DISCUSSION PAPER 169

MENTAL AND INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM

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

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EXECUTIVE SUMMARY

A Background

1 Our Constitution promises equality before the law and frowns upon discrimination based on disability. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) enjoins the State to *audit*, and *enact* appropriate, laws with a view to eliminate discrimination, inter alia, based on disability. The Mental Health Care Act 17 of 2002 expressly stipulates that the person, human dignity and privacy of mental health care users must be respected; that such persons must be provided with care, treatment and rehabilitation services that improve their mental capacity and facilitate their integration into community; and that the provision of these services must not be used as punishment or for the convenience of other people. The abovementioned legislative instruments not only provide an important backdrop to the review of this strand of the Criminal Procedure Act 51 of 1977 (CPA), which is concerned, primarily, with the *mental and intellectual capacity* of accused persons contemplated in section 77-79 and 159B(4) of the CPA, but also serve as a yardstick or scorecard against which to assess the adequacy of measures designed to protect the rights of people with disabilities. We hasten to add that South Africa's accession to the Convention on the Rights of Persons with Disabilities (CRPD) signalled its intent to put people with disabilities, including mental and intellectual impairment, at the centre of legislative and policy making.

2 However, the criminal justice process does not commence when a person appears in court, that is an intermediate stage, but when a charge is laid with the police; and ends with a conviction, acquittal, or incarceration of the accused person, or in the case of a mentally ill person, a referral to mental health care facility. So, the process inevitably involves other parties and organs of state, *viz* victims, witnesses, and complainants, on the one hand; and police officers, courts, correctional officials, and medical professionals, on the other. This begs the question: does the law prescribe how mentally incapacitated accused persons, victims and witnesses should be treated *throughout* the criminal justice system value chain?

3 The CPA is not completely reticent in this regard. It provides, in addition to the above-mentioned provisions (ss 77-79 and 159B(4)), that:

- everyone is eligible, and could be compelled, to testify in criminal proceedings – s 192;
- the court decides whether a witness is competent to give evidence or not – s 193;
- evidence must be tendered orally – 161(1); and that

- testimony must be under oath or affirmation to be admissible – ss 162-163.

4. Moreover, a witness afflicted with *mental, psychological or emotional condition* may, when giving evidence, be allowed:

- to use demonstrations, gestures, or other forms of non-verbal communication – s 161(2)(b);
- to give evidence on the basis of admonishment to tell the truth, as opposed to taking an oath or making an affirmation – s 164; and
- to use an intermediary – s 170A.

5 In terms of s 221 of the CPA, certain trade or business records provided by a person who is, among others, *mentally unfit* to attend criminal proceedings as a witness, may be admitted into evidence.

6 Over and above these provisions, the CPA makes provision for proceedings, in appropriate circumstances, to be held in private (behind closed doors) or to be moved to another place; for the use of closed circuit television, audiovisual link or similar devices; for evidence to be given at any place that is arranged to put the witness at ease or obviate upsetting the witness but allows the court and other parties to the proceedings to hear the testimony and see the witnesses – s 153, 158(2), 159A, 169 and 170A(3). However, these provisions are severely circumscribed.

7 In contrast to the abovementioned provisions which seek to enable, rather than deny, full and effective participation of a witness or alleged offender with mental disability in criminal proceedings, s 194 prohibits, outright, the testimony of a mentally ill person or person suffering from imbecility induced by the use of alcohol or drugs while the condition subsists. More than 20 years ago, the Supreme Court of Appeal in *S v Katoo* (2005) cautioned that mental illness of a witness on its own does not warrant a finding of incompetence; and added that it must be shown that a witness suffers from mental illness, and that as a result, he or she is deprived of proper use of reason. Section 194A qualifies both sections 193 and 194 by providing that expert evidence may be admitted on the mental state of a witness.

8 In this review, we are therefore asking whether the abovementioned provisions of the CPA (and by extension the accommodations and support they underpin or provide) are:

- relevant, adequate, effective, clear;
- compatible with the Constitution, PEPUDA and the CRPD; and
- address contemporary challenges relating to persons with mental or intellectual impairment who come into contact with the criminal justice system.

B Findings and proposals for reform

9 Following a comprehensive and painstaking analysis of the statutory framework, in particular the CPA, we have found that:

a) the CPA does not define mental illness; intellectual disability; or mental, psychological or emotional condition; and neither does it incorporate by reference the definition of mental illness contained in the Mental Health Care Act 17 of 2002;

b) at the point of police contact -
   - o the CPA is silent on how police officers must respond to incidences involving people with, or suspected of being afflicted with, mental illness or intellectual disability;
   - o the scope of the Mental Health Care Act is severely circumscribed and thus unhelpful in this regard;
   - o as a consequence, this legislative vacuum gives rise to uncertainty, and bestows on police officers unencumbered discretionary powers; and
   - o ***we thus propose***, among other things, that the rights of people with mental health challenges who come into contact with the criminal justice system; and that legal principles that should govern (regulate) how organs of state interact with them, must be entrenched in legislation; and that the role of medical professionals at this elementary stage of the criminal justice process be spelled out;

c) in the context of court proceedings -

   i. in respect of accused persons:
   - o the criminal justice system is riddled with systemic issues, including inordinately long waiting periods for forensic assessment and resource shortages;
   - o the relevant provisions of the CPA are, inter alia, convoluted; give rise to interpretive difficulties, for example, as result of failure to define key concepts such as mental illness or intellectual disability, and are under-inclusive; and
   - o ***we thus propose***, among other things, that the law explicitly affirm legal capacity of mentally or intellectually disabled persons who come into contact with the criminal justice system;

   ii. in respect of victims, witnesses and complainants suffering from or afflicted with mental illness or intellectual disability:
   - o the competence, reliability and credibility of victims and witnesses with cognitive problems may be unfairly subjected to prejudicial assessment; and their right to participate in the criminal justice process could thus be undermined;
   - o the relevant provisions of the CPA (in particular, s194) are deficient to the extent that they assume that a mentally impaired person would not be able to understand questions put to him or her and respond thereto rationally and intelligibly; that to the extent that the provisions of s170A do not expressly encompass persons with intellectual and sensory disabilities, they are under-inclusive; and
   - o ***we thus propose***, among other things, that section 170A be amended to include persons with intellectual and sensory disability; that section 194 be amended to include, inter alia, the qualifications read into this provision by the court in *S v Katoo*

(*viz* that an inquiry into mental illness be undertaken and the impact it has on the witness's ability to testify be established); that the law should expressly provide special measures for victims and witnesses suffering from mental illness, including giving evidence by means of audiovisual link; giving evidence in private; preventing witness from seeing the accused; or the provision of such devices as may be appropriate to enable the witness to communicate intelligibly; that other provisions of the CPA be amended to ensure that mental illness does not disqualify a witness from giving evidence if such witness understands the duty to tell the truth or understands questions put to him or her and responds thereto intelligibly;

d) the interplay between bail law and mental and cognitive impairment in the criminal justice system is not clearly defined;

10 Lastly, it is prudent to point out that there is paucity of information relating to the representation of (the number of people), and outcomes for, people with cognitive and mental health impairments in the criminal justice system. For example, neither the South African Police Service nor the Department of Correctional Services annual reports contain relevant information and statistics in this regard. To distil this and other data crucial to our understanding of the issues, so as to be able to fashion recommendations that improve the laws in this regard, we ask pertinent questions throughout this discussion.

CHAPTER 1: PROBLEM STATEMENT AND SCOPE OF THIS REVIEW

A Delineation of the scope of this inquiry

1.1 In our law, the *capacity* of the accused to participate in criminal proceedings is absolutely vital. While in terms of the Criminal Procedure Act of 1977 (CPA)[1] everyone is competent to give evidence,[2] this law also anticipates circumstances where the court may be confronted with an *accused person with actual or perceived cognitive problems* and stipulates how it should deal with this eventuality.[3] As part of the review of our criminal justice system and the CPA on which it is anchored, we will carefully examine the relevance, adequacy and efficacy of these provisions and, by virtue of their ignoble provenance, the extent to which they measure up to the constitutional imperatives. If they fall short, proposals for their reform will be made.

1.2 The criminal justice process, however, is put in motion when an alleged infraction is reported to the police, investigation ensues, and the alleged perpetrator is apprehended. It ends with the verdict, acquittal or incarceration of the accused. A myriad of other processes unfold alongside these generally depicted processes. It bears emphasising, therefore, that besides the alleged offender, the process inevitably includes other parties: police officers, prosecutors, correctional officials and the courts, on the one hand; and the *victims, complainants* and *witnesses* whose *competence* to participate effectively in the criminal justice system is equally crucial, and could determine the outcome of the case, on the other. The CPA itself[4] confirms this. The relevant provisions of the CPA exist alongside a plethora of other laws[5] dealing with the same subject matter.

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1 Act 51 of 1977.

2 Section 192 of the CPA.

3 Sections 77-79 and 159B(4) of the CPA.

4 See, for example, sections 161(2)(b); 164(1); 170A; 194A(1); 221(1)(b); and 252A(2)(i) of the CPA.

5 See section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997; section 49D of the Correctional Services Act 111 of 1998; Chapters III, VI and VII of the Mental Health Care Act 17 of 2002; section 120(4)(b) of the Children's Act 38 of 2005; the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; and section 48(5)(b) of the Child Justice Act 75 of 2008.

1.3 Against this backdrop, we feel constrained to confront and interrogate a broader issue which seems to have received scant, if any, attention to date, and that is whether the law, as it currently stands, *impedes* or *facilitates* the participation of people with disabilities throughout the criminal justice system. However, owing to the broad spectrum of physical and mental disabilities[6] and work currently underway at the Commission to craft *generic* legislation that will define, broadly, the rights of people with disabilities and how they should be vindicated; protect their interests and improve their lot,[7] we will limit our inquiry to how people (alleged perpetrators, victims, complainants and witnesses) with *mental and intellectual disabilities*[8] are, and should be, treated in the criminal justice value chain.

1.4 Broadening the scope of this review as espoused above is necessary for the following reasons:

- the promise of equal access to justice to which these categories of people are justifiably entitled also hinges on the role of the police, prosecutorial authorities and other role-players in the criminal justice process; and
- by virtue of ratifying the Convention on the Rights of Persons with Disabilities (CRPD) and its optional protocol in 2007, South Africa has committed to put rights of people with disabilities to equal access to justice, fair treatment and protection of their dignity at the centre of policy and legislative making, which coincidentally find legislative

[6] Article 1 of the Convention on the Rights of Persons with Disabilities provides that persons with disabilities *include* those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

[7] See South African Law Reform Commission *Discussion Paper 163 Project 148 Domestication of the United Nations Convention on the Rights of Persons with Disabilities* (October 2024).

[8] These terms, together with 'mental, psychological and emotional condition', are used in the CPA but not defined. Neither does the CPA incorporate by reference the definition of mental illness in the Mental Health Care Act of 2002. The Constitutional Court in *De Vos NO and Others v Minister of Justice and Constitutional Development and Others* 2015 (2) SACR 217 (CC) para 54 observed that mental illness is complex and that there are varying types and degrees of mental disability. For a discussion of the complexities in defining mental illness and related disabilities, see Marie Claire van Hout and Jakkie Wessels 'Navigating the Complexities of the Mentally Ill and Mentally Incapacitated in the Criminal Justice System in South Africa' *Forensic Science International: Mind and Law* 2 (2021) 4. For definition and different types of mental disorders, see Dr Ailbhe O'Loughlin 'Mental Disorder, Disability and Sentencing: A Review of Policy, Law and Research' *Sentencing Academy* (June 2022) 4; and ADAT Article 48 Southern Africa Litigation Centre *An Exploratory Study of the Interaction Between the Criminal Justice System and Persons with Intellectual and Psychosocial Disabilities in Nairobi, Kenya* (September 2021) 7 and 11.

expression in our Constitution;[9] [10] the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA);[11] and the Mental Health Care Act of 2002.[12]

1.5 We will thus carefully scrutinise whether *statutory* accommodations and powers, functions and responsibilities of organs of state in the criminal justice value chain (police, prosecutors, courts and correctional officials) vis-à-vis alleged perpetrators, victims, complainants and witnesses who exhibit symptoms of, or suffer from, mental or intellectual disability, whether or not the condition is a direct consequence of the offence, are:

- are relevant (fit for purpose), adequate, effective, and clear;
- compatible with the Constitution and PEPUDA; and
- address contemporary challenges relating to this category of vulnerable people.

B Why it matters? Difficulties associated with mental health issues in the criminal justice system

1.6 Experience, which has been substantiated by research in other countries, shows that people with mental issues are at greater risk of falling victims to crime; their condition could be a catalyst for the commission of offences;[13] their rights are often undermined through invocation of, and reliance on, deep-seated stereotypical views about their competence to give evidence, credibility and reliability;[14] and refusal or failure by authorities to explore alternatives to incarceration or appropriate rehabilitative programmes to address their condition. Worrisome for us, in the light of over-crowding in correctional facilities, is the trend observed elsewhere that mentally ill individuals face the prospect of indefinite detention because they

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[9] Constitution of the Republic of South Africa, 1996.

[10] See in this regard, sections 9, 10, 12, 27(1)(a), 34, 35 and 165(4) of the Constitution.

[11] Act 4 of 2000.

[12] Act 17 of 2002. See, in particular Chapter III thereof.

[13] UK College of Policing Mental Health and the Criminal Justice System 1 and 3 available at: https://www.college.police.uk/app/mental-health/mental-health-and-criminal-justice-system (accessed July 2025).

[14] Mwiza Jo Nkhata 'Chapter 6: Access to Justice for Persons with Disabilities in Malawi: Exploring the Challenges and Possibilities in the Criminal Justice System' *African Disability Rights Yearbook 8* (2020) 127.

do not understand, or cannot meet, the requirements necessary to have carceral time reduced or to secure early release.[15]

1.7 It is also widely accepted that the presence, or suspicion, of mental disorder or disability could influence decision-making at several points in the criminal justice system (at the point of arrest, interrogation, charge, bail, prosecution, trial, conviction, sentencing, disposal, treatment, and release)[16] and alter the trajectory of the case. The alleged offender, victim or witness could, as a result of the condition, experience problems with memory; struggle to provide an accurate, coherent, consistent and complete account of an event; or could be susceptible to confabulation, acquiescence and suggestibility.[17] To address these problems in the context of the criminal justice system, an audit of the statutory framework to ascertain whether it is compatible with the Constitution[18] and PEPUDA,[19] or provides *reasonable accommodations*,[20] is mandatory.

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15 See Joint Statement of American Association of Intellectual and Development Disability and the Arc available at: https://www.aaidd.org/news-policy/policy/position-statements/criminal-justice (accessed 9 July 2025).

16 Dr Ailbhe O'Loughlin 4.

17 Neta Ziv 'Witnesses with Mental Disabilities: Accommodations and the Search for Truth – The Israeli Case' *Disability Studies Quarterly* Vol 27, No. 4 (Fall 2007) 7.

18 See section 7(2) and Item 2(1)(b) of the Constitution which require the state to *fulfil* the rights in the Bill of Rights and to review laws for consistency with the Constitution respectively.

19 Section 28(3)(b)(i) and (ii) of PEPUDA provide that:

'(b) In carrying out the duties and responsibilities referred to in paragraph (a) **[to eliminate discrimination and promote equality]**, the State, institutions performing public functions and, where appropriate and relevant, juristic and non-juristic entities, must-

(i) audit laws, policies and practices with a view to eliminating all discriminatory aspects thereof;

(ii) enact appropriate laws, develop progressive policies and initiate codes of practice in order to eliminate discrimination on the grounds of race, gender and disability.'

20 The CRPD defines 'reasonable accommodation' as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'

C Implications of the CRPD for this investigation

1 General

1.8 As intimated above, by ratifying the CRPD,[21] South Africa accepts all the legal obligations that are imposed by this instrument.[22] For our purpose, its significance lies in the fact that it enjoins South Africa to:

a) take legislative (amend or repeal existing law, or enact new law) and other measures (policies, directives, guidelines and so on) to ensure the implementation of the rights contained therein; and

b) provide reasonable, procedural and age-appropriate accommodations, including diverse communication methods, for persons with disabilities appearing in court.[23]

1.9 The rights the CRPD urges us to infuse into our criminal justice system and relevant legislation include the right to *legal capacity*; equal access to justice on an equal basis with others; equality before the law; the right to liberty; and the protection of the integrity of the person.[24] [25]

2 Incarceration of mentally ill or incapacitated offenders in international human rights law

1.10 As far as mentally ill accused persons are concerned, imprisonment is considered, in international human rights law, as a measure of last resort. It is believed that the special needs of these offenders are better addressed in the context of non-custodial measures. However, the gravity of the offence itself, risk to society, and social rehabilitation also play a decisive role in this regard. It is acknowledged that incarceration of such offenders does occur and that

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21 In terms of section 231(2) of the Constitution, read with subsection (3), an international agreement binds the Republic only after it has been approved by Parliament unless it is an agreement of a technical or administrative nature. Furthermore, it becomes law once it is enacted into legislation. See, section 231(4) of the Constitution.

22 Human Rights Commission *Human Rights and Persons with Disabilities* 1.

23 See articles 4, 5, 13 and 14 of the CRPD.

24 *Nairobi, Kenya Study* 41-45.

25 These rights are not novel, they also find expression in the Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; and Convention on the Elimination of All Forms of Discrimination Against Women. See *Nairobi, Kenya Study* 45.

efforts to divert them away from the criminal justice system are often thwarted by resource and systemic challenges. The downside of incarcerating mentally ill individuals is that it contributes to the overburdening of the correctional system which often lack requisite healthcare capacity.[26]

D Approach

1.11 The law at the centre of this review, the CPA, is an old-order legislation which by virtue of its ignoble provenance may be deficient and susceptible to amendment or repeal.[27] However, it may also be capable of interpretation that renders its provisions constitutional. We will therefore carefully and thoroughly analyse (read and interpret) the relevant provisions of this Act to ascertain whether they are capable of giving effect to the Constitution and PEPUDA. Where necessary, international law will be considered.[28] Should such constitutional interpretation prove unattainable; amendment, repeal or substitution of the provision found wanting will be pursued.

1.12 While our main focus in this inquiry is improving the substantive and procedural rules and principles relating to mental illness that are contained in the CPA, we cannot completely dismiss the prospect of proposing consequential amendments to other laws dealing with the same subject matter, including the Child Justice Act, Mental Health Care Act and Correctional Services Act. Secondly, the law reform proposals emanating from this review must be evidence based. Consequently, extensive consultation with the general public, organs of state, and most importantly with persons with disabilities or their representative advocacy organisations will be undertaken.

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26 Ibid.

27 See item 1 and 2(1)(a) and (b) of Schedule 6 to the Constitution.

28 See section 233 of the Constitution.

CHAPTER 2: EXPOSITION OF CURRENT STATUTORY FRAMEWORK RELATING TO MENTAL AND INTELLECTUAL DISABILITY

A Introduction

1 Outline of South Africa's criminal justice system and the impact of the Constitution

2.1 In essence, our criminal justice system comprises three distinct, but overlapping, phases, namely pre-trial, trial and post-trial phases;[29] which involves a myriad of processes[30] and multiple actors who, by virtue of their work, are likely to come into contact with mentally and intellectually impaired individuals, *viz* the law enforcement agencies (mainly, the police); the courts (prosecutors, judicial officers, lawyers); and correctional services (prison officials and probation officers). The stages and processes; and powers and functions of organs of state, alluded to above are regulated, primarily, by the Criminal Procedure Act of 1977 (CPA).[31] In turn, the CPA must be consistent with the Constitution as the supreme law of the Republic.

2.2 Upon careful consideration of the Constitution,[32] the inference that the CPA must strike a balance between effective crime control and due process; and ensure that victims and witnesses have unbridled participatory rights throughout the criminal justice system,[33] is

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[29] For general description of criminal justice system, see ADAT Article 48 Southern Africa Litigation Centre *An Exploratory Study of the Interaction Between the Criminal Justice System and Persons with Intellectual and Psychosocial Disabilities in Nairobi, Kenya* (September 2021) 10.

[30] For example, investigation of crime; bail; pre-trial procedural matters; pleadings; defence; sentencing and post-trial remedies (appeal and review) and mercy and pardon. See JJ Joubert (ed) *Criminal Procedure Handbook* Thirteenth Edition (2019) 7.

[31] Act 51 of 1977.

[32] In particular, sections 2; 7(2); 8(1); 9; 10; 12; 27(1)(a); 34; 35; 165(4) and 205 thereof.

[33] The Supreme Court of India in *Jagjeet Singh & Ors vs. Ashish Misshra alias Monu & Anr* (2022) 9 SCC 321 explained this principle as follows:

unavoidable. So far, our criminal justice system has been slated for its disproportionate focus on the rights of arrested, detained and accused persons, which has given rise to tension and an outcry in some quarters that the criminal justice system is offender-oriented to the detriment of the rights and interests of victims and other witnesses. Furthermore, notwithstanding general provisions in the Constitution and the CPA aimed at promoting *victim participation* and *protection*,[34] criticism abounds, for example, that in the current system the role of victims of crime has been relegated to that of an ordinary witness, that it lacks support strategies for victims; that current victim support measures are inadequate, uncoordinated and underutilised.[35] It does seem, therefore, that there is a need for the *development and enactment of legislative measures* to remedy the deficiencies alluded to above, should they be proven to be true.

2 Overview of the CPA vis-à-vis people with cognitive and mental illness

2.3 The CPA reflects, on the one hand, compassion for people afflicted with mental illness who come into contact with the criminal justice system; and a firm stance against those who take advantage of such people, on the other hand.[36]

2.4 Accordingly, it empowers the courts to inquire into the mental state of the accused or witness; to consider diminished responsibility when sentencing the accused; and provides certain accommodations (i.e. allows the court to dispense with the oath or affirmation; witness

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'A victim…has a legally vested right to be heard at every step post the occurrence of the offence… such a victim has unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision…and that the mere presence of the State…does not tantamount to according a hearing to a victim of the crime.'

34 See sections 179(5)(d)(ii) of the Constitution; and 105A(1)(b)(iii), 144(3)(a)(ii), 153(2), and 158(3)(e), 299A and 300 of the CPA. For detailed discussion, see JJ Joubert 14-16. Other relevant provisions are the 'neutral' sections 29, 36A(3), 36D(7)(d)(i) and (ii) of the CPA setting standards for searches and the taking of buccal and intimate samples.

35 See JJ Joubert 6-16.

36 Focus on the law, as opposed to policies or guidelines, is necessary in the light of the Constitutional Court's decision in *Minister of Education v Harris* 2001 (4) SA 1297 (CC) where the court referred with approval to the SCA's decision in *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty)* 2001 (4) SA 501 (SCA) and concluded that:

'…laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend, or be in conflict with laws (including subordinate legislation). Otherwise, the separation between Legislature and Executive will disappear.'

to use non-verbal communication; or to testify through intermediaries). However, these laudable principles exist alongside the courts' power to completely prohibit the testimony of a mentally ill individual while their condition persists. The question is whether these accommodations are sufficient or could be enhanced.

2.5 Conversely, our law views crimes against mentally or intellectually disabled persons in a serious light. It characterises these as serious offences, which carry severe consequences for accused persons involved. For example, the accused could be arrested without a warrant, in appropriate cases by private citizens; release on police or prosecutorial bail is not possible; securing court bail is cumbersome as the seriousness of the offence shifts the onus to the accused; and a conviction could attract a minimum sentence.[37]

2.6 The tough stance alluded to above permeates pre and post-trial remedies. For example, it is extremely difficult for a person convicted of an offence against a person with *intellectual disability* (or a child) to have their criminal record expunged. Their name must first be removed from the National Register for Sex Offenders. The law also bestows power on police officers to enable them to expeditiously preserve forensic evidence in cases of sexual or violent crimes involving people with mental disabilities.[38]

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37 Schedule 1 and 2 of the CPA read with sections 40, 42, 59, 60(11) and (11A). See also section 51 of the Criminal Law Amendment Act 105 of 1997 (minimum sentences legislation).

38 Section 271B(1)(b) and 335B of the CPA. The latter provision, which is modelled on Australian legislation, is important as it seeks to remove barriers in obtaining consent for the taking of forensic samples which may result in undue delays and thus prejudice investigation and prosecution of crimes against persons with disabilities, particularly in cases involving disabled victims of sexual assault. In determining whether to make the order, the magistrate is required to take into account the seriousness of the offence, the best interest of the person from whom the forensic sample must be taken and his or her wishes, if these can be ascertained. See section 23XWU of the Crimes Act 1914 (Cth); and the Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws Final Report 124* (August 2014) 232.

B Analysis of the relevant statutory framework

1 Investigation stage – assessment of CPA rules applicable to law enforcement officers

(a) Overview

2.7 As intimated above, the interaction between law enforcement agencies or officials and the victim, witness or alleged offender signals the commencement of the criminal justice process. This often occurs when the matter is reported to the police; alleged criminal conduct is investigated and evidence is gathered by the police.[39] How should the law enforcement officials respond to incidents involving people with cognitive impairment who, as alluded to above, could experience difficulties with memory, distort or fabricate facts, provide answers they believe the questioner wants, and may have a tendency to acquiesce.[40] Put differently, what reasonable procedural accommodations and support exist in law to ensure that people with mental health issues are able to participate and cooperate fully with authorities *at this elementary stage* of the criminal justice process?

(b) Exposition of the relevant provision of the CPA and their adequacy

(i) Reticence in the CPA

2.8 The CPA is deafeningly silent on this aspect. It only cautions police officers against taking advantage of a mentally vulnerable person in undercover operations as evidence obtained in these circumstances may be inadmissible in court; and to expedite investigations into sexual or violent crimes, empowers police officers to seek consent of a magistrate for medical examination to be carried out if a parent of a minor or a person with mental disability against whom a sexual offence or violent crime has been committed cannot be located or is a suspect in the case.[41]

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39 ADAT Article 48 Southern Africa Litigation Centre *An Exploratory Study of the Interaction Between The Criminal Justice System and Persons with Intellectual and Psychosocial Disabilities in Nairobi, Kenya* (September 2021) 10.

40 Neta Ziv 'Witnesses with Mental Disabilities: Accommodations and the Search for Truth – The Israeli Case' *Disability Studies Quarterly* Vol 27, No. 4 (Fall 2007) 7 and 9.

41 See section 252A(2)(i) and (m) and 335B of the CPA. For source of the latter provision, see footnote 38 above.

2.9 This legislative vacuum and lack of specificity on how police officers should conduct themselves in situations involving mentally ill persons should concern us because, as research emanating from Kenya and Malawi attests, it leads to uncertainty and leaves room for the exercise of wide and unencumbered discretionary powers, which could have devastating consequences.[42] Moreover, we ought to ask deeper questions as the Australian Human Rights Commission has done,[43] whether:

- people with disabilities in general, and those with mental illness in particular, are able to access the criminal justice system at the same rate as people without disabilities;
- support is provided to people with intellectual or psychosocial disabilities when reporting crimes and whether such support, if it is available, is underpinned by legislation;
- crimes by or against people with disability are reported; and vigorously pursued by the police; if not, why;[44]
- information is available (provided) as to how, when and where to report criminal conduct; and
- whether there is data (research) available that can enrich our understanding of the prevalence of crimes affecting this category of people, their risk of victimisation or susceptibility to commit crimes.

2.10 Another crucial aspect highlighted by the Australian Human Rights Commission is enabling mentally ill people in closed settings, or those who care for them, to access justice.[45]

(ii) Narrow scope of the Mental Health Care Act

2.11 Under the Mental Health Care Act,[46] police officers have two responsibilities namely:

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42 See paras 2.15 - 2.23 below.

43 Australian Human Rights Commission *People with Disability and the Criminal Justice System – Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (20 March 2020) 31-32.

44 Research conducted in Australia revealed that police represent a significant barrier to the reporting of crime and subsequent pursuit of a criminal charge. This has been attributed to negative attitudes they hold, failure to identify disability (and to distinguish between intellectual disability, psychosocial disability and acquired brain injury), failure to provide appropriate support or make necessary adjustments, and perception that a person with disability is 'child-like' or that they will be unable to cope with the investigation, which exacerbate their predicament. Id 32.

45 The Australian Human Rights Commission has defined closed settings to include mental health facilities, group accommodation, educational settings, hospitals or correctional facilities. Id 32-33.

46 Act 17 of 2002.

a) to assist in containing and transporting *mentally ill* or *severely or profoundly intellectually incapacitated* individuals to relevant health institution; or

b) to locate a mental health care user that has absconded.[47]

2.12 All subsequent decision-making relating to such persons, for example, whether they should be admitted as involuntary mental health care users or be released, vests in the health practitioner not the police.[48] It is also worth noting that these powers *can only be invoked if the person poses a threat to himself or to others*. It also appears, from further reading of the Act, that the said vulnerable person may be kept in police custody.[49] The language chosen by the legislature in this legislation, particularly in section 40 thereof, severely restricts its reach and by extension the powers and responsibilities of police officers. It is difficult to see, therefore, how this legislation could be of assistance to a police officer who wants to interview or take a statement from a mentally ill victim, witness or accused person who poses no threat to himself or to others.

(iii) No option for assessment, support, treatment or diversion at the point of police contact

2.13 The law as it stands makes no provision for mentally or intellectually ill persons who come into contact with the criminal justice system to be assisted, supported, referred for treatment at the point of police contact unless they pose a threat to themselves or others. Apparently, the erstwhile Mental Health Act catered for pre-arrest and pre-booking diversion whereby a mentally ill accused was diverted from the criminal justice system before a criminal charge was filed; and a police officer could apply for a treatment order for a mentally ill person when it would be more suitable option than to put such a person through the criminal justice system.[50] Regrettably, these options, we submit, are no longer available to police officers. Experts in this area of the law have stressed the value that statutory pre-arrest and post-arrest diversion could have in the criminal justice system.[51]

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47 Section 40, 44, 57 and 66 of the Mental Health Care Act.

48 Section 40(2) of the Mental Health Care Act.

49 Section 60 of the Mental Health Care Act provides that the Minister may make regulations pertaining to the transportation and *the period within which such a person may be kept in police custody*.

50 Letitia Pienaar 'Considering Mental Health Courts for South Africa: Lessons from Canada and the United States of America' *CILSA* Vol 54, No.3 (2021) 6 and 8.

51 Ibid.

(c) Approaches adopted in other jurisdictions

2.14 The issue under consideration – mechanisms police officers could invoke to facilitate participation of people with mental health issues in processes leading up to the decision by prosecutorial authority to charge or not to charge the accused – has garnered considerable attention in other jurisdictions. We consider the developments in this regard with a view to distil best practices.

(i) Kenya

2.15 In Kenya, the rights of persons with disabilities who have been incarcerated are entrenched in legislation. This law accords them the right to be treated on an equal basis with others and to be accommodated in facilities that meet their needs.[52] In contrast, procedures and rules to prevent, or curtail further, detention of mentally ill persons are contained in the guidelines (policies) relating to diversion and decision to charge.

2.16 When weighing up their options on whether to charge the accused, prosecutors consider:

a) the mental state of the accused at the time of the commission of the offence; or
b) whether the accused will be able to understand the charges or procedure in court or give instructions to his or her legal representative.[53]

2.17 These factors could dissuade the prosecutor from prosecuting the case. However, other factors enter the equation:[54]

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52 Section 23 of Persons Deprived of Liberty (Chapter 90A) of the Laws of Kenya provides that:

‘23. Rights of persons with disabilities

(1) Where persons with disabilities are deprived of liberty under any legal process, they shall be treated on an equal basis with others and shall be entitled to such guarantees as are in accordance with the Constitution and the law relating to the protection of the rights of persons with disabilities.

(2) Persons with disabilities deprived of liberty shall be accommodated in facilities that adequately meet their personal needs, taking into account the condition and nature of their disability.

(3) The Competent Authorities shall take appropriate measures to facilitate humane treatment and respect for the privacy, legal capacity and inherent human dignity of persons with disabilities deprived of liberty.’

53 Office of the Director of Public Prosecutions *Guidelines on the Decision to Charge, 2019* para 3.2.2.1.

54 Also, the greater the harm to the victim or community or if the offence was motivated by prejudice against the victim’s disability, among others, the more likely that prosecution is required in the public interest. The likely impact of the prosecution, inter alia, on the victim’s

a) the gravity of the offence;
b) the likelihood of the offender offending again;
c) the need to safeguard the public or those providing care to such person; and
d) the interests of the victim – the more vulnerable the victim's situation or the greater the perceived vulnerability of the victim, the greater the culpability of the suspect.

2,18 Most importantly, prosecutors do not wait for the court to inquire, but proactively seek such an inquiry where it is clear that one is required.

2.19 In addition, sometimes prosecutors, acting at the behest of police officers, consider whether diversion is not the appropriate course of action in the circumstances of a particular case, especially where the offender is a vulnerable person, inter alia, with a mental disorder or impairment.[55] This discretion is circumscribed. Where the accused committed a petty offence, the prosecutor has the authority to decide; but where a serious offence (felony offence) is involved, the bar is set slightly higher, there must be exceptional circumstances, even if the offender is a vulnerable person.

2.20 While the decision relating to the suitability of diversion in a particular case is the prerogative of and vests in the prosecutor, police officers play an important role in this regard:[56]
a) a police officer may request the public prosecutor to consider an offender for diversion;
b) prosecutors do not frequently see offenders before court, consequently police officers are required to flag important information when the police file is handed to prosecutors, including whether the offender is a vulnerable person or has previous convictions;
c) the prosecutor is required to consult with the investigating officer (and the victim) and solicit their views before making a final decision on diversion;
d) where diversion is deemed appropriate, the police officer must inform the prosecutor of any violations of the terms and conditions of such programme, who will in turn terminate the programme and inform the offender; and

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mental health is equally significant. The availability of special measures for the victim; the possibility of a prosecution without the participation of the victim; and the views of the victim or his family, must be considered. Id para 3.2.2.2 and 3.2.2.3.

55 See clauses 7, 9, 10, 15, 17 and pages 5 of the Office of the Director of Public Prosecutions *Diversion Guidelines and Explanatory Notes* (2019).

56 Ibid.

e) diversion records, including the diversion agreement, remain in the police file, but only for official use and is not available to members of the public and should not be used improperly to prejudice the offender in future.

2.21 Sadly, these powers exist alongside wide discretionary police powers to take people with intellectual or psychosocial disability into *custody* or a psychiatric institution.[57] Commentators in Kenya have warned about the pitfalls and deleterious effects the exercise of these uncircumscribed powers could have, that we need to heed, namely that they could:

a) erode due process;
b) result in lengthy indefinite incarceration, during which time mentally ill persons are exposed to heightened risk of violence, abuse and acts of torture or inhuman degrading treatment or punishment;
c) lead to diverse responses when attending to complaints involving mentally ill people as a result of lack of particularity;
d) increase the probability that the vulnerable person will provide unreliable or self-incriminating information or make false confessions;
e) result in failure to screen suspects to establish whether they need support; and
f) lead to failure to capture disability data at the police station; and when the matter eventually comes before court, the court filing system would only reflect or capture the accused's name, the date, case number and the nature of the charge, leaving out the disability, entrusting the prosecutor with enormous powers when deciding to charge or not to charge.[58]

2.22 Lastly, experts in Kenya take a dim view of the institutionalisation of mentally ill persons. They argue that it fosters a perception that a person with intellectual disability is not able to take his or her place in society. To plug this gap in the law (to mitigate excessive police

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57 Section 16 of the Mental Health Act (Cap 248) provides that:

'(1) Any police officer of or above the rank of inspector, officer in charge of a police station, administrative officer, chief or assistant chief may take or cause to be taken into his custody—

(a) any person whom he believes to be suffering from mental disorder and who is found within the limits of his jurisdiction; and

(b) any person within the limits of his jurisdiction whom he believes is dangerous to himself or to others, or who, because of the mental disorder acts or is likely to act in a manner offensive to public decency; and

(c) any person whom he believes to be suffering from mental disorder and is not under proper care and control, or is being cruelly treated or neglected by any relative or other person having charge of him.'

58 For detailed discussion, see *Nairobi, Kenya Study* 20, 21 and 25.

powers), a useful mechanism often resorted to by citizens to secure the release of their mentally disabled family members from police custody is the production of disability cards issued by the National Council for People with Disabilities or letters from government departments.[59]

(ii) Malawi

2.23 Malawi has acceded to the CRPD and has enacted the Disability Act which sets out rights of people with disabilities.[60] However, accommodations necessary to enable people with disabilities to participate in the criminal justice system are yet to be addressed, particularly in the Criminal Procedure and Evidence Code.[61] These are challenges we will also have to grapple with. The most pronounced gap in the Code is its failure to regulate circumstances involving individuals with mental or psychosocial disability, including an injunction that the police must facilitate access to support services for such people. It has been submitted that the neutral provisions, such as the requirement that searches must be conducted with strict regard to decency,[62] do not adequately address this deficiency as their meaning and application in cases involving people with mental illness depend on the conduct of the police and not on a clear prescription of the law. Consequently, police officers have a considerable amount of discretion and power to improvise.[63]

(iii) United Kingdom

2.24 While in the United Kingdom, courts are deemed to be the most appropriate institution to deal with issues of mental disability and the seriousness of the case and public safety determine whether the accused should be prosecuted,[64] there is a myriad of policy directives

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59 Id 19 and 25.

60 Disability Act (Malawi) assented to 10 July 2012 and commenced 1 August 2013. Available at: https://media.malawilii.org/media/legislation/11983/source_file/034281847c6a33c3/2012-8.pdf

61 These relate to how: people with visual or hearing disability should be informed of their rights; searches involving people with disabilities should be conducted; charge sheets or summons should be prepared to accommodate the needs of people with disabilities; service of process and court records should be adapted to accommodate persons with visual impairment; and that no provision is made for court records to be recorded or translated in braille or any other medium. For detailed analysis, see Mwiza Jo Nkhata 'Chapter 6: Access to Justice for Persons with Disabilities in Malawi: Exploring Challenges and Possibilities in the Criminal Justice System' *African Disability Rights Yearbook* (2020) 137-140.

62 For similar provisions in the CPA, see sections 29, 36A(3) and 36D(7)(d)(ii) thereof.

63 Nkhata 140.

64 Where the offender is acutely unwell and the offence is trivial and where there is no threat to public safety, and the approach could lead to recovery and rehabilitation, the offender is diverted from the criminal justice system at the point of police contact.

and guidelines that regulate how police officers should discharge their functions vis-à-vis people experiencing mental health problems. First, their response is governed by the following principles:[65]

a) adherence to the principles of equal access to justice; due process; respect and protection of the dignity of the *accused*, *victim* and *witness*;

b) provision of mechanisms for vulnerable people to report crime;

c) seeking assistance of medical professionals when interviews are conducted, and statements taken;

d) ensuring that investigations are thorough and not influenced by assumptions about reliability;

e) ensuring that this category of people is not prejudiced as a result of their special needs; and

f) arrangements should be in place to refer vulnerable people to appropriate services for assessment, support and treatment.

2.25 Importantly, with regard to accused persons, screening for any appropriate service or diversion, if necessary, takes place during the investigation while the person is still in police custody.[66] At this stage, information is shared between the police and support services (health and social services), and psychiatric opinion is rarely necessary. But there are safeguards to ensure that these mechanisms are not abused, that repeat offenders do not slip through the net, and that police officers err on the side of caution. In determining whether a diversionary approach is appropriate, police officers must:

a) carry out background check for previous convictions;

b) ascertain whether there are any previous diversions following offences that were not prosecuted; and

c) establish whether as a patient, the accused has disengaged from care (failed to follow through) after diversion and then offended on a second or subsequent occasion.

(iv) Australia

2.26 In Australia, diversion of people with cognitive and mental health impairment from the criminal justice system has gained prominence. The New South Wales Law Reform Commission (NSWLRC) has endorsed this approach on the basis that treatment addresses

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65 See in general, the UK College of Policing Mental Health and the Criminal Justice System 1 and 3 available at:https://www.college.police.uk/app/mental-health/mental-health-and-criminal-justice-system (accessed July 2025).

66 Ibid.

the root causes of criminal behaviour and obviates recidivism. Following its inquiry into people with cognitive and mental health impairments in the criminal justice system,[67] the NSWLRC recommended that:

a) where a person has committed a trivial offence, the police should be able to refer that person to services without the need to go to court first;

b) the police be provided with clear legislative power to discontinue proceedings in appropriate cases in favour of referral to services (diversion);

c) at the stage of contact with the police, diversion should be available pre and post charge and be supported by the referral to support services; and should not require admissions or take the place of warnings and cautions; and that

d) existing programmes (for instance, Statewide Community and Court Liaison Service and Court Referral of Eligible Defendants into Treatment) be expanded to assist the police (and the courts) with identification of impairments, assessments of needs, and arranging and maintaining links to services.[68]

2.27 To give effect to these proposals, the NSWLRC recommended, inter alia, that legislation should provide for pre-court diversion option as follows:[69]

(a) where a person appears to have a cognitive impairment or mental health impairment as defined, a police officer may decline to charge or may withdraw a charge.
(b) In making a decision under (a), the police office should take into account:
  (i) the apparent nature of the person's cognitive or mental health impairment
  (ii) the nature, seriousness and circumstances of the alleged offence;
  (iii) the nature, seriousness and circumstances of the person's history of offending, if any, and
  (iv) any information available concerning the availability of treatment, intervention or support in the community.
(c) this option should:
  (i) be available in relation to summary offences and indictable offences that are capable of being dealt with summarily
  (ii) be available both pre and post charge
  (iii) not require admission of guilty, and
  (iv) not preclude a person from being diverted merely because that person has previously committed offences or been dealt with under this option,
(d) this option should only be used where it is not appropriate to deal informally with the person, such as warning or caution.

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67 The NSWLRC defined cognitive and mental health impairments and recommended that these definitions be used in legislation. See New South Wales Law Reform Commission *Report 135: People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* (June 2012).

68 New South Wales Law Reform Commission *Fact Sheet Report 135: People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* 3.

69 NSWLRC Report (June 2012) xxviii.

(e) This option does not preclude a police officer from exercising his or her powers under the Mental Health Act.
(f) A police officer should make a record where a person has been dealt with under this section.

(v) Conclusions drawn from comparative law

(aa) <u>Generally</u>

2.28 It appears advisable, firstly, to explicitly set out the rights of people with mental impairment who come into contact with the criminal justice system; and secondly, to expressly stipulate the powers of the police (and prosecutors) vis-à-vis such persons. This will ensure that there is due process, uniformity, and that the disability is recorded much earlier in the process, and could obviate lengthy indefinite detention of such people. It is worth mentioning that South Africa already has in place a comprehensive statutory framework intended to obviate indefinite detention of mentally ill accused persons.[70]

(bb) <u>Suspects</u>

2.29 From the foregoing, it is apparent that in other jurisdictions, at the very least, mentally ill suspects are protected from harm and self-incrimination when they are detained or questioned by the police; are provided with the necessary support; and could be diverted from the criminal justice system. The appropriate course of action, whether the determination is made by a police official or prosecutor, seems to turn on the seriousness of the offence, public safety concerns, history of the accused, and, in some cases, the views of the victim. Expanding the powers of the police in this regard appears to be gaining traction.

(cc) <u>Victims and witnesses</u>

2.30 As far as victims and witnesses are concerned, various reasonable procedural accommodations and support exist (or are recognised), for example, some jurisdictions insist that mechanisms must exist to enable vulnerable people to report crime; that interviews and statement taking must take place in the presence of qualified medical practitioner; that guidance, advice and assistance of a medical practitioner must be sought; that investigation must not be prejudiced by the condition of the victim or witness; that the presence of a next of kin during investigation be permitted; that investigations must be led by professionals other than police officials in certain instances; and that arrangements must be in place to refer such individuals to appropriate service for assessment, support or treatment.

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70 See the discussion below in para 2.33.

(d) Law reform proposals to improve this area of our law

Recommendations – Accommodations of mentally ill persons during investigations

Having had regard to the gaps in the law, particularly in the CPA; as well as the Mental Health Care Act, Child Justice Act, and Criminal Law (Sexual Offences and Related Matters) Amendment Act; and to obviate addressing this crucial issue in piecemeal fashion, through amendments to these laws; and to give effect to section 9(3) of the Constitution which enjoins the State not to discriminate on the grounds of disability, we recommend:

a) firstly, that the law, either through the amendment of the CPA or inclusion of a chapter in new legislation intended to supplant it, should:
   (i) expressly stipulate the *rights of people with disabilities* in the criminal justice system, including affirmation of their legal capacity; right to equal access to justice; due process and protection of their dignity; that they should not be prejudiced, and no inference of unreliability should be inferred from their condition; and
   (ii) set out *broad principles* that should govern police officers (and other organs of state) when responding to or handling incidents involving people with disabilities in general and mental and intellectual disability in particular;
b) secondly, that it should expressly require that when interviews are conducted or statements taken from *victims*, *witnesses* or alleged *perpetrators* who suffer from, or exhibit signs of, mental or intellectual disability-
   (i) a family member or any other person chosen by the vulnerable person may be present, if available; and that
   (ii) relevant information relating to actual or perceived disability of the witness, victim or alleged perpetrator must be captured in writing at the police station and that the police officer should flag this information for the attention of the prosecutor in the case; and
c) thirdly, that pre-trial diversion of mentally ill accused person contemplated in sections 77 and 78 of the CPA, read in conjunction with Chapter VI of the Mental Health Care Act of 2002 which makes provision for admission, caring for, treatment and rehabilitation of accused persons classified as State patients in terms of the abovementioned provisions; periodic review of their mental health status; and discharge of such patients, should remain a judicial a judicial function.[71]

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[71] This cautious approach is necessitated by the need to protect the public and the integrity of the criminal justice system; and to obviate the institution of civil lawsuits for damages against the

Over and above these reform proposals, provisions in the CPA relating to communication, searches, service of process, and provision of court records must be reviewed and, if deemed necessary, amended to accommodate people with disabilities.

2 Accommodations afforded to mentally ill persons during court proceedings by the CPA

(a) Introduction

2.31 Various factors could impact a mentally ill person's ability to fully and effectively participate in criminal proceedings: misconceptions about credibility and reliability, inability to communicate, acquiescence and suggestibility, and so on.[72] The CRPD requires the law to mitigate this possibility. It enjoins state parties thereto to ensure access to justice for persons with disabilities on an equal basis with others.[73] It mandates training for those in the administration of justice. But, most importantly, it calls for procedural and age-appropriate accommodations to be included in the law to ensure the participation of disabled people throughout the criminal justice process.

2.32 How do we, as a country, fare in this regard? The CPA contains elaborate *substantive* and *procedural* rules and principles relating, broadly, to the approach the *courts* should adopt when dealing with *accused persons* or *other participants* in criminal proceedings who are suspected of, or are suffering from, mental illness or intellectual disability.[74] This is done under the rubrics:

a) accused capacity to understand proceedings: mental illness and criminal responsibility (ss 77-79);
b) requirements for audio visual appearance by accused person (s159B(4));
c) witness to testify *viva voce* (s161(2)(b);

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state, for example, on the basis that a person against whom criminal charges were laid was diverted from the criminal justice system either by police officer or prosecutorial authorities and such a person thereafter committed or caused harm to the victim, witness, himself or herself or committed further offences.

[72] Australian Law Reform Commission *Equality, Capacity and Disability in Commonwealth Laws (Final Report) 124* (August 2014) 192; Yuval Melamed, MD, MHA 'Testimony by Mentally Ill Individuals' *J Am Acad Psychiatry Law* Vol 36, No. 3 (2008) 393.

[73] Article 13 of the CRPD.

[74] Sections 77-79; 159B(4); 161(1) and (2); 164; 170A; 194; 194A; 221(1)(b); 252A(2)(i) and (3)(a); 271B(1)(b) and 335B of the CPA.

d) when unsworn or unaffirmed evidence admissible (s164(1) and (2));
e) evidence through intermediaries (s170A);
f) incompetency due to state of mind (194);
g) evaluation of competency of witness due to state of mind (s194A);
h) admissibility of certain trade or business records (s221(1)(b)); and
i) authority to make use of traps and undercover operations and admissibility of evidence so obtained (s252A(1) and (2)(i)).

2.33 Although some interpretive difficulties will persist,[75] these provisions must be read in context with other relevant provisions, for example, section 192 of the CPA which provides that every person (witness) is competent and compellable to give evidence.[76] Moreover, the aforementioned provisions have been extensively amended by various laws enacted between 1994 and 2021. In addition, they exist alongside a myriad of other laws dealing with the same subject matter, for example, the Child Justice Act;[77] Correctional Services Act;[78] and the Mental Health Care Act.[79] The latter Act, the Mental Health Care Act, is particularly important because its purpose is to facilitate care, treatment and rehabilitation of State patients, mentally ill prisoners, persons referred for psychiatric observation by the courts and people with severe and profound intellectual disabilities, among others. Firstly, it cautions that the abovementioned services (care, treatment and rehabilitation) must not be used as punishment or for the convenience of others. Secondly, it contains provisions designed to obviate indefinite incarceration of mentally ill persons, and to that end:

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75 For example, mental illness or intellectual disability or other similar terms are not defined in the CPA and neither is the definition contained in the Mental Health Care Act of 2002 incorporated therein by reference; section 77(1) states that 'if is appears to the court…that the accused is not capable of understanding the proceedings…the court shall direct that the matter be enquired into…', which raises the question whether the accused's legal representative or prosecutor too can raise the question; section 78(2) states that 'if it is alleged that the accused is by reason of mental illness or intellectual disability or *for any other reason not criminal criminally responsible*' which raises the question whether the italicised general words must be interpreted restrictively to mean some or other mental condition; and section 192 refers, in the heading, to a 'witness' but the provision itself refers to 'every person'. In comparison, section 36(1) of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No 12 (New South Wales) relating to fitness to stand trial is couched in a similar way as section 78(2) of the CPA.

76 This section is qualified by (applies subject to) section 206 of the CPA which provides that:

'206 The law in cases not provided for

The law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act or any other law.'

77 Act 75 of 2008. See section 48(5) thereof.

78 Act 111 of 1998. See sections 49D and 49E of this Act.

79 Act 17 of 2002.

- It provides that where a user is an involuntary mental health care user, for example, as contemplated in section 77(6)(a)(i)(cc) or 78(6)(i)(cc) of the CPA, his or her mental health status must be reviewed six months after the commencement of the care, treatment and rehabilitation and every 12 months after thereafter. Such a review must, inter alia, make recommendations regarding further care, treatment and rehabilitation. The review must be considered by the Review Board which must decide whether or not to discharge the mental health care user concerned.
- It establishes a Mental Health Review Board for each health establishment that provides the services referred to above and bestows on it the power to consider, inter alia, the mental health status of mentally ill prisoners and to discharge such patients.
- It dedicates a whole chapter to State patients, which it defines as persons so classified by the court in terms of sections 77(6)(a)(i) or 78(6)(i)(aa) of the CPA. Importantly, it provides, in respect of these patients, that the head of the health establishment where they are receiving services or the medical practitioner providing services to such patient may apply to a judge in chambers for the discharge of such patient. The judge, in turn, has wide powers, including the power to order that the patient remain a State patient, be reclassified as voluntary, assisted or involuntary mental health care user; be discharged conditionally or unconditionally.[80]

(b) Capacity of the accused (s77-79 of the CPA)

(i) Introduction

2.34 The commission of an act or omission proscribed by law does not automatically lead to criminal liability. Two requirements must be met: unlawfulness - there must be no justification for the alleged infraction; and the perpetrator must be personally blameworthy or culpable. In law, the latter requirement is referred to as "*mens rea*". A significant aspect of culpability is an inquiry into whether the perpetrator has *criminal capacity* – the mental ability required by law to be held responsible and liable for unlawful conduct. Essentially, this refers to the capacity to distinguish between right and wrong and to conduct oneself in accordance with that appreciation.[81]

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80 See in particular section 37 and Chapters III, IV, VI and VII of the Mental Health Care Act. The only problem is that as far as State patients are concerned the Act may be under-inclusive as the relevant provisions thereof only apply to mentally ill accused referred to in sections 77(6)(a)(i) or 78(6)(i)(aa) and thus leaves out of its ambit mentally ill accused referred to in sections 77(6)(a)(ii) and 78(6)(i)(bb) and (cc) and (ii)(aa) of the CPA.

81 Hoctor *Snyman's Criminal Law* Seventh Edition (2020) 136-7.

(ii) Salient features of sections 77 -79 of the CPA

2.35 The CPA anticipates that there may be instances where:

a) there is uncertainty whether the accused is *capable of understanding the proceedings* as a result of mental illness or intellectual disability (mental state), so as to be able to make a proper defence (fitness to stand trial - section 77 of the CPA);[82] or

b) it is alleged at criminal proceedings that the accused is by reason of mental illness or intellectual disability or *for any other reason* not criminally responsible for the crime committed (criminal incapacity- section 78 of the CPA).[83]

2.36 It prescribes, in respect of both instances above, that an inquiry must be conducted to ascertain the mental state of the accused. However, the gravity of the offence determines how the panel should be constituted. In respect of less serious offences, the inquiry must be conducted by one psychiatrist; whereas for serious offences involving violence, by three psychiatrists and a clinical psychologist. The prosecutor assigned to the matter (or any other prosecutor attached to the same court) has the responsibility to bring the relevant information to the attention of the panel.[84]

2.37 For the purposes of the aforementioned inquiry, the court may commit the accused to a psychiatric hospital for a period of 30 days *at a time*. In terms of section 79(2)(a) and (b), an extension may be granted *in the absence of the accused* unless the said accused or his or her legal representative requests otherwise.

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82 Our law in this regard is modelled on the English law. The test in section 77 of the CPA that the defendant must have sufficient intellect to comprehend the proceedings so as to make proper defence was set out in *R v Pritchard* (1836) 173 ER 135 [304]. The test was stated as being whether the defendant is 'of sufficient intellect to comprehend the course of proceedings or the trial, so as to make a proper defence—to know that he might challenge any of [the jury] to whom he may object—and to comprehend the details of the evidence. The Australian court in *R v Presser* (1958) VR 45 set out facts relevant to this test namely: understanding of the charges, court proceedings, evidence, ability to decide what defence to offer, and to explain his or her version of the facts to counsel and the court. These considerations were incorporated into section 6 of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic). These factors have been severely criticised in other jurisdictions on the basis that they put a lot of emphasis on the accused's intellectual ability to understand aspects of legal proceedings and trial process and too little emphasis on the person's decision-making ability. See ALRC Final Report 195-196.

83 If the accused was criminally responsible at the time of commission of the offence but his or her capacity was diminished by reason of mental illness or intellectual disability, this fact may be considered by the court during sentencing. – section 78(7).

84 See in general section 79 of the CPA.

2.38 At proceedings in terms of section 77 or 78 of the CPA, the court may order that the accused be provided with the services of a legal practitioner appointed in terms of the relevant provision of the Legal Aid South Africa Act[85] if this is necessary to prevent substantial injustice.

(iii) Criticism of forensic assessment and provisions underpinning it

(aa) Systemic issues

2.39 Experts in this area of the law have decried that mentally ill persons who have been referred for psychiatric observation:

a) spend long periods awaiting forensic assessment owing to resource shortages (staff and available beds at licensed facilities);
b) whilst waiting (often for several months for beds to become available), they are kept in correctional facilities, and thus remain in the criminal justice system where mental health care services are lacking, which leaves them at risk of falling between the proverbial cracks of the system; and that
c) the law itself prescribes observation period of 30 days, which is considered excessive for psychiatric evaluation, compared to, for example, Canada where a compulsory five-day period is fixed.[86]

2.40 To address these challenges, these commentators proposed a formal diversion of accused persons from the criminal justice system,[87] and because of the enormous shortage of psychiatrists in South Africa's forensic setting, the role of clinical psychologists in forensic assessments should be revisited with the view to intensifying their involvement.[88] Modernising the criminal justice system by introducing a centralised database on mentally ill prisoners is also deemed crucial.[89]

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85 Act 39 of 2014.

86 See, for example, Letitia Pienaar 'Considering Mental Health Courts for South Africa: Lessons from Canada and the United States of America' *CILSA* Vol 54, No.3 (2021) 1, 4 and 17 and footnote 104. See also Marie Claire Van Hout and Jakkie Wessels 'Navigating the Complexities of the Mentally Ill and Mentally Incapacitated in the Criminal Justice System in South Africa' *Forensic Science International: Mind and Law 2* (2021) 4. The latter add that inordinate delays emanate from the lack of registered psychiatrists willing to do the observations.

87 See Pienaar above.

88 Van Hout and Wessels 4.

89 Ibid.

(bb) *Criticism of, and gaps in, the law*

2.41 Some of the abovementioned provisions of the CPA have been altered following a successful challenge of their constitutional validity.[90] [91] However, other gaps and deficiencies persist.

General observations

2.42 In their broad assessment (critique) of sections 77-79 of the CPA, commentators have highlighted the lack of distinction between mental illness or intellectual disability in these sections and berated the uniform assessment procedure that is prescribed in respect of both. In their view, the current statutory framework does not adequately comply with the CRPD and the Protocol to the African Charter on the Rights of Persons with Disabilities. They propose an urgent review of due process; a reconsideration of capacity-based defence; the delineation of intellectual disability within the broader context of psycho-social disability, especially in respect of the procedure for assessment; and ensuring that court orders are appropriate for the specific needs of the person, the identified disability and the interests of justice. Lastly, they bemoaned the lack of formal diversion or rehabilitative options for child and adult offenders in the CPA; in particular, in the sections under consideration.[92]

Fitness to stand trial

2.43 Fitness to stand trial is a pre-trial issue which, in terms of the law expounded above, is determined by mental health professionals during court ordered forensic assessment, after which the court may find the accused either fit or unfit to stand trial. If the accused is unfit, the court may order, inter alia, that they should be treated in a psychiatric hospital, during which time there will be no trial until they regain fitness.[93]

2.44 In South Africa, the problem, corroborated by research, is firstly that whilst the Department of Correctional Services makes an effort to expedite assessments, it is repeatedly hampered by inadequate resources in the forensic mental health care system. Secondly, accused persons who are sent for forensic assessment with mental health issues are often

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90 *De Vos NO v Minister of Justice and Constitutional Development* 2015 (2) SACR 217 (CC). In this case the court found that section 77(6)(a)(i) and (ii) of the CPA denied the presiding officer discretion not to order the detention of an accused in appropriate circumstances which option is available in terms of section 78(6) of the CPA.

91 See Criminal Procedure Amendment Act 4 of 2017.

92 Van Hout and Wessels 3 and 5.

93 Letitia Pienaar 2.

found fit to stand trial, notwithstanding a diagnosis with mental illness. These fit, but mentally ill, accused are returned to custody after assessment to await trial and their trials proceed, with little or no mental health support or any further consideration of their mental illness during trial, unless they raise insanity as a defence.[94] As a result, their condition deteriorates. It has been lamented that the CPA at best does not cater for such a category and at worst contributes to the problem in that the law does not prescribe orders the court can make in cases of such accused - accused who are fit to stand trial but are mentally ill. It has been argued that, at a minimum, such persons require mental health support for the duration of their contact with the criminal justice system. Diversion of such individuals from the criminal justice system into treatment where their mental illness could be identified and addressed has been proposed by commentators as a panacea in these circumstances.[95]

Onus and statutory presumption of sanity

Fitness to stand trial

2.45 With regard to fitness to stand trial, the provisions of section 77 are considered straightforward as far as the onus of proof is concerned. Where an accused relies on this provision, the state has the burden of proving that, notwithstanding the mental illness or intellectual disability, the accused is capable of understanding the proceedings so as to make a proper defence.[96]

2.46 Notably, in contrast to section 78, the legislature did not consider it necessary to include a statutory presumption of fitness to stand trial.

Criminal incapacity

2.47 In contrast, two elements of section 78 have been slated. This provision provides, firstly, that every accused is considered sane until the contrary is proved on the balance of probabilities. Secondly, the burden of proof in this regard rests with the party that raises the issue. To the extent that the accused may be saddled with the responsibility to discharge this onus, it has been asked whether the common-law and statutory presumption of sanity and its

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94 Pienaar points out that untreated mental illness can lead to recidivism, causing the mentally ill accused to cycle in and out of the criminal justice system, perpetuating the revolving door phenomenon, which poses a threat to public safety and contributes to prison overcrowding since these persons will be housed in prison repeatedly. Id 5.

95 Id 2-6 and 17.

96 PJ Schwikkard and TB Mosaka *Principles of Evidence* Fifth Edition (2023) 642. Interestingly, section 44(4) of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No. 12 (New South Wales) provides that: 'The onus of proof of the question of a defendant's unfitness to be tried for an offence does not rest on any particular party to the proceedings.'

concomitant rule that the accused must prove his or her defence is constitutionally defensible.[97]

2.48 In *Snyman's Criminal Law*, this issue is summed up as follows:

> It is conceivable that the constitutionality of the rule that the onus of proof rests on X to prove his mental illness if he is the party raising the defence, may in future be challenged on the basis that it amounts to an unjustifiable infringement of the presumption of innocence. In the Canadian case of *Chaulk* the majority of the court held that the presumption of sanity, as well as the onus placed upon the accused who raises this defence, is a justifiable limitation of X's right to be presumed innocent, and that this rule is therefore not unconstitutional.

2.49 Notwithstanding the Canadian court's finding in *Chaulk*, it has been argued that *it would be better to burden the state with the onus of proving that X was not mental ill at the time of the conduct in question*, as such an approach would accord with the general rule relating to the onus in criminal matters as well as the presumption of innocence. It has further been observed that this approach has merit, especially if one bears in mind that a mentally ill person is of all persons, the least capable of proving his own incapacity.[98]

2.50 Others agree that the presumption of sanity and onus provision in section 78 are inimical to the constitutional presumption of innocence. They argue that, in view of the fact that insanity excludes the element of capacity, which is a fundamental aspect of liability, placing the onus on the accused relieves the state of establishing this element of liability. While some see this provision as placing an *evidentiary burden* on the accused as opposed to a *burden of proof*.[99] However, the latter argument, it has been submitted, does not cure the *prima facie* unconstitutionality of the presumption of sanity, instead, it may strengthen the argument that it meets the requirements of the limitation clause.[100] Without expressing a view on the merits of either of these arguments, it is necessary to underscore that failure by the accused to discharge the burden contemplated in section 78(2) would not automatically lead to a guilty verdict, which would infringe the presumption of innocence, instead the proceedings

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97 Id 641.

98 Hoctor *Snyman's Criminal Law* 153.

99 On the difference between overall onus and burden to adduce evidence in rebuttal, see Schwikkard and Mosaka 660 and cases cited therein.

100 Id 642.

would continue in the ordinary manner. For this reason, we make no recommendation in relation to this aspect.

Composition of panel, process and period for observation

2.51 Firstly, although the provisions relating to the composition of the panels that conduct forensic investigations have been amended to address criticism by the court, section 79 is still considered problematic:[101]

a) firstly, because it is not clear whether the second psychiatrist to be appointed by the court should be a state or a private psychiatrist;
b) secondly, because there are no guidelines for the requirement that the accused has to show good cause for the appointment of a third psychiatrist; and
c) thirdly, because the appointment of a psychologist is not mandatory.

2.52 Secondly, it has been observed that although the Act makes provision for observation for a period not exceeding 30 days, in most instances, persons are taken to the psychiatrist for an assessment session of an hour, *while being kept in custody*. During this period, they are generally detained with all other awaiting trial detainees where they are particularly vulnerable to abuse, where those with mental illness are generally not provided with the necessary medication, including those who have not previously been diagnosed or treated.[102]

2.53 Moreover, it has been lamented that there is no consistency in the procedure for evaluation followed by different psychiatrists nor is the reporting method consistent. It has been observed that in some instances, the reports are short with conclusions and recommendations, whilst in others, the reports are detailed.

2.54 Lastly, legal representatives appointed by the court to look after the interests of the accused sometimes insist that the psychiatrist should come and testify regarding the

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101 Marie Claire Van Hout and Jakkie Wessels 'Navigating the Complexities of the Mentally Ill and Mentally Incapacitated in the Criminal Justice System in South Africa' *Forensic Science International: Mind and Law 2* (2021) 3 and 4. It will be recalled that for serious offences (murder culpable homicide, rape, offence involving serious violence, or if the court considers it necessary) the inquiry must be conducted by the head of health establishment (who must be a psychiatrist or his delegate); psychiatrist appointed by the court; psychiatrist appointed by the court upon application and on good cause shown by the accused; and clinical psychologist where the court so directs. Section 79(1)(a) and (b) of the CPA.

102 Sections 49D and 49E of the Correctional Services Act 111 of 1998 seeks to obviate these eventualities but, as stated elsewhere in this discussion paper, it is hampered by severe resource constraints.

evaluation and its finding, especially where the report is lacking in detail, but more often than not, such reports are just accepted.

Exclusion of mentally ill accused from some processes

2.55 Section 79(2)(b) relating to the extension of the period of committal of accused person for forensic observation provides that:

> When the period of committal is for the first time extended under paragraph *(a)*, such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.

2.56 We submit that the requirement that the accused (or his legal representative) should be informed of the pending application for extension of the committal period is implied in this provision. Otherwise, how would they exercise the choice to be present when the matter is considered. Nevertheless, the provision raises constitutional issues and could be under-inclusive. Section 35(3)(e) and (f) of the Constitution require the accused to be present when being tried and to be represented by a legal practitioner. Secondly, it seems deficient in that it does not deal with subsequent extensions of the period of committal.

Questions

a) Is section 79(2)(b) of the CPA consistent with section 35(3)(e) and (f) of the Constitution which require the accused to be present when being tried and to be represented by a legal practitioner?

b) Do you agree that it may be under-inclusive in that it does not expressly cater for subsequent extensions of the period of committal of the accused for psychiatric observation?

(iv) Input from a psychiatrist

(aa) Introduction

2.57 The Commission benefits immensely from the inputs of experts who are at the coalface of the issues raised in its inquiries. For the purpose of this investigation, an insightful and invaluable submission has been received from a psychiatrist who has worked in psychiatric hospitals in various provinces for many years, the key features of which have been reproduced hereunder.

(bb) The process of psychiatric evaluation

2.58 We understand that the process of psychiatric evaluation proceeds as follows:

- Bookings come from prosecutors with J138, Prosecutor's Report, and sometimes with copies of the whole docket.
- Dates for evaluation are then given (sometimes, immediately).
- The accused comes with the docket, the investigating officer, and a relative. Health practitioners have access to previous files if the accused is a mental health care user. The documentation (police docket) is perused; the offender, relative and investigating officer are interviewed; a decision is then taken on what the mental condition was at the time of the offence (or we suppose is at the time of appearance in court in the case of fitness to stand trial); the interview is typed as it happens so that the report can go out the same or the following day if a conclusion is reached which happens in 90% of the cases. If the conclusion is not reached or there is a need for further information, another booking is made and the prosecutor, the police are informed about the next date and what other information is required.
- If further investigation is necessary, this can be done on an outpatient or inpatient basis.
- Reports are made available to prosecutors within 3 days of the examination.
- If an accused is mentally ill, or on maintenance treatment, treatment is prescribed, issued and a referral is given for the accused to get treatment from the nearest facility. The problem is police officers at the cells do not do so reliably, compared to prison authorities.

(cc) *Broad issues relating to observations*

2.59 The submission also highlighted the following issues which are critical in this review, namely that:

2.59.1 the waiting period for forensic assessment in academic hospitals is about 1 ½ years, which, in turn, extends the amount of time it takes for the case to be finalised (by between 4–5 years);

2.59.2 average cases dealt with per month range between 17-30, and focus mainly on accused persons and criminal capacity of children; and only occasionally on victims, witnesses or complainants;

2.59.3 on average, 60% of single cases are found not fit to stand trial and accused stay in prison in the absence of a psychiatric hospital;

2.59.4 although the law prescribes a period of 30 days for observation, patients are usually seen and written up after one or two visits;

2.59.5 detailed reports are often prepared with recommendations which obviates queries from courts (queries from lawyers often focus on why the accused the accused was not observed for 30 days); and

2.59.6 assessment for full 30-day period usually makes no difference to the outcome, compared, for example, to the outcome reached after two visits.

(dd) General comments on the CPA

At the time of arrest

2.60 This expert has submitted that any accused who is obviously mentally ill in the cells or in court should be taken to the nearest hospital for assessment or treatment. The doctor can document and make findings available if necessary. Keeping mentally ill accused persons in the cells before they are taken for observation without receiving the necessary treatment poses a risk to themselves and to police officers. For this purpose, further recommendations were made that:

a) contact details of available psychiatrist should be available in every hospital;
b) accused persons should be transferred from the cells to a prison hospital section; and
c) prosecutors and magistrates should instruct the police officers to take the accused for treatment if it is so obvious that the accused is sick.

Period of observation

2.61 This expert argued that accused persons who have committed offences are no better or worse than the everyday psychiatric patient who is immediately taken to a psychiatric hospital and against whom no charges are laid, who is treated and discharged which renders the necessity of 30-day requirement questionable.

2.62 This expert also explained that the J138 is a document that allows assessing agency – the psychiatrist - to detain the accused for 30 days after the lapse of which it needs to be renewed should the process take longer. And, that it is often misinterpreted to mean that every accused referred for observation must be admitted for 30 days. This expert recommended that the role of this document should be clarified – it is a referral order for observation which should cover all modes – the 30 days would be the validity of the document after which it would need to be renewed if the process is not completed.

2.63 This expert pleaded that psychiatrists should decide how long the observation should take (the duration of the process) and whether the accused should be an outpatient or inpatient. These are experienced people who would know after 10 minutes in most instances what the decision will be if they have the right information.

<u>Waiting period</u>

2.64 The expert also highlighted complex and inexplicable issues bedevilling the system, including that:

a) some accused are granted *bail* after being referred for observation, spend time at home, sometimes on treatment and a year and a half later or so they are then locked up in a forensic psychiatric ward;
b) sometimes magistrates refuse to sign a J138 because they want an observation without admission;
c) some referrals are unnecessary;
d) preferably, accused persons must be seen shortly after the alleged offence, whilst everything is still raw and clear and a decision on how to proceed or treatment can be made quickly; and that
e) a number of cases are referred for psychiatric evaluation several years after the commission of the offence and usually no explanation is provided why, for example, a person would spend 5 years in jail and thereafter be referred for observation.

2.65 The expert proposed a screening process of cases referred for observation (with docket, investigating officer, relative and prosecutor's report), which could be used to determine whether hospital admission is necessary. And, highlighted another problem: the lack of district surgeons in provinces who would, through evaluating some of the cases, reduce the workload and referrals to hospitals.

2.66 It has also been recommended that there needs to be a monitoring authority for the waiting lists as it constitutes a grave injustice that cases are delayed instead of the accused getting a speedy trial or even being admitted to a hospital.

2.67 The expert also proposed that the quality of prosecutors' summaries needs to be improved, and they need to be trained in mental health issues.

<u>Reports</u>

2.68 Lastly, the expert proposed that recommendations should be made in the report, for example whether the accused is intellectually disabled or organically impaired (impairment attributable to brain injury or disease as opposed to a psychiatric condition), risk factors, with the possibility of declaring some of the cases on an outpatient basis.

(v) Lessons from other jurisdictions

(aa) Australia

<u>Overview</u>

2.69 To address the issues similar to those we are seized with – improving participatory rights of people with mental illness in the criminal justice system - Australia has adopted multipronged approach which involved the Australian Human Rights Commission (AHRC) and the Australian Law Reform Commission (ALRC), with the former focusing on policy intervention strategies and the latter on the law and law reform.

2.70 The AHRC proposed the development and adoption of *Disability Justice Strategy* incorporating, inter alia:

a) early intervention and diversion into appropriate programmes to enhance the lives of people with disabilities and support the interests of justice;
b) increased service capacity and support;
c) effective training to address the rights of people with disabilities and prevention of and appropriate responses to violence and abuse, including gender-based violence; and
d) better frameworks and policies to address the intersection of disability and gender to achieve an appropriate understanding and responses by service providers.[103]

2.71 The ALRC focused on laws to ascertain whether they deny or diminish equal recognition of people with disabilities as persons before the law and their ability to exercise legal capacity and changes that should be made.[104] The review embarked upon by the ALRC encompassed laws relating to access to justice and assistance programmes, federal offences, giving evidence and medical treatment. The overarching objective of the review being to ensure that Australian laws are responsive to the needs of people with disabilities and to advance, promote and respect their rights. In other words, it considered whether individual autonomy and independence could be modelled in law and legal frameworks.[105] The ALRC made crucial findings and recommended extensive reforms to the law in this regard, particularly in respect of eligibility to stand trial, to which we revert below. It highlighted lack of

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[103] Australia Law Reform Commission *Equality, Capacity and Disability in the Commonwealth (Final Report) 124* (August 2014) 193.

[104] Australian Law Reform Commission *Equality, Capacity and Disability in the Commonwealth Laws (Summary Report)* (2014) 3.

[105] Id 4 and 8.

support for people with cognitive impairment accessing and interacting with the justice system as one of the stumbling blocks hampering access to justice.[106]

Detention on the basis of unfitness to stand trial

2.72 A person unfit to stand trial cannot be tried. This rule, characterised as 'protective', is meant to avoid inaccurate verdicts, maintain the moral dignity of the trial process, and to avoid unfairness and abuse of the process of law. It exists alongside common law precept, which has been supplanted by statutory enactments in some jurisdictions in Australia,[107] that the alleged offenders are presumed fit to stand trial. Any party raising this issue bears the onus to prove on the balance of probabilities that the defendant is unfit to stand trial.[108]

2.73 The ALRC bemoaned that the application of the rules on unfitness to stand trial could lead to adverse outcomes for individuals found unfit, who may be subjected to detention for an indefinite period in prison or in secure hospital facilities. Although some states have legislated to divert such people away from the criminal justice system, in others, a person can be indefinitely detained in a custodial setting without trial if found unfit to stand trial. Such a person may end up in a secure mental health facility or detention for periods well in excess of those they would have served had their case progressed if they had pleaded guilty and been sentenced to imprisonment for the offence. They will also find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed. Thus, there is an incentive for innocent people to plead (or to be advised to plead) guilty, to avoid the consequences of unfitness. The effect of a finding of permanent unfitness varies between states.[109] This procedure effectively prevents people with disabilities from accessing protection or justice from the courts on the same footing as others. Thirdly, there are no special procedures for children with Foetal Alcohol Spectrum Disorder, intellectual or psychosocial disabilities who are overrepresented in the juvenile system.[110] The ALRC also referred to criticisms of this rule in other jurisdictions, namely that:

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106 ALRC Final Report 194.

107 See section 269I of the Criminal Law Consolidation Act 1935 (SA) and section 7(1) of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (Victoria).

108 ALRC Final Report 194-195.

109 Id 196. See also Australian Human Rights Commission *People with Disability and the Criminal Justice System – Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (20 March 2020) 23 *et seq*.

110 Id 24.

- fitness to stand trial test, by focusing on intellectual ability, generally sets too high a threshold for unfitness and is inconsistent with the modern trial process;
- the test is too difficult to apply to defendants with mental illness because the criteria were not designed for them, rather it was developed through experience with defendants who were deaf and mute and, by extension, defendants with intellectual disability;
- a defendant may not be unfit to stand trial even where the court takes the view that he or she is not incapable of making decisions in his or her own interests.[111]

2.74 In relation to this criticism, the Victorian Law Reform Commission, like its counterpart, the UK Law Commission,[112] inquired whether the test for unfitness to stand trial should include a consideration of the defendant's decision-making capacity, effective participation in the trial, or capacity to be rational.[113] In contrast to the New South Wales Law Reform Commission which recommended that the common law criteria for unfitness, as represented in *Presser* case, should not be fundamentally changed but updated and incorporated into legislation,[114] the UK Law Commission proposed a new test, which it included in section 3 of its draft legislation, which incorporates both *capacity for effective participation* and *decision-making capacity*.[115]

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111 ALRC Final Report 197.

112 See Law Commission of England and Wales *Unfitness to Plead Volume 1 Report* (12 January 2016) and Law Commission of England and Wales *Unfitness to Plead Summary* (13 January 2016). The UK Law Commission proposed that the legal test should be a revised single test which assesses the decision-making capacity of the accused by reference to the entire spectrum of trial decisions he or she might be required to make. Under this test an accused would be found to have or to lack decision-making capacity for the criminal proceedings. It proposed a new test under which a defendant would be found unfit to stand trial if he or she is unable: (1) to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial; (2) to retain that information; (3) to use or weigh that information as part of decision making process; or to communicate his or her decisions. Id 198. This proposal has been included in section 3 of the draft legislation prepared by the Law Commission of UK and Wales.

113 Id 197.

114 For detailed discussion on New South Wales Law Reform Commission approach and recommendations, see ALRC Final Report 199. It is important to point out that the NSWLRC recommended that in determining whether a person is unfit to stand trial the court must consider: (a) whether modifications to the trial process can be made or assistance provided to facilitate the person's understanding and effective participation; (b) the likely length and complexity of the trial; and (c) whether the person is legally represented. These considerations have been incorporated into section 44 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No 12 (NSW).

115 Section 3 of the draft Bill of the Law Commission of England and Wales provides that:

'3 Capacity to participate effectively in a trial

2.75 To address problems relating to fitness to stand trial in general, and lengthy incarceration of people found unfit, the ALRC proposed, inter alia, that all states and territory laws governing consequences of a determination that a person is ineligible to stand trial should provide for limits on the period of detention without conviction that may be imposed and ensure that detention orders are subject to regular reviews.[116] It further endorsed a proposal that such limits should be set by reference to the period of imprisonment likely to have been imposed if the person had been convicted of the offence.[117] It added that if such persons, after they have

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(1) This section has effect for the purposes of section 1.

(2) A defendant is to be regarded as lacking the capacity to participate effectively in a trial if the defendant's relevant abilities are not, taken together, sufficient to enable the defendant to participate effectively in the proceedings on the offence or offences charged.

(3) In determining that question, the court must take into account the assistance available to the defendant as regards the proceedings.

(4) The following are relevant abilities—

(a) an ability to understand the nature of the charge;

(b) an ability to understand the evidence adduced as evidence of the commission of the offence;

(c) an ability to understand the trial process and the consequences of being convicted;

(d) an ability to give instructions to a legal representative;

(e) an ability to make a decision about whether to plead guilty or not guilty;

(f) an ability to make a decision about whether to give evidence;

(g) an ability to make other decisions that might need to be made by the defendant in connection with the trial;

(h) an ability to follow the proceedings in court on the offence;

(i) an ability to give evidence;

(j) any other ability that appears to the court to be relevant in the particular case.

(5) For the purposes of subsection (4)(e) to (g), an ability to make a decision is to be regarded as consisting of—

(a) an ability to understand information relevant to the decision,
(b) an ability to retain that information,
(c) an ability to use and to weigh the information when making the decision, and
(d) an ability to communicate the decision.

(6) For the purposes of this section, so much of any proceedings as consists of a court proceeding under section 6 of the Proceeds of Crime Act 2002 (making of a confiscation order) is not to be treated as proceedings on an offence.

116 ALRC Final Report 206 and 210.

117 A good example of such a provision is section 20BC(2) of the Crimes Act which provides that:

'(2) Where a court has made a determination under subsection (1), the court must:

served their time, pose a threat or danger to themselves or the public, they should be the responsibility of mental health authorities, not the criminal justice system.[118] Laws of various states[119] provide that where a person is found unfit to plead and there is a finding of guilt, the court may impose a limiting term representing the time the person must spend in forensic custody. The limiting term generally mirrors the sentence a court would have imposed for the offending conduct.[120] The Australian Human Rights Commission has endorsed this recommendation and called for its implementation across all jurisdictions. Courts imposing limiting terms have been urged to consider that a mentally ill person cannot demonstrate mitigating or discounting factors available to other defendants.[121]

(bb) Kenya

2.76 In Kenya, all persons are competent to testify unless they cannot *understand the questions put to them or cannot give rational responses to those questions* as a result of youthfulness, old age or disease (either of the mind or body). Accommodations for disabled people such as giving evidence in any other manner which will render the testimony intelligible exist.[122] The law, in section 125(2) of the Evidence Act, expressly affirms the legal capacity of a mentally ill person by stating that:

> A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

(a) if the court has determined that the person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital and that the person does not object to being detained in a hospital—order that the person be taken to and detained in a hospital, or continue to be detained in a hospital, as the case requires; or

(b) otherwise—order that the person be detained in a place other than a hospital, including a prison;

for a period specified in the order, not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.'

118 ALRC Final Report 210.

119 See sections 301 of the Crimes Act 1900 (ACT); section 23(1)(b) of the repealed Mental Health (Forensic Provisions) Act 1990 (NSW); and section 2690 of the Criminal Law Consolidation Act 1935 (SA).

120 Australia Human Rights Commission 24.

121 New South Wales Law Reform Commission *People with Cognitive and Mental Health Impairments in the Criminal Justice System – Criminal Responsibility and Consequences Report 138* (2013) par 0.27.

122 Section 125(1) and 126(1) of the Evidence Act Chapter 80 of the Laws of Kenya.

2.77 The most conspicuous element of Kenyan law relating to the incapacity of an accused is the requirement that if bail is granted to such a person, the court may release him or her on sufficient security being given that he or she will be properly taken care of and prevented from doing injury to himself/ herself or to any other person, and for his or her appearance before the court or such officer as the court may appoint in that regard.[123]

2.78 Notwithstanding the provisions alluded to above, Kenya has express legislative provisions regulating how people with intellectual or psychosocial disabilities must be dealt with – sections 162 to 164 of the Criminal Procedure Code, which are broadly similar to sections 77-79 of the CPA. The said sections have been slated on the basis that they cause the right of the accused with mental impairment to be suspended until the court can inquire into their mental capacity; they have not been amended to reflect the spirit of the Constitution of Kenya, including the right to equality before the law, freedom from discrimination, the right of access to justice and the right to a fair trial; do not consider the imperatives of the CRPD on access to justice, legal capacity, and the right to reasonable accommodations.[124]

(cc) <u>United Kingdom</u>

2.79 In the United Kingdom, the basic principle, espoused in the *M'Naughten* case,[125] is that all suspects are sane and need to be held legally accountable for their actions unless the contrary is proved in court. Defendants who are charged and found to be insane or unfit to stand trial leave the criminal justice system without being convicted of the offence but are subjected to a whole range of restrictions and hospital orders.

2.80 To the prosecutors, however, the suspect's mental health is just one of a range of issues which must be weighed in each case. In some instances, the purpose or value of prosecuting a vulnerable person is considered to be low and not in the interests of the public or justice.

2.81 Our law in relation to psychiatric evaluation to determine whether the accused is fit to stand trial or lacks criminal capacity is the same as English law, with two important exceptions. In the UK too, a person is referred to an institution for evaluation for a period not exceeding 28 days at a time, but such a period should not *cumulatively* exceed 12 weeks. In other words,

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123 Section 162(3) of the Criminal Procedure Code of the Laws of Kenya Chapter 75.

124 *Kenya, Nairobi Study* 54-57.

125 *Queen v M'Naughten*, 8 Eng. Rep. 716 (1843).

the period of assessment is capped.[126] Secondly, in contrast to our law, a court may remand an accused person of unsound mind to a health institution for treatment before his or her case is finalised.[127] The words "for treatment" are missing in all the relevant provisions of the CPA, namely section 77(6)(a)(i)(aa)-(cc) and 78(6)(b)(i)(aa)-(cc) of the CPA.

(dd) *Canada*

2.82 In Canada, as in South Africa, the assessment order of the mental condition of an accused person does not exceed a month. However, *in respect of an order for assessment to determine whether the accused is unfit to stand trial*, the law specifically stipulates that it must not exceed five days. This period may be extended if compelling circumstances warrant it.[128] Generally, the period of assessment is capped as the period of the initial assessment together with all extensions must not exceed 60 days.[129] No psychiatric or other treatment of the accused may be carried out during the assessment. It is also noteworthy that the law expressly contains a presumption that an accused is presumed to be fit to stand trial unless the court is satisfied on the balance of probabilities that the contrary is true.[130]

(vi) Compassion for mentally ill accused who uses audiovisual appearance in court and its limitations – section 159B(4) of the CPA

(aa) *The import of section 159B(4) of the CPA*

2.83 An incarcerated accused person required to appear before the court for a postponement or bail application may do so by means of audiovisual link.[131] Section 159B(4) of the CPA, which is couched in peremptory language, requires the court, at such appearance, to inquire into the physical and *mental well-being* of the accused and may direct that the facilities be used in such a manner to enable the presiding officer to satisfy himself as to the accused's well-being. This provision reads:

> The court must, at every appearance of an accused person in terms of section 159A **[postponement of criminal proceedings]**, inquire into the physical and mental well-being of the accused person and for that purpose may, where necessary, direct that

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126 Section 35(7) of the Mental Health Act of 1983 provides in this regard:

'An accused person shall not be remanded or further remanded under this section for more than 28 days at a time or for more than 12 weeks in all; and the court may at any time terminate the remand if it appears to the court that it is appropriate to do so.'

127 Section 36 of the Mental Health Act of 1983.

128 Section 672.14(1)-(3) of the Criminal Code (R.S.C., 1985 c.C-46).

129 Section 672.15(2) of the Criminal Code of Canada.

130 Section 672.22 of the Criminal Code.

131 Section 159A of the CPA.

> the facilities referred to in section 159C be used in such a manner which will enable the presiding officer to satisfy himself or herself as to the accused person's well-being as that presiding officer would be able to do if the accused person were physically before the court.

2.84 The ambit of the procedure contained in section 159B(4) is circumscribed and is available in several courts and correctional facilities.[132] As its counterpart in civil proceedings,[133] its purpose is to prevent unnecessary delays, expense and inconvenience caused by the transportation of awaiting-trial prisoners from correctional facilities to courts. However, where evidence is required or prosecution opposes bail, it cannot be invoked.[134] In contrast to other jurisdictions, this compassion – concern for the accused's well-being – which is linked to the use of an audiovisual link - is not extended to victims or witnesses who, for whatever reason, are not be able to attend court. Section 158 of the CPA, with the heading 'criminal proceedings must take place in presence of accused', makes provision for use closed circuit television by a witness to prevent delays; save costs; convenience; to prevent harm; or if it is in the interests of the security of the state, public safety, or justice; but *not as a special measure available to a mentally or intellectually (or physically) disabled witness or victim*. This provision, as its heading puts beyond doubt, is concerned with the accused not with disabled witnesses or victims. In fact, this mechanism - to give evidence remotely - is an exception to the rule contained in this section that all evidence must be given in the presence of the accused.

(bb) *<u>Use of similar procedure in other jurisdictions</u>*

2.85 In the United Kingdom too, "live links",[135] the equivalent of audio-visual links in the CPA, are widely used. This mechanism is available to magistrates and police officers when extending the detention of an accused person whilst an investigation is underway and for bail decisions.[136] However, it is not limited to accused persons. Most importantly, for our purpose, *witnesses* under the age of 18; or suffering from a mental disorder; or who have a significant

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[132] In terms of section 159A(2), the accused must be above the age of 18 years; must be in custody in respect of an offence; must have previously appeared in court; must be required to appear for further postponement or application for bail.

[133] See section 51 of the Magistrates Court Act 32 of 1944.

[134] JJ Joubert (ed) *Criminal Procedure Handbook* 123 and 240.

[135] Defined in the relevant legislation as follows:

"live link" means an arrangement by which a person (when not in the place where the hearing is being held) is able to see and hear, and to be seen and heard by, the court during a hearing.

[136] Section 43 and 45ZA of the Police and Criminal Evidence Act 1984.

impairment of intelligence; or have physical disability or disorder, are allowed to give evidence by means of a live link.[137]

2.86 In Canada, witnesses *in general* may participate, inter alia, in criminal matters outside Canada by means of technology that enables parties to the matter to hear and examine the witness in question.[138]

(cc) *Law reform proposals*

2.87 It is unfathomable why the courts must show concern for the well-being of the accused person and not empathise with other parties to the proceedings. To counter the perception that the law is disproportionately concerned with the rights and well-being of accused persons and to foster the rights of persons with disabilities in general and those with mental health issue in particular, it is recommended that the CPA be amended to enable the courts where criminal proceedings are pending, and in appropriate circumstances, to provide assistance to witnesses on grounds of *incapacity*. The special measures envisaged in this context include allowing vulnerable witnesses to give evidence by means of a live link or video recorded evidence in addition to the use of intermediaries, gesture language; demonstrations or any other form of non-verbal expression as contemplated in section 161 of the CPA.[139]

Recommendations

We make the following non-statutory recommendations: that support for mentally ill accused persons be increased and that concomitant and appropriate resources be provided; and that effective training of role-players in the criminal justice sector be provided to protect the rights of mentally ill users.

Furthermore, that the expansion of the role of clinical psychologists be explored further.

(c) The law relating to mentally impaired victims and witnesses

(i) Introduction

2.88 The Australian Judicial Commission observed that:

> People with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have

137 Section 16 and 24 of the Youth Justice and Criminal Evidence Act 1999.

138 Section 46(1) and (2) of the Canada Evidence Act.

139 See ensuing paragraphs.

> preconceived views regarding a person with an intellectual disability. For example, they may fail to attach adequate weight to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability.[140]

2.89 The barriers faced by people with disabilities, which thwart their full participation in criminal proceedings, have also been attributed to the rules on the competency of witnesses; difficulties in accessing support and assistance in giving evidence; and establishing credibility when interacting with the justice system. Experience in other jurisdictions is that cases are not thoroughly investigated, in part because of the perception that people with disability are not competent to give evidence as witnesses in criminal proceedings or considered credible witnesses. As a consequence, crimes involving vulnerable people go unprosecuted and their vulnerability is heightened.[141] The question is how do we fare in this regard?

(ii) Overview of basic principles contained in the CPA

2.90 The basic rules of our law are that every witness, including the victim, unless expressly excluded by law, is *eligible* and may be *forced* to give evidence in a criminal trial;[142] the said evidence must be tendered *orally*;[143] and to ensure that it is admissible and reliable,[144] it must be given under oath, affirmation or admonishment.[145] The court decides whether a witness is competent and compellable to testify.[146] The evidence of a witness who was not property sworn in is inadmissible. Evidence must be given in the presence of the accused so he can

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140 ALRC Final Report 224.

141 Ibid.

142 Section 192 of the CPA. This provision must be read together with section 206 of the CPA which reads:

> 'The law as to the competency, compellability or privilege of witnesses which was in force in respect of criminal proceedings on the thirtieth day of May, 1961, shall apply in any case not expressly provided for by this Act.'

143 Section 161 of the CPA.

144 See in this regard, *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC); *Sobahle Macinezela (aka Macimela) and The State* (550/2017) [2018] ZASCA 32 (26 March 2018); and *Wayne Gavin Armstrong and The State* (Case Number A265/16) Western Cape Division (17 September 2018).

145 Sections 162, 163 and 164 of the CPA. Witnesses who do not wish to take the oath, give evidence on affirmation, and thus the law acknowledges the secular character of modern society. On historical account of the development of the law in this regard, see Ireland Law Reform Commission *Report on Oaths and Affirmations (LRC 34-1990)* (December 1990).

146 Section 193 of the CPA.

observe the demeanour of the witness and challenge it through cross-examination.[147] In addition to these provisions, the CPA makes provision for proceedings to be held in private (behind closed doors) or to be moved to another place; for the use of closed circuit television, audiovisual link or similar devices; for evidence to be given at any place that is arranged to put the witness at ease or obviate upsetting the witness but allows the court and other parties to the proceedings to hear the testimony and see witnesses.[148] However, these provisions are severely circumscribed.

(aa) *Complete ban due to state of mind - s194 of the CPA*

Meaning and application by the courts

2.91 As far as people who suffer from mental illness or labouring under the influence of alcohol or drugs are concerned, they are completely barred from testifying in criminal cases *whilst their condition subsists*. Section 194 of the CPA provides that;

> **194 Incompetency due to state of mind**
> No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.

2.92 Jafta AJA, in *S v Katoo*,[149] explained various aspects of this provision. He stated that the word 'imbecile' is outdated terminology and imbecility is not a mental illness; only imbecility induced by intoxication or drugs falls within the ambit of the section, and then only when the witness is deprived of proper use of reason. Secondly, he held that section 194 must be read in context with section 192 and 193 of the CPA. Under section 192, every person is competent to give evidence. The court has a duty under section 193 of the CPA to inquire into the competence of a witness and could consider medical evidence on the mental state of the witness or observe the witness and form its own opinion on the witness's ability to testify. He added that such an approach was in line with the presumption that every person is a competent witness. According to him, two requirements, both of which must be satisfied, flow from section 194, namely that it must be shown that the witness suffers from mental illness (or imbecility due to intoxication or drugs) and that as a direct result thereof the witness is deprived of proper use of his or her reason. He cautioned that mental illness on its own is not sufficient

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147 Schwikkard and Mosaka 399.

148 See sections 153, 158(2), 159A, 169 and 170A(3) of the CPA.

149 2005 (1) SACR 522 (SCA), see in particular paras 9-12.

to warrant a finding of incompetence. It must affect the witness's ability to testify.[150] The learned Judge added that in the past courts allowed people with mental disorders to testify subject to their being competent to do so (if they were not deprived of proper use of their reason).

2.93 As opined by the court in *S v Katoo*, expert evidence, contemplated in 194A of the CPA, may be necessary to make a determination whether a person is mentally ill or not.[151] As far as section 164 is concerned, the court explained that there must be an assessment to determine whether the witness can distinguish between the truth and falsity; whether she understands the nature and import of the oath or affirmation; failing which they must be admonished to speak the truth.[152]

Criticism

2.94 Lumping together people who suffer from mental illness with people whose incapacity stems from alcohol consumption or drug use is problematic. Firstly, because the latter group can be dealt with summarily by the court through adjournment of the matter and contempt proceedings once the witness has sobered up. Secondly, because the law contains elaborate provisions stipulating how substance abuse, which includes alcohol, must be dealt with.[153]

2.95 It also flies in the face of the CRPD which emphasises that people with mental disabilities have the same legal capacity and agency as people without disability and sections 161 and 164 of the CPA which seek to promote the participation of such people in criminal proceedings. It assumes that a witness suffering from mental illness would not understand admonishment provided for in section 164 of the CPA, or questions and give answers that can be understood, that the evidence of such a witness would be unintelligible. It thus equates legal capacity with mental capacity.

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150 Id para 14.

151 Section 194A of the CPA, inserted into the CPA in 2017, entrusts the court with the responsibility of determining the competency of a witness to give evidence by providing that a witness may be examined by a medical practitioner, a psychiatrist or clinical psychologist who must furnish the court with a report on the competency of the witness to testify.

152 Schwikkard and Mosaka 496.

153 See section 255 of the CPA. The Prevention of and Treatment for Substance Abuse Act 70 of 2008, which repealed Drug Dependency Act of 1992 referred to in this section, makes provision for an enquiry and committal of such people to treatment. Reference in section 255 of the CPA to the 1992 Act must now be read as reference to the 2008 Act. See section 12 of the Interpretation Act 33 of 1957.

(iii) Accommodations to facilitate participation of witness with mental impairment in criminal proceedings

2.96 There are exceptions to the abovementioned rules.

(aa) *Testifying through non-verbal expression*

2.97 Firstly, it is permissible for a deaf, mute, senior, youthful or mentally incapacitated witness to use gestures, demonstrations or other forms of non-verbal communication.[154] The relevant provisions of section 161 of the CPA provide that:

> **161 Witness to testify *viva voce***
> (1) A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*.
> (2) In this section the expression ***'viva voce'*** shall –
> (a) In the case of a witness lacking the sense of hearing or the ability to speak, be deemed to include gesture-language; and
> (b) In the case of a witness under the age of eighteen years or a witness who suffers from a physical, *psychological*, *mental* or emotional condition, which inhibits the ability of that witness to give his or her evidence *viva voce*,
> be deemed to include demonstrations, gestures or any other form of non-verbal expression.

(bb) *Admonishment*

2.98 Secondly, in terms of section 164 of the CPA, the evidence of a person who has been cautioned by the court to speak the truth, instead of taking the oath or affirmation, is admissible. This provision reads:

> **164 When unsworn or unaffirmed evidence admissible**
> (1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

2.99 Lying in these circumstances constitutes perjury.[155] Criminal capacity would be required for liability.[156] This procedure is invoked when dealing with a witness who, as a result of youthfulness, lack of education, or other cause does not understand the significance of the oath or affirmation. Whilst aimed at child witnesses,[157] it equally applies to *mentally ill* or

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154 Section 161(2) of the CPA.

155 Section 164(2) of the CPA.

156 Schwikkard and Mosaka 402.

157 As far as children are concerned, the following points are noteworthy: there is no statutory provision regulating the child's competence to give evidence; the SAPS officers are instructed to assume that a child 12 years of age or younger cannot understand the significance of the

intellectually impaired witnesses.[158] The presiding judicial officer must establish whether the witness understands the nature and import of the oath. If the witness does not, the presiding judicial officer must establish whether the witness can distinguish between truth and lies, and if they can, admonish the witness to speak the truth.[159]

(cc) *Giving evidence through an Intermediary*

Overview of section 170A of the CPA

2.100 To protect vulnerable witnesses, namely children under the age of 18; and witnesses who suffer from psychological, mental or emotional condition; and older persons, from undue psychological, mental or emotional stress, trauma or suffering if they were to testify, the court may allow them to give evidence through intermediaries.[160] The following elements of this procedure are worth noting:

a) only the court may examine such witness;
b) the court may direct that the witness's evidence be given at any place;
c) the court may direct that the witness be protected from seeing or hearing any person whose presence may upset such witness; and
d) the evidence tendered through an intermediary shall not be inadmissible on account that such intermediary did not qualify to be appointed as such.

2.101 Intermediaries are appointed largely from the ranks of social workers, educators and psychologists. Intermediaries can also assist the court in establishing the competence of the witness and whether they qualify for the assistance of an intermediary. A witness for whom an

oath; the courts too draw inferences in this regard depending on the age of a child; the child must demonstrate to the presiding judicial officer that they understand the difference between the truth and lies; intermediaries and experts could assist in determining the competence, and garnering the evidence, of a child; a child witness or party in a case in the Children's court must be questioned through an intermediary; a child over the age of 10 may decline the assistance of an intermediary if it is a fully informed decision by the child; and may give evidence in camera. See JJ Joubert (ed) 376; Schwikkard and Mosaka 403, 432 and 494; section 61(2) of the Children's Act 38 of 2005; and section 153(5) of the CPA.

[158] JP Swanepoel 'Chapter 13: The Trial Courts' in Joubert (ed) *Criminal Procedure Handbook* (2019) 291 and 376.

[159] Ibid.

[160] Section 170A of the CPA. This provision was extensively amended in 2022 by the Criminal and Related Matters Amendment Act 12 of 2021.

intermediary has been appointed participates in proceedings through that intermediary not personally.[161]

2.102 Furthermore, the Minister has the power to issues regulation (subordinate legislation) relating to the counselling of witnesses and the assistance of, and support to witnesses.[162]

Criticism

2.103 Regrettably, witnesses with intellectual or sensory disabilities and child offenders have not been included in this statutory framework. To cure this lacuna, it has been proposed that the court must interpret provisions of the CPA relating to intermediaries expansively.[163]

Law reform proposal

Recommendation

It is recommended that section 170A(1)(b) be amended to include witnesses with intellectual or sensory disabilities.

(iv) Lessons from other jurisdictions

(aa) Australia

Victims and witnesses with cognitive challenges

2.104 In Australia, all witnesses who are able to comply with testimonial formalities such as taking the oath or being truthful are competent to give evidence.[164] There is no other test of physical or psychological competence, but a judge has discretion in exceptional cases to refuse to permit a witness to testify where the evidence is likely to be unreliable. Otherwise, matters of competence are relevant only to the witness's credibility and the weight to be attached to the evidence given.[165] The Australian Human Rights Commission, however, observed that people with disabilities frequently experienced prejudicial assessments of their competence to give evidence as witnesses in criminal proceedings, despite evidence that most people with intellectual disabilities are no different from the general population in their

161 See Schwikkard and Mosaka 428-30. The authors also point out that prosecutors often receive "competency reports" from social workers for the same purpose, but a competency report is not a statutory requirement for the appointment of an intermediary.

162 Section 191A of the CPA.

163 Schwikkard and Mosaka 426 footnote 137 and 138.

164 Section 13(1), (3) and (4) of the Evidence Act 1995 (Cth) Australia.

165 ALRC Final Report 225.

ability to give reliable evidence as long as communication techniques are used that are appropriate for the particular person.[166]

2.105 The Australian Law Reform Commission (ALRC),[167] has reviewed existing tests of a person's capacity to exercise legal rights or participate in criminal proceedings as a witness. It has been recommended that they be reformed in line with art 12 (equality) and 13 (access to justice)[168] of the CRPD. It has proposed that these tests be reformulated to focus on whether, and to what extent, a person can be *supported* to play their role in the justice system, rather than on whether they have the capacity to play a role at all. It acknowledged, *generally*, that a range of personal and systemic issues could affect the ability of persons with disabilities to participate fully in court processes, including communication barriers, difficulties accessing the necessary support, and misconceptions and stereotypes about the reliability and credibility of people with disabilities as witnesses. In relation to the competency of witnesses specifically, it is submitted that these barriers include rules dealing with the competency of witnesses and difficulties in accessing the necessary support and assistance in giving evidence. It referred to the Judicial Commission of New South Wales which observed, as stated above, that:

> People with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have preconceived views regarding a person with an intellectual disability. For example, they may fail to attach adequate weight to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability.

2.106 The consequence of failure to investigate, pursue charges or support the capacity of people with cognitive impairments to participate as witnesses or victims in court proceedings; barriers to establishing credibility; assumptions by police and court officers about the competency of such people to give evidence as witnesses in court, resulted in crimes going unpunished which in turn heightened the vulnerability of this vulnerable group.

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166 Id 225-226.

167 Id 192, 194, 224, and 225.

168 To recap, this article requires state parties to ensure effective access to justice by providing accommodations in all legal proceedings and appropriate training of those working in the justice sector.

<u>Changes to the law</u>

2.107 The ALRC noted that legal reform without access to the support necessary to enable, particularly people with cognitive impairment interacting with the criminal justice system, to participate in legal processes will have limited practical impact. It noted that section 13(1) of the Evidence Act 1995 (Cth)[169] *implies* that a person's lack of capacity may be overcome by forms of support or assistance being provided to them in giving evidence. It had proposed that the Evidence Act should *expressly* provide that competence must be determined in the context of available support, a view that enjoyed support from stakeholders. In other words, it argued that the test of general competence should explicitly incorporate the concept of support.[170] Generally, sections 30 and 31 of the Evidence Act 1995 provide examples of the assistance that can be afforded to people with disabilities, with the former making provision for an interpreter and the latter applying to deaf and mute witnesses. The ALRC argued that there is no reason to limit the application of these provisions to a particular category of witnesses needing support. It proposed that there should be express provision for any witness who needs support to give evidence in any appropriate way that enables them to understand questions and communicate answers. It added that the courts should be empowered to give directions in this regard.[171] The Evidence Act also includes provisions protecting witnesses from improper questioning and allowing them to give evidence in a narrative form. The Crimes Act too contains an extensive range of provisions protecting vulnerable people in their interaction with the justice system, including allowing vulnerable people to choose someone to accompany them while giving evidence in proceedings;[172] protective provisions that may disallow inappropriate or aggressive cross-examination of vulnerable and special witnesses; allow for the use of alternative arrangements for giving evidence such as close-circuit television; exclusion of members of the public from the courtroom; and ensure that vulnerable

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169 Section 13(1) of the Evidence Act provides that:

'(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

(a) the person does not have the capacity to understand a question about the fact; or

(b) the person does not have the capacity to give an answer that can be understood to a question about the fact;

and that incapacity cannot be overcome.

Note: See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.'

170 ALRC Final Report 227.

171 Id 229.

172 New South Wales' Criminal Procedure Act 1986 (NSW) contains similar provision.

witnesses are not compelled to give further evidence unless it is necessary in the interests of justice.[173]

2.108 We have already dealt with the changes it proposed to the test for unfitness to stand trial above, we will not repeat it here, except to add that it noted that the existing test did not consider the possible role of assistance and support for defendants.

2.109 It recommended that the law, the Evidence Act 1995, be amended to provide that:

1. a person is not competent to give evidence about a fact if the person cannot be supported to:
   a) understand a question about the fact; or
   b) give an answer that can be understood to a question about the fact.
2. that a person who is competent to give evidence about a fact is not competent to give sworn evidence if the person cannot understand that he or she is under an obligation to give truthful evidence and cannot be supported to understand.
3. A witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers.[174]

2.110 Because of the overwhelming view that to facilitate the giving of evidence by people with disability by allowing questions to be explained and assistance to be given in communicating the answers, it also recommended that the Crimes Act 1914 (Cth) be amended to provide that a witness who needs support has the right to have a support person present while giving evidence, who may act as a communication assistant; assist the person with any difficulty in giving evidence; or provide the person with other support.[175] With regard to concerns about the effect of supporters on the fairness of proceedings, including the perception that evidence is essentially being communicated to the court by the support person, rather than the witness, and about opportunities to influence evidence, the ALRC the submitted that the role of the supporter will be subject to judicial discretion and the overriding duty of the judicial officer to ensure that court proceedings are fair.[176]

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173 ALRC Final Report 231.

174 ALRC Final Report 225 and 227.

175 Id 228 and 230.

176 Id 230.

(bb) *Canada*

Eligibility, Oath and affirmation

2.111 Canadian law relating to oaths and affirmations in criminal proceedings is, to a large extent, similar to South African law.[177] The most conspicuous exception is that the form for the oath is not prescribed.

Accommodation for witnesses with mental or physical disability

2.112 In Canada, the law provides that if a witness finds communicating challenging as a result of physical or mental disability, the court may order that he or she be permitted to give evidence *by any means* that render the evidence understandable. And the court may inquire into the necessity and reliability of the means chosen in this regard.[178]

2.113 However, if the mental capacity of a witness who is 14 years or older is challenged, the court must determine:

a) whether the witness understands the nature of the oath or solemn affirmation; and
b) whether the person is able to communicate the evidence.[179]

2.114 If the witness understands the oath or affirmation and is able to communicate the evidence, he or she shall testify under oath or affirmation. However, if the witness does not understand the nature of an oath but is able to communicate the evidence, he may testify on the promise to tell the truth. Such a witness may not be asked any question regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.[180]

2.115 A person who neither understands the oath or affirmation nor is able to communicate intelligibly is barred from testifying.[181]

2.116 A party who raises the issue of capacity bears the responsibility of convincing the court that such an issue actually exists.

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177 Section 13 and 14 of the Canada Evidence Act R.S.C, 1985, c. C-5.

178 Section 6(1), (2) and (3) of the Canada Evidence Act.

179 Section 16(1)(a) and (b) of the Canada Evidence Act.

180 Section 16(2) and (3) of the of the Canada Evidence Act.

181 Section 16(4) of the of the Canada Evidence Act.

(cc) United Kingdom

<u>Eligibility to give evidence</u>

2.117 In the UK, everyone, regardless of their age, is competent to give evidence as a witness in criminal proceedings, except people who do not understand questions put to them and give answers that cannot be understood.[182]

2.118 Importantly, the onus is on the party calling the witness to satisfy the court that the witness is competent. Expert evidence on this issue may be admitted.[183]

<u>Oath</u>

2.119 A witness can be sworn and give evidence if he has attained the age of 14 and has sufficient appreciation of the solemnity of the occasion and of the responsibility to tell the truth. A witness who is able to give intelligible evidence is presumed to have sufficient appreciation if no evidence is adduced to the contrary. It is for the party seeking to have the witness sworn in to satisfy the court in respect of the requirement above. Expert evidence may be received on the question. Intelligible evidence means the witness understands the questions put to him as a witness and gives answers that can be understood.[184]

2.120 The law relating to unsworn evidence is similar in all respects to our law.[185]

<u>Special measures applicable to vulnerable witnesses</u>

2.121 In that country, the Youth Justice and Criminal Evidence Act 1999 *expressly* requires the courts to provide assistance (or special measures) to witnesses in criminal proceedings (other than the accused) who are under the age of 18 at the time of the hearing; suffer from mental disorder; have impairment of intelligence and social functioning; or physical disability or disorder.[186]

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182 Section 53(1)-(3) of the Youth Justice and Criminal Evidence Act 1999 (YJCEA).

183 Section 54(2) and (5) of the YJCEA.

184 Section 55 of the YJCEA.

185 See section 56 and 57 of the YJCEA.

186 Section 16 of the YJCEA.

2.122 The purpose of any special measure or assistance (or combination thereof) is to improve the quality of evidence to be given by the witness, meaning its completeness, coherence, and accuracy.[187] The special measures may include:[188]

- preventing the witness by means of a screen or other arrangement from seeing the accused;
- giving evidence by means of live link;
- giving evidence in private;
- video recorded evidence (evidence in chief, cross-examination and re-examination);
- giving evidence through an intermediary; and
- provision of such a device as the court considers appropriate with a view to enabling questions or answers to be communicated by a witness despite any disability or disorder or other impairment which the witness has or suffers from.

Recommendations

We recommend that:

a) the relevant provisions of the CPA be amended to:
   (i) ensure that mental disability does not disqualify a witness from testifying if such a witness understands the duty to tell the truth or is able to understand questions and respond thereto intelligibly;
   (ii) provide special measures that can be used to facilitate the participation of witnesses and victims who suffer from mental or intellectual disability in criminal proceedings, including:
   - preventing witness by means of screen from seeing the accused;
   - giving evidence by means of video link;
   - giving evidence in private; or
   - provision of such device as the court consider appropriate to enable questions and answers to be communicated by a witness.

187 Section 16(5), read with 19(2), of the YJCEA. Coherence in this context refers to the witness's ability to give answers which address the questions put to the witness and can be understood both individually and collectively.

188 Sections 23-30 of the YJCEA.

3 Post-trial accommodations

2.123 The Department of Correctional Services is required by law to provide certain accommodations to offenders afflicted with disabilities in its care whether such offenders have been sentenced or not, including mentally or intellectually disabled or offenders with sensory disability.[189]

2.124 As stated above, the CPA prohibits the expungement of the criminal record of a person convicted of an offence against a child or a person with intellectual disability whose name has been included in the National Register for Sex Offenders unless their name has been removed from such register.[190]

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189 See sections 37, 40(3)(c), 41(3), 42 and 49D of the Correctional Services Act 111 of 1998.

190 Section 271B(1)(b) of the CPA.

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