the review of the broader review of the criminal justice system

1.1 Theoretically, the South African legal system distinguishes between substantive criminal law and criminal procedural law. The distinction between the two lies in the fact that substantive law defines the content of the rights applicable in the criminal justice system. It defines the rights and obligations of individuals and the state and outlines what conduct is considered criminal. On the other hand, the criminal law of procedure sets out the processes and methods for enforcing rights and obligations established by substantive law. It governs the rules and procedures that must be followed in legal proceedings, such as the rules of evidence, court procedures, and the steps involved in filing a lawsuit or presenting a case in court.

1.2 Although criminal law and criminal procedural law are separate branches of law, they are interdependent and intertwined, as both underlie the implementation of state policy in the handling of criminal proceedings.

1.4 Furthermore, notwithstanding the distinction between substantive and procedural law, it is not unusual for a procedural law to include aspects of substantive law. The CPA, which is procedural in character, is one such example. In *Freedom Stationary (Pty) Ltd and Palm Stationary Manufacturers (Pty) Ltd And Others*,⁵ the applicant challenged Rule 49(13) of the Uniform Rules (“the Rule”) on the ground that it is ultra vires to the extent that it seeks to make substantive law in terms of which security is required in appeals emanating from the Superior Court. The court held that:

⁵ *Freedom Stationary (Pty) Ltd v Palm Stationary Manufacturers (Pty) Ltd and Mveli Data Matrix Solutions (Pty) Ltd (Joint Venture) and Others (1023/2021) [2021] ZAMPMBHC 42 (15 September 2021)*

Not only the substantive law creates rights and obligations. So does the procedural law too. The Uniform Rules (and also the rules of other courts), which operates within the realm of the procedural or adjective law, are abound with rights and obligations, albeit procedural.⁶

B The terms of reference for the review of the Criminal Justice System

1.5 In March 2020, the then Minister of Justice and Correctional Services, Mr Ronald Lamola (Minister), through a letter addressed to the Chairperson of the South African Law Reform Commission (Commission), requested that it include in its investigation programme the review of the criminal justice and the civil justice systems. The Minister's letter was accompanied by the Terms of Reference (TOR"s) prepared by the Department of Justice and Constitutional Development (DoJ&CD) in respect of both the criminal and civil justice systems.

1.6 The terms of reference of the review of the criminal justice system (CJS) provided a broad scope for the contemplated review and include the review of the CPA. With respect to the CPA, in particular, paragraph 5.1.1 of the TOR further states that:

"The overhaul of the CPA and related legislation includes but is not limited to –

- (a) Bail reform generally;*
- (b) Reform of the arrest dispensation, including remove confusion on the interpretation of the 48 hour rule and alternative means of ensuring the attendance of accused persons before court to be charged or tried;*
- (c) Reform of parole laws and ensure uniformity with other laws;*
- (d) Reform in the expungement of criminal records;*
- (e) Reform and uniformity in sentencing provisions;*
- (f) Reform of laws of general importance so as to simplify them and to remove anomalies, ambiguities and inequities;*
- (g) Review and alignment of the Justice of Peace dispensation; and*
- (h) Review and reform of laws relating to the JCPS Cluster."*

1.7 The TOR's were subsequently amplified by a note which accompanied the Minister's second letter addressed to the Commission dated 26 August 2021. Paragraph 2.2 of the note lists

⁶ Ibid., para 38.

the aspects that must be encapsulated in the contemplated new legislation that replaces the CPA. The paragraph is restated hereunder:

“2.2 Policy considerations

There is a need to review the criminal justice regime in its entirety to reflect the modern, transformed, accessible, efficient and integrated criminal justice system. The envisaged legislation should encompass broad policy principles such as:

- (a) human rights as entrenched in the Bill of Rights;*
- (b) access to justice, which must be ensured at all stages of reformation of the criminal justice system;*
- (c) needs of society today, including Africanisation of the law, should be reflected;*
- (d) **the rights of victims be promoted, protected and enforced in order to create a victim-centric criminal justice system;***
- (e) governance and accountability mechanism must be strengthened; and*
- (f) a modernised and technologically advanced criminal justice system which includes the development of integrated performance management tools across various criminal justice line function departments and a crime management information centre.”*

1.8 This discussion paper is specifically concerned with the protection of the rights of victims (and witnesses) of crime in criminal proceedings. Other aspects referred to in the TOR and the Minister’s note are addressed in various discussion papers that were developed by other researchers and considered by the Advisory Committee on Criminal Procedure Reform Investigation.⁷

C The approach towards creating a victim-centric criminal justice system

⁷ The Advisory Committee on Criminal Procedure Reform Investigation was appointed by the Minister on 13 December 2023 in terms of section of s 7A(1)(b)(ii) of the South African Law Reform Commission Act 19 of 1973. It is chaired by Judge MF Legodi, the retired Judge President of the Mpumalanga Division of the High Court.

1.9 The Truth and Reconciliation Commission (TRC) was established under the Promotion of National Unity and Reconciliation Act⁸ (TRC Act) was the first state's endeavour to place the victim at the centre of the democratic project. The TRC was entrusted with the duty to establish and to make known "the fate or whereabouts of victims" with the purpose of "restoring the human and civil dignity of such victims" and affording them an opportunity to relate their own accounts of the violations, and by recommending "reparation measures" in respect of such violations.⁹

1.10 The first Minister of Justice in the democratic South Africa, Dullah Omar, in his testimony before the TRC, gave a fitting description of the state-dominant criminal justice system when he stated the following:

Our legal system over the years has never paid adequate attention to victims and the concerns of victims... The fundamental objective of our criminal law and criminal procedure was to protect the state but in the latter years of National Party rule the security of the apartheid state. So our criminal law system pays scant regard to what happened to victims. Victims came to court as witnesses and complainants. After giving their evidence they were thanked for having given evidence and told to go. But crime was essentially regarded as a crime against the state. And quite correctly it is a crime against the state. But the wrong to the individual, to the victim has been sorely neglected in our history. Now I am saying that this Commission can make a contribution towards a re-assessment of our criminal justice system and its objectives. Because we believe that in a democratic society, in a constitutional state what happens to individuals is very important. And the hurt and harm caused to individuals needs to be addressed. And that is why we have asked the South African Law Commission to review the whole question of victim empowerment. Which is much more than, much more that compensation but, compensation is part of it.¹⁰

1.11 The National Crime Prevention Strategy (NCPS), which was released in 1996, further recognised that the role of victims of crime was central to addressing the effects of crime and at the same time creating crime-resistant communities. Under the NCPS, an Interim Steering Committee was officially appointed as the first programme team of the Victim Empowerment, and the lead agency of the project was the Department of Social Development (DSD), supported by the Departments of Health (DoH), Safety and Security, Justice, Correctional Services, Local

⁸ Promotion of National Unity and Reconciliation Act 34 of 1995.

⁹ Report on the Review of the expungement of certain criminal records by the South African Law Reform Commission, Project 137 (20 May 2017), para's 2.19 and 2.20.

¹⁰ Legal Hearing of the Truth and Reconciliation Commission 27 - 29 October 1997, <https://www.justice.gov.za/trc/special/legal/legal.htm>: (accessed on 22 March 2023).

Health Authorities, and non-government.¹¹ The re-emphasis on the need to establish a victim-centric CJS three decades after the advent of democracy attests to the slow-pace of the reform of the CJS in embracing the victim across its various stages.

1.12 The CJS, in its various stages, from crime reporting to investigation, arrests, bail processes, trial, sentencing and post-trial parole processes, portrays the hostility and arbitrariness of the system. This is part of the manifestation of bureaucratic ordering. It epitomises Max Weber's rationalisation theory in terms of which the state exercised a monopoly of violence over its citizens.¹²

1.13 Camerer¹³ advocates for a separate chapter, devoted entirely to victims' rights in the CPA when she postulates that:

Most importantly, victims should have the right to be present and to make submissions...The Criminal Procedure Act should be amended to accommodate these 'impact statements' by victims...and the judge or magistrate will be obliged to take this into account.

1.14 The role of the victim, similar to that of the accused, straddles across the pre-trial, trial and post-trial stages of the CJS. It will therefore be difficult to group all rights pertaining to victims in a single chapter in the anticipated CPA. It is in this context that this discussion paper incorporates an appendix at the end of the paper for purposes of tracking the rights of the victim across the various stages of the CJS. The appendix indicates whether any such right is tangible or merely aspirational (cannot be claimed).

¹¹ Report on Sentencing Framework (A Compensation Fund for Victims of Crime) South African Law Reform Commission, project 82, p3.

¹² Weber, M., *Economy and Society: An Outline of Interpretive Sociology*, Bedminster, New York, (1968), 56.

¹³ Camerer S "What about the victims?" *De Rebus* Archived issues (1999) January Feature Articles, 3.

D Scope of the Criminal Procedure Reform Investigation

1.15 The scope of the CPR Investigation entails the overhaul of the CPA in its entirety and includes the reform of other laws applicable to the law of criminal procedure. This is deduced from para 2.1.3 of the Minister’s letter, which states as follows:

The “Overhaul of the Criminal Procedure Act” seeks to re-write the Criminal Justice system (CJS) foundational law, which is the Criminal Procedure Act, 1977 (Act 51 of 1977) in order to infuse democratic values and ethos in the criminal justice value chain and to ensure that the criminal justice system is victim centric. Secondly, it is aimed at improving the overall regulatory criminal justice value chain from crime reporting to detection, investigation, arrest, prosecution, adjudication, legal representation, sentencing, and rehabilitation.

1.16 The scope of this discussion paper is limited to the protection of the rights of victims of crime and draws largely from the previous investigation undertaken by the Commission relating to this theme. The discussion paper excludes the protection of the rights of child victims and witnesses in criminal proceedings to the extent that such are addressed in the Child Justice Act of 2008¹⁴ (CJA). Conversely, the new criminal procedural law may include provisions that are enunciated in the CJA and deemed appropriate for such inclusion.

E Recommendations of previous investigations that are relevant to the Criminal Procedure Reform Investigation

1.17 The Commission resolved that any recommendation emanating from any previous investigation by the Commission that concerns any thematic area or sub-theme under the broad thematic area that may be relevant for purposes of the current investigation, having regard to the following:

- (a) Whether there has been an indication of the acceptance of the Commission’s recommendations in the previous investigation, if so whether such were implemented by the government through legislative amendment to the CPA;

¹⁴ Child Justice Act No. 75 of 2008.

- (b) whether, in the event of the rejection of the recommendation of the Commission in its previous investigation, the Commission was informed of the reason for such rejection; such recommendation has not been implemented; and
- (c) whether the recommendation of the Commission in its previous investigation still enjoys the support of the Commission under its current investigation with or without any amendment thereto.

1.18 Any recommendation emanating from previous investigations that has been found relevant for purposes of the current investigation and meets the requirements under subparagraphs (a) to (c) above may be subject to public participation for purposes of its re-validation.

1.19 The Commission may, based on the outcome of further research and public consultation, change, reconsider or refine any recommendation made in any of its previous investigations in a manner it deems appropriate. This is with the view to adapting any recommendation from any such previous investigation to the current investigation and thereby avoiding or minimising duplication or overlap across similar or related investigations.

1.20 The table below lists previous investigations undertaken by the Commission which have a direct or indirect impact on the CPR Investigation and are relevant to the thematic areas of the ongoing investigation:

Name of the Investigation/ Project	Thematic areas and sub-themes relevant to the rights of victims of crime	Recommendations Implemented / Not implemented
Sixth Interim Report on Simplification of Criminal Procedure Out of Court Settlements in Criminal Cases (Project 73)	Plea and sentence agreements Alternative Dispute Resolution mechanisms and Diversion programmes in criminal matters	Fully implemented Not implemented. The consideration of ADR and Diversions in criminal matters constitute part of separate discussion documents published under the relevant thematic area
Report on Sentencing Framework (Project 82)	Reparation	Not implemented

	Victim Impact Statement	Not implemented
	Victim's right in respect of correctional supervision and parole	Partially implemented – only in respect of victim's participation in correctional supervision and parole proceedings through the National Commissioner
	Community services sentences	Not implemented
Sentencing (A Compensation Fund for Victims of Crime) (Project 82) (April 2004)	Compensation for Victims of crime by the state	No recommendation was made
Report on the Review of the expungement of certain criminal records by the South African Law Reform Commission, Project 137 (20 May 2017)	Restorative justice, reparation	Not implemented

CHAPTER TWO: THE CONSTITUTION AS THE BASIS FOR THE PROTECTION OF RIGHTS OF VICTIMS

A The protection of victims of crime under the 1996 Constitution

2.1 The rights of victims of crimes are protected under the various provisions of the Bill of Rights in the Constitution. These include: the right to dignity;¹⁵ the right to equality;¹⁶ the right to freedom and security of the person, which include to be free from all forms of violence;¹⁷ and the right to access to court.¹⁸ Notwithstanding the protection the victims enjoy under these enshrined rights, concerns abound regarding the adequacy of the protection of victims of crime under the Bill of Rights. These concerns are fuelled by the right to a fair trial enshrined in the Constitution for the arrested, detained, and accused persons under section 35 of the Bill of Rights. There are no similar provisions in the Bill of Rights that specifically enshrine the rights of victims of crime.

2.2 From the perspective of an arrested, detained or accused person, an accessible CJS implies access to several rights that constitute the overarching right to a fair trial as enshrined in section 35 of the Constitution. Of these rights, the following are within the scope of the criminal procedure reform:

- (a) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released;¹⁹
- (b) to be released from detention if the interests of justice permit, subject to reasonable conditions;²⁰

¹⁵ Section 10 of the Constitution.

¹⁶ Section 9 of the Constitution.

¹⁷ Section 12(1)(c) of the Constitution.

¹⁸ Section 34 of the Constitution.

¹⁹ Section 35(1)(e).

²⁰ Section 35(1)(f).

- (c) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment;²¹
- (d) to have a legal practitioner assigned by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;²²
- (e) to have their trial begin and conclude without unreasonable delay;²³
- (f) to be present, when being tried;²⁴
- (g) 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.²⁵

2.3 All the rights alluded to in the preceding paragraph have a similar effect on the victims of crime. For example, it is the expectation of victims that:

- (a) he or she be furnished with information that will be relevant during the trial of accused person who inflicted or caused harm to him or her;
- (b) the trial in respect of which the victim suffered harm, begin and conclude without unreasonable delay;
- (c) services of an interpreter which will interpret in the language that he or she understands during his or her testimony;
- (d) she receives medical treatment and/or counselling for the harm caused by the commission of the offence.

2.4 The Constitution enjoins all courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.²⁶

2.5 The Interim Constitution incorporated the value *ubuntu*, in its epilogue under the heading National Unity and Reconciliation, wherein it recognised that:

... there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *Ubuntu* but not for victimisation.

²¹ Section 35(2)(e).

²² Section 35(2) and 35(3)(g).

²³ Section 35(3)(d).

²⁴ Section 35(3)(e).

²⁵ Section 35(3)(k).

²⁶ Section 211(3) of the Constitution.

2.6 The value of *ubuntu* continues to play an important part in our law, including criminal law, particularly as a source of law and jurisprudence.

2.7 The first case where *ubuntu* featured prominently was in *S v Makwanyane*²⁷ in which several Justices of the Constitutional Court contributed to its broad meaning. In particular, Langa J (as he was then) explained the value of *ubuntu* as follows:

An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of *ubuntu*. Thus, heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*.²⁸

2.8 In her separate judgment, Mokgoro J stated that *ubuntu* was a shared value of all South African communities. She articulated the value as follows:

Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly prized. It is values like these that section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.²⁹²⁵

2.9 In the same judgment (*Makwanyane*), Madala J also emphasised the need for further research on the question of traditional African jurisprudence. That it was important to consider such jurisprudence not only within the confines of South Africa, but to Africa in general.³⁰

²⁷ *S v Makwanyane* 995 (3) SA 391; 1995 (6) BCLR 665 (CC)

²⁸ *Makwanyane* at para 225.

²⁹ *Makwanyane* at para 307.

³⁰ *Makwanyane*, para's 249 and 255.

2.10 The value of *ubuntu* continues to form the substratum of South Africa's rights jurisprudence. The recognition of customary law as an equal source of South African law entrenches *ubuntu* into the South African jurisprudential landscape.³¹ In *Port Elizabeth Municipality v Various Occupiers*³² the court held that the spirit of *ubuntu* was part of the deep cultural heritage of the majority of the population and suffuses the whole constitutional order. Further, it combines individual rights with a communitarian philosophy.

2.11 According to Malan³³ *ubuntu*, as gleaned from its evolving jurisprudence, represents the following salient characteristics connected directly to the CJS: it is contrasted to vengeance; it is inextricably linked to the values dignity, compassion, humaneness and respect for the humanity on which it places a high premium; it dictates a shift from confrontation to mediation and conciliation; it favours restorative rather than retributive justice.

2.12 Outside the formal court system, the traditional justice system provides a communal form of dispensing justice in accordance with the indigenous law and customs which apply within a particular territory of the Republic. The importance of traditional courts stems from the fact that they are freely accessible, use the local language and adhere to the culture and customs of local communities; they facilitate a speedy resolution of disputes since they are easily accessible, inexpensive, and procedurally simple. The enacted Traditional Courts Act³⁴ must be viewed in the context of traditional courts being viewed as a complementary justice dispensation to the conventional court system.

³¹ Kamnga S.D., "Cultural values as source of law: Emerging trends of Ubuntu jurisprudence in South Africa" (.2018) *African Human Rights Law Journal*, 18.

³² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 5 17; 2004 (12) BCLR 1258 (CC) par 37 237E-238A.

³³ Malan K "The suitability and unsuitability of ubuntu in constitutional law" *De Jure* Volume 2 (2014) p 239.

³⁴ The Traditional Courts Act, 2022 (Act No.9 of 2022).

B The state's obligation to fulfil the rights in the Bill of Rights

2.13 The Constitution enjoins the state to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights.³⁵ Reference to the state in the Constitution means the three arms of government comprising the Executive, the Legislature and the Judiciary. Under the rubric of victims' rights, these include the rights of access to justice and access to court.

2.14 The obligation to respect entails a negative action on the part of the state, namely, it requires the state to refrain from interfering with, or violating, any of the enshrined constitutional rights. The duty to 'protect' obliges the state to take active steps to ensure the fulfilment of every constitutional right. The initiation of Bills by the executive to repeal colonial and apartheid era legislation and their enactment by Parliament is a fitting example of a positive act to enhance access to justice. Unlike the duty to 'respect', the duty to 'protect' imposes positive duties on the state. The duty to 'promote and fulfil', the state must provide conditions or a conducive environment for the meaningful enjoyment of the rights in the Bill of Rights.

2.15 The state derives its mandate from the Constitution itself and from any other law (in the form of legislation and case law) and policies sanctioned by the Constitution as the supreme law. It is in this context that the reform of the criminal procedural law to promote and protect the rights of victims, among others, must be understood.

C Protection of victims' rights under International and regional human rights instruments

2.16 In terms of the Constitution, international law is binding on the South African state. Customary international law automatically forms part of South African domestic law unless it is

³⁵ Section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

inconsistent with the Constitution or an Act of Parliament.³⁶ Further, South Africa is, in terms of the Constitution, bound by international agreements to which it is signatory. All international agreements only become law in South Africa when enacted into domestic law by national legislation. This is with an exception for self-executing provisions approved by Parliament, which become law unless inconsistent with the Constitution or an Act of Parliament.³⁷

2.17 The rights of victims of crime are protected under international and regional human rights instruments, which have been ratified by South Africa.

2.17 Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which South Africa signed on 3 October 1994 and ratified on 10 December 1998, obliges state parties to -

assure to everyone within their jurisdiction effective protection and remedies (...) against any acts of racial discrimination which violate his / her human rights and fundamental freedoms contrary to this Convention, as well as the right to seek (...) just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination’.

2.18 The Convention on the Elimination of All Forms of Discrimination against Women³⁸ (CEDAW) provides measures for the protection of women victims. CEDAW General Recommendation 35 urges States to: (a) provide effective reparation to women victims/survivors of gender-based violence. Reparation should include different measures, such as monetary compensation and the provision of legal, social and health services, including sexual, reproductive and mental health, for a complete recovery; (b) establish specific funds for reparations or include allocations in the budgets of existing funds, including under transitional justice mechanisms, for reparations to victims of gender-based violence against women.³⁹

³⁶ Section 232 of the Constitution.

³⁷ Section 231(4) of the Constitution.

³⁸ The Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979.

³⁹ CEDAW General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, adopted by the Committee on the Elimination of Discrimination against Women on 26 July 2017.

2.19 At the regional level, the African Charter on Human and Peoples' Rights⁴⁰ (African Charter) guarantees rights to victims of crime. South Africa signed and ratified the Charter on 9 July 1996. Article 21(1) and (2) of the Charter provides for a right to 'adequate compensation' in article 21 (1) and (2). According to this provision,

a]all peoples shall freely dispose of their wealth and natural resources' and '[in] no case shall a people be deprived of it'. 'In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation

2.20 The Principles and Guidelines on the Right to a fair trial and legal assistance in Africa⁴¹ (Principles and Guidelines to a fair trial) were adopted by member states under the African Charter in 2003. These Principles and Guidelines provide, among others, the following in respect of the victims of crime:

2. Fair Hearing

The essential elements of a fair hearing include:

- (a) equality of arms between the parties to proceedings, whether they be administrative, civil, criminal, or military;
- (d) respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;

Public hearing:

- (f) The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence

Right to effective remedy:

- (g) The right to an effective remedy includes:
 1. access to justice;
 2. reparation for the harm suffered;
 3. access to the factual information concerning the violations.
- (h) Every State has an obligation to ensure that:
 1. any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body;

⁴⁰ African Charter on Human and Peoples' Rights⁴⁰ (African Charter) guarantees rights to victims of crime. The African Charter entered into force on 21 October 1986.

⁴¹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, <https://achpr.au.int/en/node/879>.

D United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power⁴²

2.21 The United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power (UN Declaration for Victims of Crime) has been called "a Magna Carta for victims."⁴³ It defines victims of crime as:

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power... The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

2.22 The UN Declaration for Victims of Crime advances four avenues of redress for victims: access to justice and fair treatment, restitution, compensation, and assistance. Its strength lies in the right of access to justice. Although the Declaration is by no means binding, its goal of promoting the victims' needs under international law has gained momentum. South Africa ratified the Declaration for Victims of Crime in 2008.

E The Rome Statute of the International Criminal Court

2.23 The Rome Statute establishes the International Criminal Court (ICC) as a permanent institution with jurisdiction "over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions."⁴⁴

2.24 The Rome Statute introduced a completely new system for victims' participation in criminal proceedings during the pre-trial and trial phases of the criminal justice system. The protection of

⁴² The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by the United Nations on 29 November 1985 under General Assembly resolution 40/34.

⁴³ Michael Bachrach M "The Protection and Rights of Victims under International Criminal Law" (2000) 34 INT'L L. 7, <https://scholar.smu.edu/til/vol34/iss1/3>.

⁴⁴ Rome Statute Article 1.

the rights of victims and witnesses is more profound under Article 68 of the Statute, particularly the following:

Article 68 Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. 49 Rome Statute of the International Criminal Court
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6. 5. Where the disclosure of evidence or information pursuant to this Statute.

2.25 As Cohen⁴⁵ correctly puts it, the purpose of victims' participation is to shed light on the suffering and harm that occurred during or as a consequence of the crime being considered and assist in the discovery of the truth. Furthermore, their views and concerns can bring a voice to the entire community that suffered, if not as direct victims, certainly as indirect victims of the crimes committed.

⁴⁵ Cohen M "Victims' Participation Rights within the International Criminal Court: A Critical Overview" *Denver Journal of International Law and Policy* (2009) Vol 35 Number 350 -377, at 373

F Domestication of the Rome Statute and its implication and its effect

2.26 South Africa has domesticated the Rome Statute in terms of the Implementation of the Rome Statute of the International Criminal Court Act of 200⁴⁶ (Implementation of the Rome Statute Act). In terms of this domestication, the Rome Statute became annexed to the Implementation of the Rome Statute Act. The Preamble of the Act states, among others, the following:

To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; ...; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstance; to provide for the co-operation by South Africa with the said Court; ...”

2.27 Section 14 of the Implementation of the Rome Statute mirrors Article 93(1) of the Rome Statute and specifies areas of cooperation and judicial assistance in the implementation of the Act. It enjoins the relevant competent authorities in the Republic to cooperate with, and render assistance to, the Court in relation to investigations and prosecutions in relation to the protection of victims and witnesses and the preservation of evidence, among others.⁴⁷

2.28 South Africa, by virtue of its domestication of the Rome Statute, is bound by its provisions. The full court bench of the Gauteng Division of the High Court in the matter of *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others*⁴⁸ found that the government’s failure to cause President Al Bashir to be arrested was unlawful and unconstitutional. This was following President Al Bashir’s visit to South Africa to attend the 25th Assembly of the African Union (AU) which was held on 14-15 June 2015. In its judgment, the full court reiterated that South Africa was obliged to comply with international law. In this respect, it

⁴⁶ Implementation of the Rome Statute of the International Criminal Court Act No. 27 of 2002.

⁴⁷ Section 14(1)(k) of the Implementation of the Rome Statute Act.

⁴⁸ *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others*⁴⁸ (27740/2015) [2015] ZAGPPHC 402; 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); [2015] 3 All SA 505 (GP); 2015 (9) BCLR 1108 (GP) (24 June 2015).

relied on the following dictum in *Glenister v The President of the Republic of South Africa and Others*⁴⁹ where Ngcobo CJ enunciated the significance of International Law to the Constitution:

Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human rights law... These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution'.

2.29 The Supreme Court of Appeal in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*⁵⁰ the appeal against the decision of the full court judgment in the Al Bashir matter. The SCA, although it did not discuss its view extensively, alluded to the relevance of the CPA as was hinted in the court order demanding the arrest Al Bashir. In delivering the judgment of the court, Wallis JA stated the following:⁵¹

I am not sure why it was thought necessary to look to the CPA in regard to the possible arrest of President Al Bashir. After all the power to arrest him existed under the Implementation Act. Furthermore he was not to be arrested without a warrant, but in terms of warrants endorsed by a magistrate, one of which was in existence at the time, although SALC did not know that. As paragraph 2 of the order sought by SALC and granted by the High Court was inappropriate, and there is at present no reason to think that the existing arrest warrants will not be dealt with in terms of the Implementation Act and be available to be enforced if President Al Bashir returns to this country, it should simply be deleted. Subject to those amendments to the order the appeal should be dismissed.

2.30 The paragraph above points to the extent to which the CPA is inconsistent with the Implementation of the Rome Statute and therefore suggests the need for its harmonisation with recent laws. The delay in effecting the desired harmonisation creates different standards under international criminal law and domestic law. This implies that victims of crime enjoy a higher degree of protection under international criminal law (Implementation Act) than is the position under the domestic criminal law (CPA). This creates an anomaly that must be addressed through the review of the CPA.

⁴⁹ *Glenister v The President of the Republic of South Africa and Others*⁴⁹ 2011 (3) SA 347 at par. 97.

⁵⁰ *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*⁵⁰ (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016)

⁵¹ *Ibid.*, at para 109.

G Limited protection of victims under government policies

2.31 Government has initiated and implemented several policies aimed at empowering and protecting victims of crime. These policy initiatives have been initiated by several departments within the JCPS, some in collaboration with other departments and others individually. These policies have not changed the plight of victims of crime across the criminal value chain, thus necessitating legislative interventions.

2.32 The relevant government's policy initiatives include the following:

(a) National Policy Guidelines for Victim Empowerment⁵²

2.33 The National Policy Guidelines for Victim Empowerment (National Policy Guidelines) were developed by the Department of Social Development (DSD) for the purposes of facilitating access to a range of services for all people who have individually or collectively suffered harm, trauma and/or material loss through violence, crime, natural disaster, human accident and/or through socio-economic conditions.

2.34 The objectives of the National Policy Guidelines are intended to achieve a society in which the rights and needs of victims of crime and violence are acknowledged and effectively addressed within a restorative justice framework. Thus, the objectives deriving from this vision are to:

- (a) give strategic direction on the development of management structures for effective coordination of the programme at all government levels;
- (b) identify and clarify sector-specific roles and responsibilities at all government levels of the management structures;
- (c) guide the process of monitoring, evaluation and reporting by the implementing structures;
- (d) serve as a framework for the development of sector-specific policies and strategies;
- (e) identify roles and responsibilities of relevant government departments;

⁵² National Policy Guidelines for Victim Empowerment (2014), <https://www.gov.za/nationalpolicyguidelinesforvictimempowerment.pdf>

- (f) create a common understanding of victim empowerment amongst various State Departments, victims, perpetrators, non-profit organisations (NPOs), including non- governmental organisations (NGOs), and community-based organisations (CBOs), and individual members of the community.

2.35 It is evident from the National Guidelines that the DSD assumes responsibility for the overall coordination of the government's efforts and programmes aimed at empowering victims of crime. These include the monitoring and evaluation of these efforts and programmes in partnership with civil society. This is evident from the following statement in the Guidelines:⁵³

These National Policy Guidelines provide the framework for sound inter-departmental and intersectoral collaboration and for the integration of effective institutional arrangements for a multipronged approach in managing victim empowerment. Such an approach facilitates the establishment of partnerships in the victim empowerment sector to effectively address the diverse and sensitive needs of victims holistically.

Of particular importance is the cross-cutting nature of the programme. In addition, the Policy Guidelines serve as a guide for sector-specific victim empowerment policies, Capacity development and a greater emphasis on the implementation of victim empowerment programmes by all relevant partners.

2.36 It is necessary that the DSD consider developing a separate legislative framework for the enforcement of the objectives in the National Guidelines.

(b) Service Charter for Victims of Crime⁵⁴

2.37 In 2007 Cabinet approved the Service Charter for Victims of Crime in South Africa (Victims' Charter). In its preamble, the Victims' Charter states that this Charter is in line with the spirit of section 234 of the Constitution.

2.38 The Victims' Charter includes the following seven victims' rights:

- (a) The right to be attended to promptly and courteously treated with respect to dignity and privacy by all members of any department, institution, agency, organization or service provider.

⁵³ Ibid., p6.

⁵⁴ Service Charter for Victims of Crime <https://www.justice.gov.za/vc/docs/vc/vc-eng.pdf>

- (b) The right to information during the police investigation and court trial in the language understood by the victim.
- (c) The right of victims to be informed of their rights and how to exercise them.
- (d) The right to be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse.
- (e) The right to request assistance and have access to the available social, health and counselling services, as well as legal services that are responsive to their needs.
- (f) The right to compensation for loss or damage to property suffered as a result of a crime committed against them.
- (g) The right to restitution in cases where they have been unlawfully dispossessed of goods or property or where their goods or property have been damaged unlawfully.

2.39 In terms of section 234 of the Constitution, Parliament may, in order to deepen the culture of democracy established by the Constitution, adopt Charters of Rights consistent with the provisions of the Constitution. The Victims' Charter was not adopted by Parliament under this section. There are no known Charters of Rights that Parliament has adopted under this Section. This is confirmed by the legal opinion sought by the National Council of Provinces (NCOP) following the request it received for its consideration of the Climate Justice Charter.⁵⁵ The opinion notes that the legal effect of a Charter of Rights, once adopted by Parliament, has not been analysed in South African jurisprudence. Further, no court decision dealing with section 234 could be found.⁵⁶ The opinion notes the following in relation to the Service Charter for Victims of Crime in South Africa:

During 2006 and 2007 a Service Charter for Victims of Crime in South Africa (Victims' Charter) was developed and approved by Cabinet. The Charter confers a range of rights on victims of crime, although some of the provisions of the Charter are merely restatements of what are already provided for in law. It does not appear that this Charter was submitted to Parliament for adoption, and the rights enumerated therein has thus not been conferred in terms of section 234 of the Constitution.⁵⁷

⁵⁵ "Advice on procedures to consider the Climate Justice Charter in terms of section 234 of the Constitution" compiled by the Chief Legal Adviser to Parliament (Adv Z Adhikarie) under ref. 118 / 2021 15 November 2021): <https://static.pmg.org.za/211208LegalOpinion.pdf>

⁵⁶ Ibid., para 27.

⁵⁷ Ibid., para 28.

2.40 In light of the above legal opinion, the Victims' Charter remains a mere expression of the government's policy with no mechanisms of enforcement. It has also not attained the status of a white paper, which is the established process of policy formulation within the government circles.

2.41 The following statement articulates the clear vision of the Victims Charter when it was adopted by Cabinet in 2007:

The Victims' Charter aims to locate all victims at the centre of the criminal justice system and to eliminate secondary victimisation. It is premised on the assumption that victims are empowered with knowledge about the criminal justice system: what it is, how it functions, who its role-players are and how they relate to each other. A further assumption is the understanding of government service providers about what secondary victimisation is and how to eliminate it. Finally, an assumption is made that both victims and government service providers will work together to eliminate revictimisation and assist in crime reduction.⁵⁸

2.42 Following the approval of the Victims Charter by Cabinet, the DoJ&CD developed the Minimum Standards on Services for Victims of Crime (Minimum Standards), which sought to explain the rights of victims as contained in the Victims' Charter. The Victims' Charter, together with the Minimum Standards provide information relating to the government's commitment towards improving service delivery for victims of crime. The Minimum Standards, as stated in its title, aim to set minimum standards on services that the DoJ&CD committed to provide for the victims of crime.

2.43 The Discussion Paper on Understanding the Victims' Charter describes secondary victimisation as referring to the attitudes, processes, actions and omissions that may intentionally or unintentionally contribute to the revictimisation of a person who has experienced a traumatic incident as a victim through: failure to treat the victim with respect and dignity; disbelief of the person's account; unsympathetic treatment of victims; blaming the victims for the crime; lack of or insufficient support to the victim at interpersonal, institutional and broad social level.⁵⁹

⁵⁸ Understanding the South African Victims' Charter Contextual Issues (A discussion paper (published in April 2008), which provided an understanding of the content of the Victims' Charter; particularly in terms of providing definitions for the terms 'victim'; https://www.justice.gov.za/vc/docs/2008Understanding%20victims_context.pdf, p31

⁵⁹ Ibid., p36.

(c) Batho Pele principles⁶⁰

2.44 The *Batho Pele* (people first) represents the first government policy that sought to transform the policies of the public service aimed at improving the delivery of its services to the citizens. The policy incorporates eight principles which are: (a) *Consultation*: people must be consulted about the level and quality of service they are to receive; *Service standards*: service standards that guide exactly what they deliver and to what quality or standard must be set; (c) *Redress*: When people be given the right to redress; (d) *Access*: citizens have the right to equal access to the services to which they are entitled; (e) *Courtesy*: actors should always be courteous and helpful; (f) *Information*: citizens should be given full information about the services that they have a right to get; (g) *Transparency*: services must be provided openly and transparently. People also have the right to know how decisions are made, how they will be impacted by the decisions; (h) *Value for money*: services must be provided economically, at low costs and freely for the poor and vulnerable. Actors must be accountable for the resources expended.

2.45 The *Batho Pele* principles, although not victim-focused, embrace values that care, compassion and dignity that are essential for the protection of victims of crime. The criminal justice system, which cannot function without victims, needs to adjust and adapt to the *Batho Pele* principles. In this way, victims as part of society will be perceived as valued participants of the system from which they will derive support. By being participants, they will be able to understand the process, get updates on their cases, respectful treatment, procedural justice and support as and when it is needed. Some victims also want their voice to be considered at important stages in the proceedings. The exercise of such rights helps victims to recover from victimhood and restores their confidence in a society that has, after all, failed to protect them from crime in the first place.

⁶⁰ The White Paper on the Transformation of the Public Service was published under GN1227 of 1995 in GG No. 1638 of 24 November 1995

2.46 Boboyi⁶¹ avers that as principles that are grounded in transparency, accountability, and citizen-centred service principles, *Batho Pele* aligns seamlessly with *ubuntu's* emphasis on interconnectedness, compassion, and mutual respect. The author further postulates that the correlation between the two enhances service delivery and enriches the social fabric of communities, creating a society where every individual feels valued and heard, thereby advancing justice and equity.⁶²

2.47 Makiwane⁶³ opines that victims' rights can only be described as aspirational rather than real, because they create values to which everyone should aspire. Victims cannot enforce these basic rights; they are, as a result, denied justice to which they should be entitled. She postulates, convincingly, that the Charter for Victims of Crime should be legislated so that rights contained therein can be enforced by crime victims. This would oblige prosecutors, the police and the courts to implement restorative processes rather than to overlook the existing legislative provisions that are being under-utilised.

⁶¹ Boboyi A “ Exploring Batho Pele and Ubuntu Principles in the School Social Work Practice in South Africa: A Narrative Literature Review” *Journal of Ecohumanism* 2025 Volume: 4, No: 4, pp. 767 – 775.

⁶² *Ibid.*, p 771.

⁶³ Makiwane PN., *Restorative Justice: Bringing Justice for Crime Victims*” (2015) *Obiter* 36(1): 79 – 94, p93.

CHAPTER THREE: PREVIOUS INVESTIGATIONS PERTAINING TO THE RIGHTS OF VICTIMS IN CRIMINAL PROCEEDINGS

A The role of victims in Out of Court Settlements: (Project 73)

3.1 The Investigation on the Simplification of Criminal Procedure (Out of Court Settlements in Criminal Cases) Sixth Interim Report⁶⁴ was concerned with the role of victims of crime in out-of-court settlement proceedings. At issue during the investigation was whether a victim of crime should be able to veto the prosecutor's decision to enter into an out-of-court settlement.

3.2 The report, in its recommendation, enjoins the prosecution to, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim and, where practicable, furnish the court with particulars of –

- (a) damage to or the loss or destruction of property, including money;
- (b) physical, psychological or other injury; or
- (c) loss of income or support.

3.3 The Commission has expressed the view that the victim or victims should get the opportunity to make representations to the prosecutor on whether an out-of-court settlement would be fair in the circumstances, to make suggestions in respect to restorative justice conditions and to provide proof of damages suffered as a result of the offence. The prosecutor will have to take such representations into account in arriving at such a decision but should not necessarily be bound by them. The victim, who is subjectively involved in the matter, should not be in a position to veto the decision to enter into an out-of-court settlement. Furthermore, in order to enable the victim to make these representations, the victim should be notified of the intended out-of-court settlement whenever possible.

⁶⁴ Project 73, pp

B Report on Sentencing (New Sentencing Framework)

3.4 The Commission's Report on Sentencing (New Sentencing Framework)⁶⁵ (Sentencing Framework Report) under Project 82, although its primary focus was on sentencing, dealt extensively with the rights of victims of crime. The report notes that the Van den Heever project committee which undertook the research, published an issue paper on restorative justice that dealt with a restorative approach to the CJS and sought comments on the paper on victims' rights and their treatment in South African law; victim and community participation in sentencing; compensation for victims; victim impact statements and victim-offender mediation.⁶⁶

3.5 The Van den Heever Committee was succeeded, in late 1998, by another committee chaired by Professor Dirk van Zyl Smit, who appointed its project leader. The report states the following with regard to the approach adopted by the new committee:

The new Committee was firmly convinced that **victims of crime needed to have their interests specifically recognised and protected in the sentencing process.** Accordingly, the Committee resolved to emphasise, without further investigation in the short term, these interests in the proposed comprehensive sentencing legislation while at the same time launching a separate and wider inquiry into a national compensation scheme for the victims of crime. It was granted permission by the Law Commission to establish a subcommittee to investigate further a national compensation scheme and other wider issues, including a victims charter, that go far beyond sentencing as they affect victims of crime at every stage of the criminal justice process.⁶⁷

3.6 A separate inquiry into a national compensation scheme for the victims of crime was undertaken by a separate subcommittee of the Commission and its recommendations are discussed under the Report on Compensation Fund for Victims of Crime (under paragraph C below).

⁶⁵ Sentencing (A New Sentencing Framework)" South African Law Reform Commission Project 82

⁶⁶ Sentencing Framework Report, p8.

⁶⁷ Sentencing Framework Report, p9.

3.7 The New Sentencing Framework report made extensive recommendations in respect of reparation and victim impact statements. The following are recommendations in the report with respect to reparation.⁶⁸

37. Reparation

(1) A sentence of reparation may be imposed for any offence and must be considered in every case.

(2) The court may sentence any person convicted of an offence to make appropriate reparation in the form of restitution and compensation to any victim of the offence for -

(a) damage to or the loss or destruction of property, including money;

(b) physical, psychological or other injury; or

(c) loss of income or support;

resulting from the commission of such offence.

(3) The awards made by regional or district magistrates' courts in terms of subsection (2) may not exceed a fine that such courts may impose.

(4) In assessing the reparation that a person convicted of an offence may be ordered to pay the court must consider the means of the offender as well as the reparation appropriate for purposes of restitution and compensation.

(5) Where the court finds it appropriate to impose a sentence of reparation or to suspend the sentence on condition of reparation, and the court is considering the imposition of a fine in addition to such an award, but it appears that the person convicted would not have the means to make reparation and to pay the fine, the court must first impose the sentence of reparation or make reparation a condition of suspension and then consider the further sentence to be imposed.

(6) (a) Where a sentencing guideline provides for a fine the court may instead of imposing a fine sentence the offender to making reparation by calculating the seriousness of the offence in terms of fine units and determining the amount of reparation in the same way as a fine is set in terms of section 23, except that the amount must not be more than is appropriate for reparation.

(b) If the amount of reparation is less than the fine that would have been set the court may also impose a fine.

(7) (a) If a sentencing guideline does not provide for a fine a court may nevertheless impose an additional sentence of reparation.

(b) Such reparation may be considered when deciding on sentencing options and in determining sentences within the range of increase and decrease that the

⁶⁸ Sentencing Framework Report pp71 -73.

guideline may allow, but may not be considered as a ground for departing from the guideline.

(8) Reparation may be imposed on its own or combined with any other sentence, but the overall sentence must reflect the principle of proportionality as contained in section 3.

(9) In cases where the amount of the damage, injury or loss exceeds an award made in terms of subsection (2) an additional civil action may be instituted.

(10) Where a court determines the reparation in terms of this section, it must also determine the time for and the method of making reparation.

(11) Where the victim suffering damage, injury or loss referred to in subsection (2) is not present when sentence is considered, the court may, if it will not cause undue delay, direct that such victim be notified that he or she may attend the proceedings.

(1) Where a person is sentenced to make reparation, the court may in its discretion enforce the making of reparation whether in whole or in part –

(a) by allowing the accused to make reparation on the conditions and in installments at the intervals it deems fit; or

(b) if money is due or is to become due as salary or wages from any employer of the person concerned, by ordering such employer to deduct a specified amount from the salary or wages so due and to pay over such amount to the clerk of the court or registrar in question.

(2) The clerk of the court or the registrar may subject to the approval of a magistrate or judge in chambers, vary the conditions and installments according to which reparation is to be made.

(3) A court that has acted in terms of subsection (1), whether differently constituted or not, or any court of equal or superior jurisdiction may, on good cause shown, reconsider any decision that it has made on the making of reparation and replace it with a new order authorised by subsection (1).

39. Recovery of reparation

(1) Whenever a person is sentenced to make reparation, the court passing the sentence may issue a warrant addressed to the sheriff or messenger of the court authorizing him or her to recover the amount of the reparation by attachment and sale of any movable property belonging to such person.

(2) The amount which may be recovered in terms of subsection (1) must be sufficient to cover, in addition to the amount of the reparation, the costs and expenses of the warrant and of the attachment and sale in terms of it.

40. Failure to make reparation

(1) Whenever a court has ordered a person to make reparation and such reparation is not made in full or is not recovered in full, the court that passed sentence may-

- (a) warn such person to appear before it; or
- (b) issue a warrant directing that such person be arrested and brought before the court.

3.8 The New Sentencing Framework Report made the following recommendations in respect of victim impact statements:⁶⁹

47. Evidence relating to the interests of victims

(1) The prosecution must, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim and, where practicable, furnish the court with particulars of -

- (a) damage to or the loss or destruction of property, including money;
- (b) physical, psychological or other injury; or
- (c) loss of income or support.

(2) A victim impact statement may be made by a victim who, as a result of an offence, suffered damage, injury or loss as referred to in subsection (1), or by a person nominated by such victim.

(3) The prosecutor must seek to tender evidence of a victim impact statement where the victim is not called to give evidence and such a statement is available.

(4) If the contents of a victim impact statement are not disputed a victim impact statement is admissible evidence on its production.

(5) If the contents of a victim impact statement are disputed, the victim must be called as witness for the statement to be taken into account by the court.

3.9 The New Sentencing Framework Report recommended the inclusion of the following victims' post-trial rights:⁷⁰

48. Victims and release from prison.

(1) Where a person has been convicted of an offence involving violence against another person and is sentenced to an unsuspended term of imprisonment of two years or more, the court must explain to any victim of the crime, including the next of kin of a deceased victim, that they may inform the Commissioner that they wish to be notified of any hearing of a Correctional Supervision and Parole Board where the conditional release of such offender is being considered, so that they may make representations on the risks that such release may hold.

⁶⁹ Sentencing Framework Report, p 85.

⁷⁰ Ibid.

(2) Where a victim is incapable of informing the Commissioner as contemplated in subsection (1) the information may be conveyed by a representative of the victim.

(3) If the victim or a representative referred to in subsection (2) intends to make such representations to the Correctional Supervision and Parole Board, such person must inform the Commissioner of this intention and keep the Commissioner informed of any change of address.

3.10 Unfortunately, in South Africa, the use of victim impact statements remains unlegislated. Therefore, the use of impact statements, where they have been used, has largely been informal and inconsistent. It is noteworthy that clause 2 of the Victims Charter entitles crime victims with “the right to offer information” which includes the right to “make a statement to the court or give evidence during the sentencing proceedings to bring the impact of the crime to the court’s attention. Notwithstanding the provision of this clause, it is not often that victims are called to testify in sentence proceedings, instead, their statements are handed over to the prosecutor to present before the court on their behalf.

3.11 The report noted further the following remarks by the Supreme Court of Appeal in *S v Matyityi*:⁷¹

An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State - it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity. It enables us, as well, to vindicate our collective sense of humanity and humanness. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim. (Footnotes omitted) (emphasis and underlining added).

⁷¹ *S v Matyityi* 2011 (1) SACR 40 (SCA), para 16.

C Report on Sentencing (Compensation Fund for Victims of Crime)

3.12 The Commission submitted a separate report under its Report on Sentencing ()project 82, which focused specifically on compensation for victims of crime, namely 'Sentencing – A Compensation Fund for Victims of Crime'⁷² (Compensation Fund Report). The report was submitted to the Minister in April 2002.

3.13 The discussion paper that preceded the report recommended that a fully-fledged compensation scheme was not possible in the short term. Instead, it recommended that compensation, either partial or in full, should be seen as a complementary component of victim support, which is vital to ensuring the efficacy of the whole criminal justice system.⁷³

3.14 The Compensation Fund Report endorsed the recommendation in the discussion document that the establishment of a compensation fund was not a viable option at that stage due to: (a) affordability having regard to the financial climate; and (b) the absence of prerequisites necessary for the effective and efficient administration of the fund. The Commission, however, recommended that the establishment of a compensation fund should not be abandoned, but developed over time as a project within the broader objective of improved services for victims of crime. The report further recommended that, in the interim, the strengthening of the current victim empowerment programme (VEP), which it found lacked the ability to deal effectively with all the issues relating to victims of crime. Importantly, the report expressed the view that without an effective legislative basis, support services will continue to be uncoordinated, fragmented and reactive in nature.

3.15 The Compensation Fund Report considered compensation for victims of crime under the common law through delictual claims as well as instances in respect of which statutes provide for liability without fault for certain categories of victims. In respect of delictual debt, the report noted that such claims usually prescribe three years after they originated. Furthermore, that dependents

⁷² See Media release by the SALRC on the release of the Report Sentencing – A Compensation Fund for Victims of Crime, April 2011.

⁷³ Compensation Fund Report, p7.

of a breadwinner killed or injured in a wrongful and culpable manner may claim damages for loss of maintenance arising out of their personal right to maintenance from the breadwinner. For such a claim to be successful, a legal duty of support must be proved.⁷⁴

3.16 Included in the report in respect of statutory compensation are : (a) compensation under the Compensation for Occupational Injuries and Diseases Act⁷⁵ which obliges certain categories of employers to contribute to a fund that covers claims lodged by employees for occupational injuries and diseases; (b) compensation under the Road Accident Fund Act of 1996⁷⁶ and the reparation under the Promotion of National Unity and Reconciliation Act of 1995.⁷⁷

3.17 In respect of the Commission for Occupational Injuries and Diseases, compensation is payable at a percentage of an employee's wage at the time of injury, death or disease for permanent or temporary disability, medical expenses (for a maximum of two years from the date of accident, including medicine) and additional compensation. The fund does not provide compensation for pain and suffering.⁷⁸

3.18 Under the Road Accident Fund Act, the fund is obliged to compensate any person (the third party) for any loss or damage suffered as a result of any bodily injury or death caused by the driving of a motor vehicle in South Africa. Compensation is awarded only if the injury or death is due to the negligence or other wrongful act of the driver or the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as an employee.

3.19 With regard to the RAF, particularly the report noted, as far back as the year 2000, the difficulties that confronted the Road Accident Fund when it stated the following:

Currently, the Road Accident fund seems to be beset by administrative difficulties. A commission of inquiry has been proposed to try and set the system on a sound financial footing. The Road Accident Fund currently has a deficit of about R10bn and had a reported operating loss of R771m in the 1998-99 financial year,⁷⁹

⁷⁴ Compensation Fund Report, para 3.11.

⁷⁵ Compensation for Occupational Injuries and Diseases Act

⁷⁶ Road Accident Fund Act No. 56 of 1996.

⁷⁷ Promotion of National Unity and Reconciliation Act No.34 of 1995.

⁷⁸ Compensation Fund Report, para 3.19.

⁷⁹ Compensation Fund Report, para 3.26.

3.20 More than three decades later, the challenges confronting the RAF seem to have multiplied. At the time of writing this report, there is a Parliamentary Inquiry underway conducted by the Standing Committee on Public Accounts (SCOPA) that is probing maladministration and corruption at the state entity.

3.21 In terms of the TRC Act, the TRC had to make recommendations to the President with regard to Policy which should be followed or measures which should be taken with regard to the granting of reparations to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims.⁸⁰ In formulating its policies and recommendations, the TRC (through its Reparation and Rehabilitation Committee) engaged in extensive public consultation with a variety of stakeholders. During the consultation process, the committee held workshops across the country with non-governmental organisations, community-based organisations, faith communities and academic institutions. Flowing from the consultative process, views emerged that reparation should extend to monetary assistance, compensation, bursaries and medical care. These various categories of reparations were to be provided in terms of regulations made under the Act in respect of the type of reparation concerned.

3.22 Reparation is one of the core principles that the Commission had recommended in its previous investigation (New Sentencing Framework). This constitutes the work of the TRC's Reparation and Rehabilitation Committee, which was tasked to make recommendations as to appropriate measures of reparation to victims of the conflicts of the past. In order to determine victims' needs and expectations, the Committee collected information and propositions from a variety of different sources, such as NGOs or academic institutions, and held consultative workshops throughout the country. Victims were also able to address the Committee directly and to apply for reparation to be paid. In pursuance of its mandate and task, the Committee proposed a variety of reparation measures, ranging from the payment of monetary compensation to the building of monuments or the renaming of places and streets. Acting based on the Committee's propositions, the TRC in its final report ultimately recommended five categories of reparation to be implemented by the government: (a) urgent interim reparations to assist people with urgent needs; (b) community rehabilitation programmes like the resettlement of displaced persons to encourage the healing of communities; (c) symbolic reparations like the expunging of criminal records to restore victims' and survivors' dignity; (d) institutional reforms to ensure that the crimes

⁸⁰ Compensation Fund Report, para 3.28.

and violations of the past will not reoccur in future; and (e) individual reparation grants to acknowledge individual victims' suffering.

3.23 As Möller⁸¹ explains that, although there was some early progress on many of the non-pecuniary measures, the payout of the individual reparation grants was delayed for years. Only on 15 April 2003, President Thabo Mbeki announced a once-off reparation grant of R30 000 to each of the approximately 22 000 recognised victims, much less than the Commission had recommended. As of November 2004, an estimated R400 million had been paid out to roughly 14 000 victims.

3.24 In a reply to a Parliamentary Question on the question of reparation asked by Hon Mr B N Herron (of the Good party) submitted on 9 September 2022, the Minister of Justice and Correctional Services stated the following, among others:

Section 42(2) of the Promotion of National Unity and Reconciliation Act, (Act No. 34 of 1995), provides that "there shall be paid from the fund all amounts payable to victims by way of reparation in terms of regulations made by the President".

Thus, the funds in the President's Fund can only be used to directly benefit TRC identified victims in line with approved regulations.

The Regulations that are already promulgated are:

- (a) Reparation to Victims (R30 000.00 grant);
- (b) Exhumations, Reburial or Symbolic Burial of Deceased Victims;
- (c) Regulations relating to Assistance to Victims in respect of Basic Education; and
- (d) Regulations relating to Assistance to Victims in respect of Higher Education and Training.

The following are the Regulations that are outstanding:

- (a) Housing assistance;
- (b) Medical benefits; and
- (c) Regulations relating to Community Rehabilitation.⁸²

⁸¹ Möller C., "South Africa's Obligation under International Law to Prosecute and Punish Perpetrators of Gross Human Rights Violations and to Provide Compensation for their Victims" Minor Dissertation in Public International Law, Master Dissertation University of Cape Town (2014).

⁸² Reply to Parliamentary Question No. 2512 submitted by Ministry of Justice and Correctional Services, 20220915

3.25 Nkukwana⁸³ argues that the compensation fund would have been an ideal scheme for compensating the victims of the Marikana tragedy. Instead, the victims of the tragedy were left with no option but to file civil claims against the state.

3.26 The Commission of Inquiry appointed to investigate matters of 'public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana in the North West Province (Marikana Commission), in its report⁸⁴ (Marikana Commission Report) did not make any recommendation for victim compensation by the state. The Commission noted that the submission that the dependants of the victims who were killed during the shooting with the police should be compensated by the state raised both complex and difficult issues. That its terms of reference were not wide enough to cover the question as to whether a compensation scheme of the kind proposed should be implemented by the State.⁸⁵

D Juvenile Justice Report (Project 106) – Drawing lessons from the Child Justice Act

3.27 The Commission, in its report on Juvenile Justice⁸⁶ which resulted in the enactment of the Child Justice Act 2008⁸⁷ (CJA), considered the involvement of a victim in the CJS. Importantly, the Report imported the concept of restorative justice into the CJA, which it described as-

a concept of justice which proceeds from an understanding that a peaceful society rests on the balance of rights and responsibilities. When this balance is upset by the commission of an offence, the purpose of justice is to restore the balance, repair the harm, heal

⁸³ Nkukwana Z W "The Rights of Victims of Crime in South Africa" LLM Dissertation, Nelson Mandela Metropolitan University (2016), 51.

⁸⁴ Report of the Commission of Inquiry appointed to investigate matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana, in the North West Province, published in Government Gazette 38978 of 10 July 2015.

⁸⁵ Marikana Commission Report, p299 – 220.

⁸⁶ Juvenile Justice Report (Project 106) South African Law Reform Commission (2000)

⁸⁷ Child Justice Act No.75 of 2008.

relationships and encourage the victim and the offender to carry on with their lives. It is an approach which favours participation of the victim in the resolution of the conflict.⁸⁸

3.28 The CJA defines 'restorative justice' as -

... an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation;⁸⁹

3.29 Even before its incorporation into the CJA, restorative justice had already become a central theme during the TRC. This is evident from the statement by Mr Johny de Lange, (at the time the Deputy Minister of Justice) who said:

Restorative justice, in general, and in particular as utilised during the South African TRC process, is essentially a forward-looking, inclusive, healthy, life-giving process. It allows for the building of reconciliation through addressing the hurts and the needs of both victims and offenders in such a way that both parties, as well as the communities which they are part of, are healed.⁹⁰

3.30 Restorative justice became the basis for alternative sentencing options incorporated in the CJA, including diversion, reparation and restitution. Although the concept emerged in the context of child offenders, its application extends to adult offenders. Its incorporation into the new Criminal Procedure Act is therefore necessary and warranted.

3.31 The court may consider diversion under certain circumstances defined in the CJA. Significantly, a Director of Public Prosecutions may only indicate that a matter may be diverted after he or she has –

afforded the victim or any person who has a direct interest in the affairs of the victim an opportunity to express a view on whether or not the matter should be diverted, and if so, on the nature and content of the diversion option being considered and the possibility of

⁸⁸ Juvenile Justice Report, para 7.4.

⁸⁹ Child Justice Act, section 1.

⁹⁰ Address by Advocate Johnny De Lange, MP, Deputy Minister for Justice and Constitutional Development, at the International Conference on "The politics of restorative justice in post conflict South Africa and beyond," Cape Town, 21 September 2006.

including in the diversion option, a condition relating to compensation or the rendering of a specific benefit or service and has considered the views expressed;⁹¹

3.32 The Juvenile Justice Report enjoins the court imposing a sentence to consider the impact of the offence upon the victim as well as the imposition of a sentence in which compensation, reparation, or restitution to the victim is an option.⁹²

3.33 Although the Juvenile Justice Report in its accompanying draft Bill recommended that a victim or victims of crime may present written or oral evidence to the court about the impact of the offence on the victim concerned, the Act took a different approach.⁹³ The position adopted was that such a statement must be made to the prosecutor and not directly to the court. This denied the victim the opportunity of presenting his or her own evidence before the court.

3.34 The relevant section in the CJA reads as follows:

70 Impact of offence on victim

(1) For purposes of this section, a victim impact statement means a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.

(2) The prosecutor may, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim, and, where practicable, furnish the child justice court with a victim impact statement provided for in subsection (1).

(3) If the contents of a victim impact statement are not disputed, a victim impact statement is admissible as evidence on its production.

⁹¹ CJA, Section 52(3)(b).

⁹² Juvenile Justice Report, p 255.

⁹³ See clause 71(3) of the draft Bill accompanying the Juvenile Justice Report.

E Review of the expungement of certain criminal records by the South African Law Reform Commission (Project 137)

3.35 The report on the Review of the expungement of certain criminal records⁹⁴ recommended the amendment of section 297 of the CPA to provide for the conditional or unconditional postponement or suspension of a sentence and caution and remand on several conditions. Of the listed conditions, the following, if accepted, would be to the benefit of victims of crime:

- (aa) compensation.
- (bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;⁹⁵

3.36 The expungement process under the CPA and CJA is mainly administrative and focuses only on the accused person. In countries such as Utah, there is an assessment of whether expungement would not be contrary to public interest. Additionally, it considers the nature of the crime, rehabilitation of the offender, the harm suffered by victims and the offender. However, the situation is vastly different in South Africa, as the only requirements for expungement of a criminal record are sentences compliant with section 271B of the CPA and section 87 of the CJA and the passing of a waiting period of 10 years without committing further criminal offences. Neither Utah and South Africa assesses whether the expungement of the criminal record would sustain the applicant's reintegration into society, which is a crucial factor in expungement.⁹⁶

⁹⁴ Review of the expungement of certain criminal records by the South African Law Reform Commission (Project 137) South African Law Reform Commission (2017).

⁹⁵ Clause 9 of the proposed Amendment Bill which accompanied the Report.

⁹⁶ Mahlasela K., "How does the law on expungement of criminal records affect offender reintegration in South Africa" A research paper submitted in partial fulfilment of the requirements for the award of the LLM degree in (Criminal Justice and Procedure), University of the Western Cape (2024), p 85.

F Comparative research

3.37 The Kenyan Criminal Procedure Code⁹⁷ provide a useful comparative research in respect of victim impact statements. The Code was amended in 2003⁹⁸ to insert provisions on victim impact statements. Arising from the Kenyan Criminal Procedure Code, the following are of significance to the South African situation:

- (a) The Act provide for the submission of victim impact statement by a ‘family victim’ in the instance where the primary victim has died as a direct result of the offence.⁹⁹
- (b) The absence of a victim impact statement shall not give rise to any inference that an offence had little or no impact on a victim.¹⁰⁰

CHAPTER 4: PROVIDING FOR RIGHTS OF VICTIMS IN THE NEW CRIMINAL PROCEDURE ACT

A The right of access to justice in the context of the victims of crime

4.1 In its narrow traditional sense, access to justice means the ability to access legal remedies through the courts. In its broader connotation, as defined in the United Nations Development Programme (“UNDP”) it means –

... the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.”¹⁰¹

4.2 Critical to an accessible criminal justice system are the inordinate delays in criminal investigation, commencement and conclusion of trials.

⁹⁷ Kenyan Criminal Procedure Code CAP 75 [Rev 2018].

⁹⁸ By Act No. 5 of 2003.

⁹⁹ Ibid., 329C (2).

¹⁰⁰ Ibid., Section 329D (3).

¹⁰¹ Practice Note: Access to Justice (New York: UNDP Democratic Governance Group: Bureau for Development Policy, 2004), 6.

4.3 Inordinate delays in the commencement and finalisation of criminal cases contribute to the denial of the right to a fair trial and access to justice for both the accused and the victim of crime. The maxim of “justice delayed is justice denied”¹⁰² applies to the accused, the victim, witnesses and the community at large.

4.4 Postponement of cases is the biggest cause of delay. Under the CPA, it is permitted under section 168. The section empowers the court, if it deems it necessary and expedient to do so, to adjourn the proceedings to any date on such terms as the court may deem proper.

4.5 Delays occur at different stages of the criminal justice system and can be caused by either the state or the defence. Prior to the Section 342A amendments brought into the CPA in 1997, the CPA had not acknowledged the negative impact the delay of a criminal matter had on victims of crime. The concerns of delays of trials were only raised in the context of the accused’s right to a fair trial, entrenched in the Constitution.¹⁰³

4.6 Section 342A was inserted in the CPA in 1997 following an investigation conducted by the SALRC. Section 342A focuses on the unreasonable delays in the finalisation of criminal trials and also attempts to empower the courts to deal effectively with conduct that falls in the category of the abuse of the process. The section is restated hereunder in view of its significance to the quest to address delays in criminal proceedings. This section provides as follows:

342A Unreasonable delays in trials

(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

(a) The duration of the delay;

¹⁰² The maxim ‘justice delayed is justice denied’ is attributed to William E Gladstone (1868) <https://misa.org.za/justice-delayed/>: (accessed 28 March 2020).

¹⁰³ The accused right to a fair trial is entrenched in section 35 of the Constitution.

- (b) the reasons advanced for the delay;
- (c) whether any person can be blamed for the delay;
- (d) the effect of the delay on the personal circumstances of the accused and witnesses;
- (e) the seriousness, extent or complexity of the charge or charges;
- (f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;**
- (g) the effect of the delay on the administration of justice;
- (h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;**
- (i) any other factor which in the opinion of the court ought to be taken into account. (own emphasis).

4.7 The focus of this paper is to examine the impact and relevance of Section 342A Investigation on the victims of crime. In its current formulation, section 342A aims to address the impact of the delays on the state, the accused and his or her legal representative. The section does not make any reference to victims of crime, nor does it allude to or contemplate any *substantial injustice* to victims of crime.

4.8 The “victim” is only mentioned under subparagraph (h) of subsection (2) and is mentioned only in relation to the adverse effect on the victims (among others) in the event of the prosecution being stopped.

4.9 In the case of *Sanderson v AG Eastern Cape*,¹⁰⁴ the Constitutional Court pointed out that an application for a stay of proceedings has the effect of depriving society of presenting a complaint against someone who has transgressed its rules. It held that applications for a stay of prosecution must be considered in the context of how it impacts the ability and the imperative of the state to carry out its prosecution function. In the most recent case of *Joao Rodrigues and National Director of Public Prosecutions*, the SCA, in dismissing the Appellant’s appeal against

¹⁰⁴ *Sanderson v AG Eastern Cape*

the decision of the Gauteng full court not to grant a permanent stay of prosecution, contended that:

Permanent stays are almost never granted following delays in the commencement and conclusion of a trial. This is because a permanent stay is an exceptional remedy. It may only be granted where the delay is egregious and has resulted in irreparable trial-related prejudice. Moreover, the trial-related prejudice must be demonstrably clear ('definite not speculative'). More often than not, where there is a delay, but no clear trial-related prejudice, there are a range of less drastic remedies available to ameliorate any broader prejudice an accused may suffer. These include a mandamus requiring the prosecution to commence the trial forthwith, denying it a postponement of the trial or awarding damages to an accused following an acquittal.¹⁰⁵

4.10 The investigation under 342A places the state and the accused at the centre of the investigation. The victim only features at the end of the investigation, where a decision is most likely to result in the permanent discontinuation of the trial. The need to place the victim at the centre of section 342A Investigation necessitates the need to review the provisions of the section to address its victim-insensitivity.

G Consideration of the Truth and Reconciliation Commission model for the victims' rights

4.11 The TRC model for regulating the rights of victims of crime is one of the home-grown models for consideration for the CPA. Although the TRC's focus was on human rights abuses of the past, its objective towards the future is explicit in the constituting Act.

4.12 Section 11 of the TRC Act provides for principles that governed the TRC when dealing with victims. It states as follows:

11 When dealing with victims the actions of the Commission shall be guided by the following principles:

- (a) Victims shall be treated with compassion and respect for their dignity;
- (b) victims shall be treated equally and without discrimination of any kind, including race, colour, gender, sex, sexual orientation, age, language, religion, nationality,

¹⁰⁵ *Joao Rodrigues and National Director of Public Prosecutions* Case no: 1186/2019 (SAC), para 51.

political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin or disability;

- (c) procedures for dealing with applications by victims shall be expeditious, fair, inexpensive and accessible;
- (d) victims shall be informed through the press and any other medium of their rights in seeking redress through the Commission, including information of-
 - (i) the role of the Commission and the scope of its activities;
 - (ii) the right of victims to have their views and submissions presented and considered at appropriate stages of the inquiry;
- (e) appropriate measures shall be taken in order to minimize inconvenience to victims and, when necessary, to protect their privacy, to ensure their safety as well as that of their families and of witnesses testifying on their behalf, and to protect them from intimidation;
- (f) appropriate measures shall be taken to allow victims to communicate in the language of their choice;
- (g) informal mechanisms for the resolution of disputes, including mediation, arbitration and any procedure provided for by customary law and practice shall be applied, where appropriate, to facilitate reconciliation and redress for victims.

4.13 The justification for the restatement of the above principles in the contemplated new CPA cannot be gainsaid.

H Protection of rights of victims in other statutory enactments

4.14 The promotion and protection of the rights of victims of crime is not the exclusive preserve of the criminal procedural law. Other laws may provide for such protection, provided that such other laws are aligned and consistent with the CPA. Legislation providing for the establishment and jurisdiction of the courts, such as the Superior Courts Act of 2013,¹⁰⁶ the Magistrates Courts Act of 1944¹⁰⁷ include provisions that deal with the management of criminal proceedings through the courts concerned. The same applies to the Criminal Law (Sexual Offences and Related Matters)

¹⁰⁶ Superior Courts Act No.10 of 2013.

¹⁰⁷ Magistrates Court Act 32 of 1944.

Amendment Act of 2007,¹⁰⁸ (Sexual Offences Act) the Domestic Violence Act of 1998¹⁰⁹ (DVA) and the Child Justice Act.

4.15 The Sexual Offences Act, in its object clause, states that the objects of the Act 'are to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide; and to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic. Included among these are measures stated under section 2(d) and (e), which are aimed at:

- (d) protecting complainants of sexual offences and their families from secondary victimisation and trauma by establishing a co-operative response between all government departments involved in implementing an effective, responsive and sensitive criminal justice system relating to sexual offences;¹¹⁰
- (e) promoting the spirit of *batho pele* ('the people first') in respect of service delivery in the criminal justice system dealing with sexual offences by-
 - (i) ensuring more effective and efficient investigation and prosecution of perpetrators of sexual offences by clearly defining existing offences, and creating new offences;
 - (ii) giving proper recognition to the needs of victims of sexual offences through timeous, effective and non-discriminatory investigation and prosecution;
 - (iii) facilitating a uniform and co-ordinated approach by relevant Government departments in dealing with sexual offences;
 - (iv) entrenching accountability of government officials; and
 - (v) minimising disparities in the provision of services to victims of sexual offences;¹¹¹

4.16 Furthermore, the Sexual Offences Act assigns to the National Commissioner of Police and the Directors-General of the Department of Health (DoH) and the Department of Social Development (DSD) the tasks of developing national instructions and directives by each Department or institution to realise the object of the Act.

¹⁰⁸ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

¹⁰⁹ Domestic Violence Act No.116 of 1998.

¹¹⁰ Section 2(d) of the Sexual Offences Act.

¹¹¹ Section 2(e) of the Sexual Offences Act.

4.17 The Domestic Violence Amendment Act of 2021¹¹² (DVA) mark a watershed moment in South Africa's quest to protect the victims of domestic violence and the accountability by departments and institutions responsible for handling domestic violence complaints. Section 2 of the DVA, in particular, obliges police officers to assist the complainant who reports domestic violence. The section states as follows:

2. Duty to assist and inform complainant of rights.—

Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported—

- (a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;
- (b) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and
- (c) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at their disposal in terms of this Act and the right to lodge a criminal complaint, if applicable.

4.18 The Act extends the obligation to assist complainants in domestic violence offences to peace officers. In terms of section 3(3) A peace officer contemplated in subsection (1) or (2), who is not a member of the South African Police Service, who responds to an incident of domestic violence, must—

- (a) where necessary, make arrangements for the complainant to obtain medical attention;
- (b) where a protection order has not been issued against the respondent, or where there is no pending application for a protection order against that respondent—
 - (i) provide the complainant with a prescribed list containing the names and contact particulars of accessible shelters and public health establishments;
 - (ii) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice;
 - (ii) if it is reasonably possible to do so, explain to the complainant the content of such notice, including the remedies at the complainant's disposal in terms of this Act and the right to lodge a criminal complaint, if applicable; and
- (c) provide such further assistance as contemplated section 18B.

4.19 Section 18B, which was introduced through the Domestic Violence Amendment Act, enjoins the Directors-General of the Departments of Health, Social Development, Basic

¹¹² Domestic Violence Amendment Act No.14 of 2021.

Education, Higher Education and Training and Communications and Digital Technologies to, among others, publish in the *Gazette* directives that must provide for, among others:

- (c) services to be provided to a complainant who is an adult person;
- (d) the assistance that a member of the South African Police Service or a peace officer who attends a scene of an incident of domestic violence must provide to a complainant and affected children;¹¹³

4.20 Not only are victims' rights protected in legislation that is administered by the DoJ&CD. Other government departments, such as the Department of Health (DoH) and the DSD may promote legislation that seeks to promote and protect the rights of victims of crime through the courts. It is in this context that section 3 of the Superior Courts Act enjoins any other person initiating legislation dealing with court structures to consult with the Minister prior to the introduction of such Bill in Parliament. The section states as follows:

3. Introduction of legislation dealing with court structures

The Minister must be consulted prior to the introduction in Parliament, by a person other than the Minister, of any bill—

- (a) providing for the establishment of any court of law;
- (b) providing for the establishment of any tribunal contemplated in section 34 of the Constitution;
- (c) that amends the structure or functions of any court of law or tribunal referred to in paragraph (a) or (b); or
- (d) that assigns functions to judicial officers, other than in terms of this Act.

4.21 More importantly, the Criminal and Related Matters Amendment Act, 2021,¹¹⁴ in order to give effect to the quest to address the scourge of sexual offences and domestic violence, amended, among others, bail provisions under section 60(4) – (11) of the CPA. The amended provisions abolished the authority of the police and the prosecution to grant bail in gender-based offences; explicitly emphasised victim safety and history of domestic violence as crucial factors in bail proceedings; brought changes to the burden of proof whereby accused persons must now convince the court why bail should be granted rather than the state proving why detention is necessary.

¹¹³ Section 188(2)(c) and (d) of the DVA.

¹¹⁴ Criminal and Related Matters Amendment Act No.12 of 2021.

I Protection of victims' rights under the Criminal Procedure Act

4.22 The CPA has, since the advent of democracy in 1994, been amended several times, of which some are in relation to the protection of victims of crime, particularly to protect the rights of vulnerable victims, including child and sexual offence victims.

4.23 The CPA contains provisions on the compensation of victims of crime in sections 297 and 300 of the Act. Section 297(1)(a)(i)(aa) provides that where the court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may – in its discretion – postpone the passing of sentence for a period not exceeding five years and release the person concerned on one or more conditions, including an award for compensation.

4.24 The distinction between sections 297 and 300 lies in the fact that a compensation order in terms of the latter section is made as part of the conditions of sentence, whereas a compensation order in terms of section 297 is a condition of suspension of sentence. Failure by the accused to pay the compensation in terms of section 300 will not result in his or her incarceration; it may result in a civil process to obtain satisfaction of the compensation order. Where the accused fails to pay compensation in terms of section 297, they may be committed to imprisonment.

4.25 Section 297(1)(a)(i) of CPA allows a court to postpone the sentencing of the convicted person for up to five years on the following conditions, namely:

- (a) To allow compensation to the aggrieved person;
- (b) the rendering to the aggrieved person of some specific benefit or service in lieu of compensation for damage or pecuniary loss; and
- (c) performance without remuneration and outside the prison of sole sentence means that service for the benefit of the community under the supervision or control of an organisation or institution which, to the person who, in the opinion of the court, promotes the interests of the community which is referred to as community service.

4.26 Section 297(1)(b) authorises the court to suspend the whole or any part of the sentence for a period not exceeding five years on the same conditions mentioned in section 297(1)(a)(i).

4.27 In terms of section 300(1) of this Act, a court may make a compensation award against a person who has been convicted of a crime which has caused damage to or loss of property, including money belonging to another person- the victim. The order awarded may take the form of returning the damaged property or repairing the property that has been damaged.

4.28 The CPA does not provide for restitution for victims of crime. Restitution is a form of payment or action taken to restore the victim to the position he or she would have been but for the victimization.

4.29 Compensation is generally regarded as payment for damages suffered as a result of the commission of the crime. Although generally, compensation claims may include unpaid wages, legal fees, medical expenses and pain and suffering, compensation under section 300 is limited to the amounts that the Minister may determine from time to time. The claim that can be made under section 300 is limited to damage to property or financial loss relating to property as a result of the commission of a crime. The section does not cover any other form of damage. The remedy does not apply to claims for bodily injury, and therefore cannot be used to claim for pain, suffering, loss of amenities of life. The claim is also limited in terms of the amount that can be claimed (quantum).¹¹⁵ The limitation of the claims that may be made under section 300 leaves victims with no other option but to pursue civil action against the accused, which itself is a costly exercise.

4.30 Compensation does not necessarily remove the traumatic effects of violence but improves victims' chances of recovery and economically empowers them to avoid re-victimization. Where perpetrators of violence pay compensation, such payment can also constitute a form of sanction for the criminal conduct.

¹¹⁵ The threshold of the award as determined by the Minister at present is up to R400 for district courts and R1 million for regional courts.

J Advancing victims rights through digitisation of criminal proceedings

4.31 Digitisation can be considered as the foundation of both digitalization and digital transformation. The digitisation entails a migration from a paper-based system into on-line application. Digital transformation begins with data that is encoded into the system (digitisation), which is then used by the computer to enable or improve a process through digitalization. With the use of digital technologies and their integration in the entire organization workflow, digital transformation occurs.

4.32 Digital transformation, therefore, refers to the integration of technology into all areas of a business, essentially changing how it operates. In the context of the CJS, it is the modernisation of the system through re-engineering processes and procedures as applied and implemented across the various stages of the criminal justice value chain.

4.33 The most common form of digital technologies that are known to benefit victims are presentation of evidence through Closed Circuit Television (CCTV). Under the CPA, the use of CCTV is confined to vulnerable witnesses, mostly children and sexual offences victims. This is regulated under section 158 of the CPA. In terms of this section, criminal proceedings must generally take place in the presence of the accused, but permits evidence to be given through closed-circuit television (CCTV) or similar electronic media if it is in the interest of justice, security, or to prevent unreasonable delay.

4.34 In some countries, victims provide input about the impact of crime at parole (and sometimes parole violation) hearings in-person, via audiotape or videotape, by teleconferencing or in writing. Their statements give the paroling authority crucial information about the crime's financial, physical and emotional impact on the victim. To make this meaningful, however, parole authorities must notify victims and their families of hearings in advance and schedule time during the hearing to allow them to describe the impact of the crime on their lives.

4.35 Under the ongoing digital transformation, there exist further opportunities to extend digital solutions to victims and witnesses of crime, including the improvement of the quality of police investigation; effective management of court rolls to eliminate case backlog; improved collation

and analysis of criminal information, including that relating to victims of crime, in order to generate effective interventions to reduce and eliminate crime. The reform of the CPA provides an opportunity to explore further digital solutions beyond those that are already catered in the current CPA.

K Comparative research and precedents of foreign jurisdictions

4.36 Several countries have sought to review the participation of the victims of crime in the course of reforming their criminal justice systems. In some of the countries, the recognition of the rights of victims of crime's role find reflection in the country's constitution. Kenya is among the countries whose constitution provides for victims of crime. Article 50(9) of the Kenyan Constitution enjoins Parliament to enact laws that will guide the state in protecting victims, enforcing their rights and ensuring their welfare before, during and after the trial of the accused person.

4.37 In Kenya, the state, in response to its constitutional imperative, enacted the Victim Protection Act, 2014. The Act seeks to protect all victims of any offence under Kenyan law and provide various remedies to the victims, which is a novel concept to the criminal justice system in Kenya. The Act provides for various means of assisting the victims cope with the situation, such as restorative justice, restitution, rehabilitation, psychological treatment, protection from victimisation, et cetera.

4.38 Sections of the Kenyan Victim Protection Act provide a package of rights that the new contemplated legislation could tap into, particularly those stated in sections 9 (the rights of victims during trial); 11 (security of the victim); and 12 (victim impact statements). Victims' rights during trial include: the right to be present during trial in person or through a representative of choice, to have assistance of an interpreter in the language understood by the victim. Security-related rights include right to medical treatment and psychosocial support for the victim.

4.39 The Kenyan Act also sets out a special category of victims known as 'vulnerable' victims. These are people who, due to their age, gender, disability or other special characteristic, require

special treatment and support. Such victims could be small children, mentally disturbed persons, victims of rape, amongst others.

4.35 Victim impact statements have become a common trend in contemporary criminal justice systems' reforms. Under the UK legal system, the victim impact statements were introduced by the Criminal Justice Act of 1993. The Act also introduced a provision for the trial court, before imposing sentence on the defendant, to consider the adverse impact of the defendant's crimes on the victim in cases involving violence or sexual offences. The general policy behind the introduction of VIS was to provide victims of crime with the right to make a statement to the trial court concerning the impact the crime had upon him/her for consideration by the court prior to sentencing the accused. This is to enable the court to understand the impact of the crime on the victims, such as physical and emotional injuries, economic loss, and adverse changes in the victim's employment situation.

CHAPTER 5: PRELIMINARY LEGISLATIVE FORMULATIONS ON VICTIMS OF CRIME

5.1 The recommendations made in this chapter are in addition to the other recommendations that have been made in the various parts of the discussion paper. The recommendation include amendment to the existing provisions of the CPA and new insertions.

A New insertion into the new Bill

5.2 The provisions are to be inserted under the Chapter dealing with the institution of proceedings or reporting of crime.

Institution of proceedings (New)

(1) Proceedings may be instituted by the making of a complaint at a police station.

(2) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the police, and, in either case, shall be signed by the complainant and commissioned by a police official.

5.3 Insertion of the following Chapter 20 (in the place of Preparatory Examination) on victims of crime, before the presentation of evidence. (Section 11 of the TRC Act and Article 68 of the Rome Statute used as benchmarks):

Chapter 20: Protection of the victims and witnesses in criminal proceedings

123 Every Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses

124 Victims and witnesses shall be entitled to the following rights:

- (a) The right to be attended to promptly and courteously treated with respect to dignity and privacy by all members of any department, institution, agency, organization or service provider.
- (b) The right to information during the police investigation and court trial in the language understood by the victim.

- (c) The right of victims to be informed of their rights and how to exercise them.
- (d) The right to be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse.
- (e) The right to request assistance and have access to the available social, health and counselling services as well as legal services that are responsive to their needs.
- (f) The right to compensation for loss or damage to property suffered as a result of a crime committed against them.
- (g) The right to restitution in cases where they have been unlawfully dispossessed of goods or property or where their goods or property have been damaged unlawfully.

125 Where the disclosure of evidence or information pertaining to the trial is likely to endanger the security of a witness or his or her family, the court may order that the identity of such victim or witness not to be disclosed and the evidence be heard through CCTV.

5.4 The following insertions be made under the Chapter on Sentencing:

Evidence relating to the interests of victims

(1) For purposes of this section, a victim impact statement means a sworn statement by the victim, or someone authorised by the victim or **a representative of the victim**, to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.

(2) The prosecutor may, when adducing evidence or addressing the court on sentence, consider the interests of a victim of the offence and the impact of the crime on the victim, and, where practicable, furnish the child justice court with a victim impact statement provided for in subsection (1).

(3) If the contents of a victim impact statement are not disputed, a victim impact statement is admissible as evidence on its production.

5.5 Restorative justice sentences (New)

(1) A court that convicts an accused of an offence may impose restorative justice process which is in accordance with the definition of restorative justice.

B Amendment of existing provisions in the CPA

5.6 Redrafting the provisions of section 342A to address victim-insensitivity.

APPENDIX A:

Overview of the criminal trial process for victims

Phase	Proceedings	Victim's rights (and relevant provision in the CPA)
Pre-Trial Phase	Decision to release accused on bail or warning	Right to be informed of Police or Prosecutor's decision to grant bail before first appearance and to be informed of circumstances justifying the decision Limited right to participate – to his or her view regarding the granting bail
	Decision to prosecute	Victims has a right to be informed: The victim's views may be considered but the decision to charge a suspect is based on an assessment of the evidence, the law and the public interest
	Decision on the charges preferred against the accused	The right to be informed: The Office of the DPP must inform the victim, as soon as reasonably practicable, about the offences charged or why no offence is charged.
	Decision not to prosecute – <i>Nolle prosequi</i>	Right to be informed of the decision by the DPP and the reasons for the decision
	Withdrawal of charges	Right to be informed of the decision by the DPP and the reasons for the decision
	Decision to consider Diversion, Alternative Dispute Resolution, Pre-trial resolutions	Right to participate

Phase	Proceedings	Victim's rights (and relevant provision in the CPA)
Trial Phase	Pre-trial Conference	Victim has no role
	Plea and sentence negotiations/settlement	Victim has right of participation -
	Entering a plea of guilty	When considering a plea of guilty, the views of the victim must be taken into account but are not determinative
	Presentation of evidence upon a plea of not guilty	<p>If the victim is to appear as a witness, the Prosecution must ensure that the victim is informed about the process of the trial and the victim's role as a witness for the prosecution</p> <p>The victim who is a witness has full rights of participation, through giving evidence, upon which he or she may be cross examined on the evidence given by the defence</p>
Phase Sentencing; compensation and restitution	Sentence hearing upon conviction	<p>The victim may present a victim impact statement to the court about the impact, injury, loss or damage resulting from the offence, and may read it out before the court.</p> <p>The Office of Public Prosecutions must inform the victim, as soon as reasonably practicable, of the outcome of the criminal proceeding, including any sentence imposed.</p> <p>The victim can apply for an order that the offender pay compensation or make restitution for harm caused as a direct result of the offence. In certain circumstances, the Director of Public Prosecutions will apply on the victim's behalf.</p>
Post-trial phase (conversion of sentence to correctional supervision and parole)	Parole and correctional supervision proceedings	The victims' right of participation in the parole and correctional supervision is crucial.

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