

SOUTH AFRICAN LAW COMMISSION

ISSUE PAPER 7

PROJECT 82

**SENTENCING
RESTORATIVE JUSTICE
(Compensation for victims of crime and
victim empowerment)**

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INTRODUCTION

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

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PREFACE

This issue paper (which reflects information gathered up to the end of January 1997) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The issue paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit written comments, representations or requests to the Commission by **30 June 1997** at the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have. Comment already forwarded to the Commission should not be repeated; in such event respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who may be contacted for further information, is Mr W van Vuuren. The project leader responsible for the project is The Honourable Ms Justice L van den Heever.

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CHAPTER 1

ORIGIN OF THE INVESTIGATION AND SOME INTRODUCTORY REMARKS

1.1 During 1991 a project committee was established for the South African Law Commission's investigation into sentencing. The purpose of the investigation is to review all aspects related to sentencing on a continuous basis. The project committee on sentencing identified a number of projects for investigation one of which is aimed at improving the plight of victims of crime. One of the aspects identified by the project committee for investigation was community participation and individual interests in the sentencing process. Dr H F Snyman, a former member of the committee, prepared a short paper reflecting some proposals for improvement of our law in respect of community participation and individual interests in sentencing. These proposals include improved involvement of victims in the sentencing process by introducing victim compensation, victim impact statements, victim offender mediation and greater consultation between victims of crime and public prosecutors.

1.2 With regard to the proposal for the establishment of a fund for the compensation of victims of crime in South Africa, the committee recommended attendance of the 8th International Symposium on Victimology as a point of departure to obtain information pertaining to services provided for victims and compensation schemes elsewhere in the world.

1.3 The 8th International Symposium on Victimology was organised and presented by the Australian Association on Victimology and took place from 21 - 26 August 1994 and was attended by Professor CH Cilliers, a former member of the project committee. The World Association of Victimology is affiliated to the United Nations and has the status of an official non-governmental organisation. Compensation and restitution were central themes at the Symposium on Victimology and not only were the theoretical foundation and functioning of compensation systems discussed, but also the practical relevance of such systems. Professor Cilliers prepared a report for the Commission on the issue of compensation for victims of crime the contents of which is included in this Issue Paper.

1.4 The Republic of South Africa is at present undergoing changes and major reforms are being considered. The future development of the country is being re-evaluated not only on the

political, social and cultural front, but also in respect of the judicial processes in general. Researchers and other functionaries are constantly struggling to keep the judicial system in touch with developments in the country. However, the high crime rate, the unprecedented prevalence of violence and overcrowded prisons in South Africa pose problems for a meaningful and scientific evaluation.

1.5 A re-evaluation of the past also presents the opportunity to consider afresh the development of those aspects that were kept in abeyance within the boundaries of our country. One of those aspects is the role of the victims of crime in the judicial system. Since the Republic of South Africa is part and parcel of Africa and whereas certain judicial principles of Africa are also bound to be applied in South Africa, it is appropriate to reconsider the victims of crime as the “lost son” of the judicial process from an African perspective. Traditionally African principles are based on reparation and less emphasis is placed on the retributive aspect of crime. The victims of crime are therefore central in those judicial systems. The question arises whether the so-called African principles should also be accommodated in the search for a system which will give due recognition to the victims of crime. The search for restoring the role of victims of crime may also have far reaching consequences for the Government's Reconstruction and Development Programme.

1.6 The purpose of this issue paper is to consider the question of restorative justice which includes a consideration of the involvement of victims of crime in the criminal justice process, reparation to victims of crime and community participation in the criminal justice process and to determine whether there is a need for legislative reform. In recent times there has been interest in a new way of doing justice. The desire has been expressed to return to more traditional systems of justice which give greater prominence to the victim, greater emphasis on the issue of redress and community involvement in the fight against crime and healing of the community. When crimes are committed communities feel violated as well and they have needs too. One cannot ignore the public dimension of crime and therefore the justice process cannot be fully private.

1.7 For the purpose of this issue paper it is necessary to have a clear understanding of the meaning of the following terms:

- * **Victims** - Victims are persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws.¹ The term therefor includes direct victims (the person who was directly prejudiced by the commission of the crime) as well as indirect victims (persons who were not directly involved in the crime, but who were directly prejudiced as a result thereof, for example the family of a victim of a murder).
- * **Sentencing** - The process representing a public quantification of the individual offender's blameworthiness, determined according to acceptable standards of proportionality.²
- * **Community** - A collection of individuals who maintain homogeneous interests and customs in a distinctive social structure, in a limited territorial area and who show a strong inclination towards group identification.
- * **Victimisation** - The process whereby a victim, either innocently or through negligence or intentionally, is exposed to the negligent and or intentional unlawful conduct of a criminal which is prohibited by law. It is not limited to conduct which the victim regards as criminal, but it includes the feelings, responses and the community's attitude towards the victim.

1 The **Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power**: United Nations Compendium of United Nations standards and norms in crime prevention and criminal justice United Nations: New York 1992 211 ff.

2 Van der Merwe D P **Sentencing** Johannesburg: Juta 1991.

CHAPTER 2

RESTORATIVE JUSTICE

2.1. Restorative justice appears to have emerged from the victim-offender mediation or reconciliation movement which began to develop in Canada and North America in the 1970's. Restorative justice represents a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which caused it. It is also, more widely, a way of dealing with crime generally in a rational and problem solving way. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control.

2.2 Restorative justice is therefore in the first instance, a form of criminal justice based on reparation. Actions are aimed at repairing the damage caused by the crime, either materially or at least symbolically. When someone wrongs another, he or she has an obligation to make things right. The goal of the process is to heal the wounds of every person affected by the crime. In this context reparation to the victim and community is regarded a duty or obligation on the offender.

2.4 Secondly, communities are also affected by the commission of crime. If communities believe that the criminal justice agencies can effectively prescribe solutions to the crime problem, there is a risk that they may cease to look to preventative obligations which are fundamentally in their own hands. Crime is best controlled when members of the community are the primary controllers through active participation in persuading offenders to accept responsibility for their actions, and, having done so, through concerted efforts of participation, reintegrate the offender back into the community of law abiding citizens. Low crime communities are communities where people do not mind their own business, where tolerance and deviance has limits, where communities prefer to handle their own crime problems rather than hand them over to the professionals.

2.5 In general, the philosophy of restorative justice is based on three beliefs, namely:

- * Crime results in harm to victims, offenders and communities.
- * Not only government, but also victims, offenders and communities should be actively involved in the criminal justice process.
- * In promoting justice, the government should be responsible for preserving law and order, and the community for establishing peace.

2.6 These general beliefs lead to a number of elements common among restorative justice programmes, including:

- * Crime is regarded an injury to victims and community peace.
- * It focuses on putting right the wrong.
- * The victim, community and offender are active roleplayers in the process.
- * Compensating victims for their losses through restitution.
- * Empowering victims in their search for direct involvement in the criminal justice process.
- * Assisting victims to regain a sense of control in the areas of their lives affected by the offence.
- * Holding offenders responsible for their behaviour.

2.7 Thus, the process of restorative justice seeks to redefine crime, interpreting it not so much as breaking the law, or offending against the State, but as an injury or wrong done to another person. It encourages the victim and the offender to be directly involved in resolving conflict and thereby becoming central to the criminal justice process with the

State and legal professionals becoming facilitators, supporting a criminal justice system which aims at offender accountability, full participation of both the victim and the offender and making good or putting right the wrong.

2.8 As part of this process, restorative justice demands consideration of approaches such as that of offering compensation, where appropriate, to the victims and empowering victims in their search for recognition through direct participation in the criminal justice system. These two issues are discussed below.

COMPENSATION FOR VICTIMS OF CRIME

2.9 The principles according to which victims of violent crimes are compensated are recognised in most European countries, as well as in the USA and Canada. These principles were approved by most of the countries participating in the Eleventh Congress of the International Association of Penal Law during 1974.

*** The rationale for a compensation fund**

2.10 The important question to be answered is therefore whether the system should be introduced and not on what basis it should function. The most important arguments in relation to the introduction of such schemes also focus on the justification for its existence. The most important arguments supporting the introduction and continued existence of compensation schemes are:

- * The legal liability theory (In terms of the legal liability theory the State has a legal duty to compensate victims for all the damages and losses suffered as a result of the commission of an offence);
- * the social contract theory (the social contract theory is based on the philosophy of a moral duty);
- * the social accountable theory (State compensation funds make contributions towards damages or losses arising from the commission of crime and they therefore form a partnership with the State in combatting crime); and

- * the utilitarian theory (the success of compensation schemes operate to the benefit of the judicial system and therefore assist in restoring relationships within the community).

- * **The meaning of “victim”**

2.11 For purposes of compensation schemes it is necessary to distinguish between victims of natural disasters and accidents and victims of crime. In terms of international compensation schemes only the last-mentioned category qualifies. Meiners³ states unequivocally that only actions that are made criminal by the law and that have serious consequences for the victims, such as murder, rape, assault, robbery and arson, should receive consideration. Death or injury must therefore arise from an act which is prohibited by law and the person prejudiced by such act must be an “innocent victim”. Edelhertz and Geis⁴ state that compensation is aimed at the granting of public funds to persons who have been victimized by a crime of violence and to persons who survive those killed by such crime.

- * **What is a state compensation fund**

2.12 A State compensation fund is a fund created with State revenue for victims of serious crimes, mostly crimes against the person, to compensate **partly** the victim for losses suffered as a result of injuries sustained or for loss of income during the recovery period. Many State compensation funds are supplemented with a levy payable by convicted offenders. Some countries charge a uniform levy for all types of crimes while others charge different levies for different crimes.

- * **The administration of compensation systems**

3 1978 and 1990.

4 1974.

2.13 It is clear from the literature that the administration of compensation funds can be divided into three broad categories. They are:

- * Administration by a new agency. Most compensation systems make use of independent and newly created boards or tribunals for the administration and functioning thereof. Examples of systems that function in this manner are Britain (England, Scotland and Wales), Europe (the Netherlands), Canada (Ontario, Saskatchewan, Newfoundland, Alberta and Manitoba), United States of America (New York, Hawaii, Maryland and New Jersey), the systems of New Zealand and New South Wales in Australia.
- * Administration by an existing agency. In those cases where the administration is done by an existing agency it usually involves workmen's compensation schemes or insurance systems. Examples of such schemes are found in Canada (British Columbia) and the United States of America (Florida, Indiana, Montana, North Dakota, Texas, Virginia and Washington). The reason for employing such agencies is cost related and it is felt that costs can be saved in doing so.
- * Administration by courts. Very few systems make use of administration by the courts. Examples are Canada (New Brunswick) Britain (Northern Ireland), the United States of America (Delaware, Illinois, Massachusetts, Ohio, Rhode Island, Tennessee and West-Virginia) and Australia (Victoria). Administration by the courts causes many problems, to such an extent that Burns⁵ states that courts lack investigative staff, have case backlogs, are adversarial in character and conservative in applying legislative policy. As a result very few jurisdictions utilize the judicial administrative model.

* **Compensation for monetary loss**

2.14 Clearly, the most important purpose of compensation systems is to compensate victims for monetary loss. Since it is almost impossible to compensate victims for all physical injuries, all compensation schemes attempt to compensate for injuries that can be determined in financial

5 1992.

terms. Although the schemes differ as to the approach to the extent of monetary loss, most schemes provide for the compensation for the payment of medical expenses.

2.15 As a general rule compensation schemes award compensation for loss of income. In most American States loss of income is compensated directly, while three States, namely Alaska, Hawaii and New Jersey compensate for loss of earning power. In California, Illinois and Tennessee loss of future earnings is included in the scheme. In Britain, the Board is guided by the procedure which has to be followed in a civil action in respect of loss of income by a victim.

2.16 Loss of maintenance for a dependant of the victim is generally accepted in compensation schemes although the term dependant is not uniformly interpreted by the different schemes. In the Canadian Province Alberta the term is defined as a spouse, child or other relative of a deceased victim who was in full or in part dependent upon the income of the victim at the time of his or her death and includes a child of the victim born after his or her death. In the United States the dependants of a deceased victim can receive compensation for financial loss in Alaska, Hawaii, Indiana, Kansas, New Jersey, North Dakota, Ohio and Tennessee. In certain jurisdictions funeral costs are specifically defined as financial loss. All American States where compensation schemes exist make provision for funeral costs.

* **Minimum and maximum awards**

2.17 A number of factors influence compensation awards. The most important factor is the minimum and maximum amounts fixed for compensation and which is included in almost all jurisdictions. In determining these fixed minimum and maximum amounts the most important consideration is to keep the scheme as cost-effective as possible. In determining the minimum amount, applications that do not meet the necessary minimum requirements are not to be considered and according to Burns⁶ it represents a device to filter out trivial applications.

6 1992.

2.18 All compensation schemes reduce the compensation award if the victim receives compensation from a collateral source. Similarly, the amount is reduced in the case of a social security benefit, for example in Britain. In some schemes a private insurance benefit is excluded as a collateral source, for example, Nebraska in the USA. In all schemes the conduct of the victim at the time of the commission of the crime is an important factor.

* **Restitution of non-pecuniary loss**

2.19 Whereas all schemes attempt to compensate victims for pecuniary loss, the same cannot be said with regard to non-pecuniary loss. Non-pecuniary loss includes pain and suffering, loss of life's pleasures and amenities and life expectations. Non-pecuniary loss is excluded in most schemes since the determination of the award is very difficult. In Tennessee (USA) compensation for pain and suffering is excluded. No compensation should be awarded for any personal injury or loss alleged to have been incurred as a result of pain and suffering. In Hawaii (USA) compensation for pain and suffering is allowed. In Britain compensation for non-pecuniary loss is allowed because compensation is to be assessed on the basis of common law damages. The British Board is clear on the issue that compensation for pain and suffering is payable since "The Board will consider applications for compensation arising out of rape and sexual assaults, both in respect of pain, suffering and shock and in respect of loss of earnings and in respect of the expenses of child birth".

* **Compensation for the loss of personal property**

2.20 As a general rule compensation for the loss of property is excluded by most schemes. The motivation is that it will render compensation schemes very expensive. Only Hawaii in the USA provides for compensation in this regard and only in the case of the so-called good Samaritan. The British compensation scheme allows for the loss of or damage to clothing as a result of injuries. According to Burns⁷, most jurisdictions in Canada also accept this principle. The compensation scheme in Northern Ireland provides for restitution of loss of property in very

7 1992.

narrow circumstances, usually related to conduct by illegal organisations.⁸ In Europe this kind of compensation is also provided for in the Netherlands, but the compensation award is limited to a maximum amount.

* **Persons who may be considered for compensation awards**

2.21 Each of the compensation schemes that has been studied defines victim in terms of its own viewpoints. Furthermore, in most jurisdictions victims are divided into two categories, namely:

- * Persons suffering injuries as a result of violent crimes and who may therefore be regarded as direct victims, or their dependants who suffered loss or damage as a result of the death of the victim and who may therefore be regarded as indirect victims; and
- * persons who may be defined as good Samaritans and are therefore injured in an attempt to commit one of the following acts:
 - arrest a criminal;
 - assist a law enforcement officer in his/her duties or assist at the time of arrest of the criminal;
 - prevent crime; and
 - restore law and order.

* **Failure to report the crime or to co-operate with law enforcement officials**

2.22 Failure to report the crime within a reasonable time to the police is a ground for refusal of compensation in all the systems. The motivation therefor is that it serves as an educational technique aimed at providing an incentive to victims to report the commission of crimes in future. Most schemes provide for a direct limitation within which the crime has to be reported to

8 Burns 1992.

the police. In order to be considered for compensation it is expected of the victim to assist in the investigation of the crime.

* **The exclusion of the family of the victim**

2.23 The exclusion of the family and members of the household for purposes of compensation is a general rule. The initial British system adhered strictly to this principle but it was amended during 1979. The present British system is quite clear on this where it states that compensation will be refused where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family. In the USA only the schemes in California, Delaware and Oklahoma do not limit compensation to family members.

* **Detained persons**

2.24 A number of American jurisdictions exclude persons serving imprisonment from being considered for any compensation, for example Kentucky, Montana, North Dakota and the State of Washington. The reason is quite clear since the victims acted in contravention of the law and were themselves responsible for the creation of the unique and different environment. The British scheme explains that a person who has made his living by flouting the laws of society cannot expect to utilize those laws for his own ends.

VICTIM EMPOWERMENT AND COMMUNITY PARTICIPATION

* **Legislative framework for co-ordination of services**

2.25 In foreign jurisdictions legislation has been introduced to co-ordinate victim support services, for example in New South Wales international norms are reflected in a Charter of Victims' Rights which establishes administrative guidelines designed to secure minimum standards for the fair treatment of victims by Government agencies involved with justice, health and community service. In addition, the Director of Public Prosecutions has implemented procedures and policies designed to give effect to those standards which, **inter alia**, include the establishment of a Witness Assistance Service to provide support and assistance for witnesses

during the prosecution process; the production of information pamphlets for victims and witnesses and ongoing officer training and community education on issues relating to victims and witnesses⁹.

2.26 During 1991 a Victims Advisory Council was established comprising of representatives from government agencies (Attorney-General, Health, Community Services, Police and Women) and community representatives. The terms of reference of the Council are to assess all services provided to victims by government agencies and community organisations, co-ordinate services to ensure they are complementary, disseminate information about the services available for victims, identify inadequacies in victim assistance and advise on the establishment and funding of a community based victims agency.

* **Consultation between prosecutor and victim**

2.27 The prosecutor's duty is to see to it that justice is done and to ensure that the community's interests are taken into account when a crime has been committed. This power is derived from the community's permission to entrust the administration of justice and the right to act against offenders on behalf of the community, to prosecutors. Public prosecutors can therefore play an important role in the prevention of secondary victimisation by promoting the interests of victims.

2.28 In most cases victims are unaware of the functioning of the administration of justice. They don't understand the complex procedures and feel intimidated by the legal procedures. Prior to the commencement of the trial, the public prosecutor is in the perfect position to inform the victim of what is expected from him and to refer him/her to the available victim support services. Examples of provisions for crime victims within the criminal justice system in foreign jurisdictions are: considerate reception by the police, referral to support agencies, provision of advice on preventive measures, the right to be notified of the outcome of the investigation or of ensuing criminal proceedings, the right to inform the court about restitution from the offender.

9 New South Wales Law Reform Commission Discussion Paper 33 **Sentencing** 1996 415.

* **The victim impact statement**

2.29 Dr H F Snyman, former member of the project committee discusses the victim impact statement in the following terms:¹⁰

2.30 The Victim Impact Statement is a statement made by the victim and addressed to the presiding officer to be considered in the sentencing decisions. The Victim Impact Statement consists of a description of the harm, in terms of the physical, psychological, social and economical effect that the crime had, and will have in future, on the victim.¹¹ Sometimes this statement may include the victim's statement of opinion on his feelings about the crime, the offender and the sentence that he feels is appropriate.

2.31 The victim impact statement usually takes the form of a written statement that is presented to the court as part of the presentence report. It can however also take the form of an oral statement by the victim when decisions are made by the court on sentencing. This last format of the Victim Impact Statement is only used in some states of the United States of America.¹²

2.32 The form, content and means of implementation vary greatly. In the United States for example, some jurisdictions require a written Victim Impact Statement, attached either to the presentence report or as an affidavit which becomes part of the court file. Responsibility for the preparation of the Victim Impact Statement can rest with criminal justice personnel, like the prosecutor, police or probation officer, or with an independent outside organisation like victim service specialists. Victims may also, or in some cases only, provide oral information in court

10 Quotation from a paper submitted by her to the Commission.

11 Hinton, M "Valuing the victim. The use of victim impact statements in sentencing." Unpublished paper read at the 8th International Symposium on Victimology 22 - 26 August 1994 Adelaide Australia.

12 Erez, E "Victim impact statements" In: **Trends and issues in crime and criminal justice**. Editor P Grabosky No. 33 1991 Australian Institute of Criminology at 2.

prior to sentencing.¹³ The Victim Impact Statement can include objective information or both objective as well as subjective evaluations of injury, including psychological harm suffered by the victims.¹⁴

* **Victim-offender mediation**¹⁵

2.33 Schemes involving mediation between victims and offenders ensure wider victim participation in the justice system by allowing victims to take part in the resolution of the case. Mediation may be organised without face to face contact between the parties and one of its main aims is to address the concerns of the victim.

2.34 Mediation is considered appropriate when the offender and the victim wish to come to an agreement about the offender's future contact with the victim or where the parties desire some form of compensation or reconciliation. The process has the potential to address the needs of the victim and it may promote the restoration of victim losses. Restitution can take the form of monetary compensation or community service at the agency chosen by the victim. Through person to person communication, tension can be alleviated and conflict taken a humanitarian form. It may furthermore contribute to a more satisfactory experience of the application of the law.

2.35 Victim-offender mediation is recognised in foreign jurisdictions in the following forms:¹⁶

(i) Family group conferences

13 McLeod M Victim participation in sentencing. 1986 **Criminal Law Bulletin** 22 501 and 517 at 503.

14 Douglas R & Klaster K **Systematising police summaries in the motion court: victim impact statements through the back-door**. Unpublished paper read at the 8th International Symposium on Victimology 22 - 26 August 1994 Adelaide Australia.

15 See New South Wales Law Reform Commission Discussion Paper 33 **Sentencing** 1996 at 358-369.

16 See New South Wales Law Reform Commission Discussion Paper 33 **Sentencing** 1996 at 357-369.

2.36 A family group conference is a meeting of the offender, the victim (if he agrees), the supporters of each and a mediator where a plan for dealing with the offender is formulated. It is mostly used to deal with juvenile offenders and it may operate instead of a prosecution or prior to sentence. It is a means to establish a greater degree of community control. Family group conferences aim at reparation rather than retribution.

(ii) Community Youth Conferences (CYC)

2.37 Community Youth Conferences was introduced as a pilot scheme in six areas of New South Wales following a white paper on juvenile justice in August 1994. A government appointed Council issues guidelines and monitors the scheme. Matters may be referred to the CYC by the police or the Children's Court and victims may participate and outcomes can involve apology, reparation to the victim or to the community in the form of community work.

(iii) Community Aid Panels (CAP)

2.38 Community Aid Panels is an example of a mediation programme for adult offenders although it is not limited to adult offenders. It currently operates in New South Wales and it was first introduced in the Wyong Local Court in 1987. The Panels are used after a plea of guilty has been entered but before sentencing and the court adjourns for a period to allow the offence and related matters to be discussed by the panel.

2.39 A panel consists of a police officer, lawyer and two members of the community who will discuss with the offender (and his family if he is a juvenile) the circumstances of the offence and any related problems. The panel is required to recommend a course of action which may involve voluntary community work, skills training or counselling. The matter is returned to court for final determination. Victims are not required to participate, the outcomes can have a restorative orientation and offenders may agree to compensate the victim or to perform community service.

(iv) Circle sentencing

2.40 The judges of the Territorial Court of Yukon in Canada devised a community conference scheme which operates as a pre-sentence option for more serious adult offenders. It was first conducted in 1992. Conferences are conducted with all participants arranged in a circle and such sessions are conducted within the context of the court proceedings and have no independent legislative base.

2.41 Matters are referred to a sentencing circle at the request of the offender or his/her legal representative. Eligibility was initially decided by Judges but such decisions are increasingly made by Community Justice Committees which consist mostly of lay members of the community.

2.42 Sentencing circles are open to the public and steps are taken to involve persons affected by the crime as well as those who can contribute resources to resolving the issues involved. Support groups for both victims and offenders, usually consisting of a number of relatives, neighbours and friends, are encouraged from an early stage. A sentencing plan is devised and the offender's support group becomes responsible for the monitoring, implementation and review of the plan.

CHAPTER 3

THE PROBLEM

* The crime situation in South Africa

3.1 The question whether victims of crime, compensation for victims and community participation in the criminal justice system require special attention can be answered only when the situation with regard to crime in South Africa is considered.

3.2 South Africa is at present experiencing a crime wave that may have far reaching consequences for our citizens, economy, social services and our judicial system. When comparing statistics for the period 1 January to 31 July 1993 with the same period during 1994, there is an increase of 3,64% in the prevalence of serious crimes, namely from 1 025 109 cases reported during 1993 to 1 062 457 cases reported in 1994. During the first seven months of 1994 282 911 (26,62%) crimes were reported in Gauteng as against 187 729 (17,67%) in the Western Cape and 173 918 (16,37%) in KwaZulu Natal. The following diagram gives an overview of the number of serious crimes that were reported for the period 1992/1993.

CRIMES	1992	1993	INCREASE/D ECREASE
Unlawful strikes	50	83	+ 66,0%
Public violence	2 250	5 696	+ 153,15%
Unlawful possession of firearms and ammunition	10 580	9 556	- 9,67%
Contraventions of the Explosives Act	448	507	+ 13,16%
Rape	24 360	27 056	+ 11,07%
Drug related offences	60 630	52 919	- 12,72%

CRIMES	1992	1993	INCREASE/D ECREASE
Offences related to prostitution	210	454	+ 116,19%
Sodomy	777	961	+ 23,68%
Incest	187	152	- 18,71%
Indecent assault	3 180	3 432	+ 7,92%
Intercourse with a girl under the statutory prescribed age and/or mentally handicapped women	669	698	+ 4,33%
Abuse and illtreatment of children (sexual offences, assault and murder excluded)	1 465	1 228	- 16,17%
Assault with the intention to cause greivous bodily harm	136 332	144 662	+ 6,11%
Assault	143 806	149 197	+ 3,74%
Murder	16 067	17 467	+ 8,71%
Attempted murder	15 339	18 304	+ 19,33%
Theft (children)	1 698	1 828	+ 7,65%
Housebreaking - business premises	73 282	74 379	+ 1,49%
Housebreaking - residential premises	181 659	185 502	+ 2,12%
Robbery - with extenuating circumstances	54 194	60 089	+ 10,87%
Other robbery	24 483	27 027	+ 10,39%
Stock theft (poultry excluded)	26 921	26 633	- 1,06%
Shop lifting	58 371	62 194	+ 6,54%

CRIMES	1992	1993	INCREASE/D ECREASE
Theft - bicycle	25 524	25 554	+ 8,62%
Theft - motor vehicle	71 532	77 875	+ 8,86%
Theft - out of or from a motor vehicle	143 247	166 310	+ 7,82%
Other theft (not mentioned elsewhere)	259 690	266 909	+ 2,77%
Fraud, forgery and other forms of theft	58 576	55 890	- 4,58%
Arson	6 389	6 855	+ 7,29%
Malicious damage to property	96 138	102 415	+ 7,56%
Insolvency Act	435	452	+ 3,90%
Driving under the influence of alcohol or drugs	32 157	31 332	- 2,56%

3.3 When evaluating crimes of violence it appears that 10 448 murders were reported during the first seven months of 1994 as against 10 229 murders during the corresponding period in 1993. This represents an increase of 7,14%. A more detailed analysis shows that 128,93 murders per 100 000 members of the population were reported in KwaZulu Natal, 52,29 per 100 000 members of the population in Gauteng and 38,71 per 100 000 members of the population in the Western Cape.

3.4 In respect of rape 14 312 rape cases were reported during the first seven months of 1993 as against 16 606 during the corresponding period in 1994. This represents an increase of 16,02%. With regard to rape cases the problem areas were Natal, 12,82 per 100 000 members of the population and the Eastern Cape with 93,54 per 100 000 members of the population.

3.5 Robbery showed an increase of 11,73% for the period January until July 1994 as against the corresponding period for 1993. The following table gives an overview of the prevalence of robbery in the areas of Gauteng, KwaZulu Natal and the Western Cape:

JANUARY - JULY 1993	JANUARY - JULY 1994
Gauteng 23 793 reported cases 407,00 cases of robbery per 100 000 of the population	27 678 reported cases 473,45 cases of robbery per 100 000 of the population
KwaZulu Natal 8 420 reported cases 332,09 cases of robbery per 100 000 of the population	9 222 reported cases 363,73 cases of robbery per 100 000 of the population
Western Cape 6 843 reported cases 186,00 cases of robbery per 100 000 of the population	6 821 reported cases 184,40 cases of robbery per 100 000 of the population

3.6 When comparing the situation internationally with South Africa, there is, from a South African point of view, a need for concern. When taking into account that 94 persons per 100 000 members of the population were murdered during 1993 and when it is compared to the 4 and 8 per 100 000 members of the population in France and Germany respectively, the situation reflects a need for concern. The same trend is to be found in respect of rape. In South Africa it is at present 18 per 100 000 members of the population, in France 7, Germany 14 and the USA 41. The implication of the figures quoted above is that for all the crimes committed there are victims whose needs require consideration. The question that needs to be resolved urgently in South Africa is what is the current legal position of victims, or, more importantly, is there a need for reform and if so how can the plight of victims be improved.

* **Breakdown in the criminal justice system**

3.7 **In South Africa both the government and the public have become increasingly concerned about rising crime and accusations have been made that neither the State nor other social agencies are doing anything much about addressing the plight of victims of crime. The rising crime rate has been attributed to a breakdown in the criminal justice system.** However, the coalescence and institutionalisation of initiatives in crime has begun, as is shown by the launch in 1995 of the Business Initiative Against Crime (BAC). To some extent the activities of the Truth and Reconciliation Commission may also be regarded as an attempt to

address the problems of the victims of crime.¹ During 1994 the White Paper on the Reconstruction and Development Programme (RDP) was published and it sets out the Government's strategy for fundamental transformation of the society and economy. Among others it deals with the devastating effect violence has had on society and the need to restore peace and a sense of community security.

3.8 Furthermore, the Government's National Growth and Development Strategy (NGDS) has its origin in the RDP and it sets out a socio-economic framework to reach the targets of reducing poverty and improving quality of life. It defines six pillars of enabling policies to help Government to prioritise areas of activities and one of these pillars is to ensure the safety and security of all citizens. The **National Crime Prevention Strategy (NCPS)** forms the core component within the pillar on Safety and Security and **it is a medium to long term strategy to address the factors that lead to high crime rates, and includes prioritisation of urgent crime areas, community policing, public awareness, co-ordination mechanisms and legislation.** Within the framework of the NCPS, which is a national programme, the Department of Justice has developed prime projects based on line functionary activities and one of the prime projects is **restorative justice** which will *inter alia* deal with the plight of victims of crime. It is within this framework that the Commission's investigation into the plight of victims of crime should be seen.

3.9 In the past victims and their families were responsible for acting against the commission of crime themselves. They were able and indeed obliged to take the necessary steps against the offender for damages caused or losses suffered as a result of the latter's conduct. With the centralisation of power in the Middle Ages in the hands of owners of property and kings, a crime was regarded as a contravention of the "King's Peace" and not against the individual. This shift in emphasis caused owners of property and kings to regard their subjects as their property and the compensation to which they were entitled as a result of crimes committed against them, were regarded as payment for loss of their labour.

1 L Camerer "A victim movement for South Africa" in **Policing the Transformation** M Shaw, L Camerer IDP Monograph series No. 3 April 1996 at 31.

3.10 The maintenance of law and order, the administration of public affairs and the promotion of community welfare and public order are responsibilities entrusted to the State as sovereign authority. Government not only has the right but also a duty, through its constitutional obligation, to guarantee the safety of every individual and the community as a whole within the framework of government policy. Except in cases of self-defence, the public have entrusted their right to protect and defend themselves to the State. In return the State undertakes to protect individuals through fair conduct by police officials, the maintenance of a just legal system, laws and standards and objective court procedures. The State has a moral duty to ensure a safe community to all its citizens. This moral duty finds expression in the welfare principle in terms of which the State has a humanitarian duty to victims of crime. Although no formal contract is concluded between the State (government) and its subjects, the former undertakes to promote the social welfare of those who voted for government and whose interests the government represents. Government therefore has a legal and moral duty to give recognition to victims of crime through the court process and to take cognizance of their interests in the sentencing process. It is from this perspective that arguments in support of recognition of the interests of victims of crime in sentencing should be viewed.

3.11 Concern about the relegation of victims to an especially passive role in the criminal justice system has its intellectual roots in the emergence of victimology as a discipline in the late 1940's. The development of a victim's movement advocating a proper place for victims in the criminal justice system, has been one manifestation of that concern. The victim's movement was clearly identifiable in the United States and England by the early 1970's. The movement began to emerge in Australia in the early 1980's and it was fuelled by the attention given to domestic violence and sexual assault in feminist and other literature and by the emphasis given to the notion of retribution inherent in "just deserts". Since the 1980's official inquiries have specifically considered the role of victims in the criminal justice system in many jurisdictions. In the course of sentencing enquiries the role of victims in sentencing has been considered in many jurisdictions, including the USA, Canada, South Australia, New South Wales, Victoria, Tasmania and the Australian Capital Territory.²

2 New South Wales Law Reform Commission **Sentencing** Discussion Paper 33 April 1996 411-412.

3.12 In their interactions with authorities people want to be treated in a polite and considerate manner. In this respect, victims are not different from other people, including offenders. Interest and consideration are important for victims in their interaction with the police and the public prosecution. Victims want authorities to recognise their position and their interest in the case. When authorities show an interest in the victim and consider his/her wishes, they profit from an increase in victims' satisfaction and support for them.

3.13 However, in their contacts with legal authorities, victims are confronted with a system which largely neglects their interests. They are often not taken seriously and are excluded from the criminal justice process. Victimisation shatters the individual's belief that the world is caring and that the self is worthy. Reactions from the police and the prosecution can affect how the victim rebuilds his/her view of society. Furthermore, failure to recognise the position of the victim augments victim disillusionment with the world they live in and has a negative impact on their satisfaction and support for legal authorities.³ **Therefore, how legal authorities treat victims affects the quality of the relationship between victims and the criminal justice system.**

* **Lack of focus on the victim and the Development of Victim Support Services**

Background

3.14 **Although South Africa is a signatory to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, community participation in the criminal justice process is almost non-existent, reparation to the victims of crime is inadequate and limited services are at present being provided to victims of crime.** The existing provisions contained in legislation and services available for victims of crime are outlined below.

3 "Victim Policy and Public Support" J M Wemmers, Paper presented at the 6th European Conference on Psychology and Law, University of Siena, August 28-31 1996 at 12-13.

3.15 Most victims services developed since the 1990's when various welfare organisations and non-government institutions established victim support services such as rape crisis units, family and child abuse services, child line and refuges for victims of domestic violence. In the 1980's services were extended to victims of violence such as terrorism and robbery. The police also established child protection units. It is, however, clear that at present there is a strong movement towards the establishment of a co-ordinated victim support service, but it will take some time before results would be visible.

3.16 In terms of section 3(d) of the Probation Services Act, 116 of 1991, the Minister may establish programmes aimed at the care and treatment of victims of crime. Provision is also made for programmes aimed at prevention of crime (3(a)), information to and treatment of offenders and other persons (3(c)), the observation, treatment and supervision of persons released from prison (3(e)), the establishment, financing and registration of shelters (3(g)) and the compensation of victims of crime.

3.17 The **Working Group Crime Related Matters Input for the White Paper for Social Welfare** points out that **victims of crime have been neglected in South Africa and services to date are *ad hoc* and piecemeal and there are too few social workers to assist and provide treatment for the victims of crime as stipulated in the Probation Services Act. They stress that there should be more emphasis on the needs of victims of crime and their rights should be carefully balanced with those of offenders.**

3.18 Legislation was also enacted to counteract family violence (see The Prevention of Family Violence Act, 133 of 1993). There is currently no State Compensation Fund to assist victims of crime although a State President's Fund for Victims of Terrorism was established on 20 May 1983.

3.19 In theory victims can also institute criminal proceedings against the offender if the attorney-general declines to prosecute, but this is very seldom used in South Africa as most victims are not aware of this right and very few have the resources or legal knowledge to pursue such action.

3.20 The Promotion of National Unity and Reconciliation Act, 34 of 1995 represents steps already taken to give greater recognition to victims of crime. The Act affords victims an opportunity to relate the violations they suffered and provides for measures aimed at the granting of reparation to, and the rehabilitation and restoration of the human and civil dignity of victims of violations of human rights.

Compensation in terms of the Criminal Procedure Act

3.21 Section 300 of the Criminal Procedure Act, 51 of 1977 makes provision for the payment of compensation to victims of crime at the request of the prosecutor. Claims for damage or loss are limited to damage or loss of property and for purposes of determining the amount of compensation, the court may refer to the evidence and the proceedings at the trial or hear further evidence. Section 301 of the Act provides that where a person is convicted of theft or of any other offence whereby he has unlawfully obtained property, and it appears to the court on the evidence that such person sold the property or part thereof to another person who had no knowledge of the real situation, the court may, on application of such purchaser and on restitution of the property to the owner, order that out of any money taken from the accused on his/her arrest, a sum not exceeding the amount paid by the purchaser be returned to him.

3.22 The Act, however, does not make provision for compensation to victims for injuries sustained as a result of crime nor for the payment of compensation to the family if the victim was killed. South African courts seldom pay any attention to losses suffered by victims of crime. Orders for compensation will furthermore not be considered unless the complainant requests the public prosecutor to apply to the court for an order and complainants seldom make use of the provisions because they are either not present or they don't know about the provisions of the Act.

Witness and victims protection programme

- (i) **Section 185A of Criminal Procedure Act, 1977**

3.23 As it became evident to the Government that the existing measures did not sufficiently address the need for the protection of witnesses and victims of crimes, and that there was a need for a system based on the voluntary co-operation of witnesses, specific measures were introduced to ensure that witnesses with material information come forward and testify. To this end, the Criminal Law Amendment Act, 1991 (Act 135 of 1991), was put on the Statute Book. This Act has as its objective the protection of witnesses by the insertion of, amongst others, section 185A in the Criminal Procedure Act, 1977.

3.24 Section 185A came into operation on 31 July 1992 and provides that a witness or prospective witness who has reason to believe that his safety or the safety of a member of his family or household is being threatened, may report to a police station or local public prosecutor for protective custody for himself, his family or household, and that such persons are to be detained in or placed under protective custody. Such persons are protected by a member of the South African Police Services at a place of safety or at his home, hotel etc, in the manner that is deemed necessary.

3.25 To ensure that a witness does not endure financial hardship as a result of the programme, provision is, *inter alia*, made for the payment of allowances to a witness in protective custody as well as remuneration in respect of loss of income.

3.26 A properly structured and successful Witness Protection Programme can be one of the major contributing factors in stemming the high crime rate in the Republic. The Department, realising the crucial role that victims play in the administration of justice and that witnesses are often too terrified to testify in court due to intimidation, is at present taking steps to restructure the witness protection programme that is operating in terms of the above-mentioned section 185A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). A task group is also looking into a possible witness protection programme that can be used by the Truth and Reconciliation Commission and cognisance is taken of problems that are being experienced with the present programme in terms of the Criminal Procedure Act. It is, however, clear that, in order to properly structure and run the witness protection programme, utilizing the expertise of several government departments and NGO's is essential, and this is receiving attention. The present

programme (in terms of section 185A) notwithstanding several shortcomings, is at present protecting more than 90 persons, including family members of witnesses.

3.27 As far as the protection of witnesses is concerned, only a limited service is provided due to a lack of funds. Provision is, however, made in the Criminal Procedure Act for the protection of the identity of rape victims and cases can also be heard in camera. The testimony of child witnesses (child abuse victims) can be relayed to the court via closed circuit television.

Special courts and equipment

(i) Special Courts

3.28 In the office of the Attorney-General, Kimberley a specific group of women advocates has been detached to deal specifically with cases where children are the victims of crime. In the offices of most of the other Attorneys-General these cases are handled by skilled personnel. Directives with specific instructions regarding the prosecution of cases of child abuse, have also been issued to public prosecutors by, *inter alia*, the Attorneys-General, Bloemfontein, Kimberley, Cape Town and Pretoria.

3.29 Specialized training to public prosecutors and magistrates is also presented at seminars or during courses at Justice College pertaining to dealing with children and women victims. The training includes:

- Specific attention to consulting with and preparing children as witnesses;
- attention to the aspect of dealing with the child during the trial and protection of these witnesses against unfair questioning or behaviour during the trial;
- continuous contact between the specialist prosecutors and lecturers at the College to keep them up-to-date with developments; and
- lecturers focus in particular on crimes/offences where children/women are the victims.

Children's Courts

3.30 Section 5 of the Children Care Act, 1983 (Act 74 of 1983) provides that every magistrate's court shall be a children's court for the area of its jurisdiction. In terms of section 8 of the said Act, a children's court sits in a room other than that which any court ordinarily sits and no person is present unless his presence is necessary in connection with the proceedings of that court.

Juvenile Courts

3.31 At present no provision is made in the criminal justice system for specialized courts to adjudicate criminal matters involving juvenile offenders. Although such matters are dealt with by the existing lower - and supreme court structures in terms of the criminal law and procedure applicable to all offenders (adults and juveniles), provision is made by the Criminal Procedure Act, 1977 (Act 51 of 1977), for certain exceptions with regard to the handling of cases involving offenders under the age of 18 years. In terms of section 254 of this Act the proceedings in the criminal court may be stopped and the court may refer the juvenile accused to a children's court operating in terms of the Child Care Act, 1983. Section 290 and 291 of the Criminal Procedure Act, 1977, also provides for certain orders in terms of which a juvenile may be placed under supervision of a probation officer or sent to a reform school, instead of any punishment being imposed.

The sexual offences court in Wynberg

3.32 In Wynberg the Attorney-General established the first sexual offences court in March 1993 with the main objective to protect victims from secondary victimisation during court proceedings. Two full-time prosecutors are assigned to the court and every complainant is consulted prior to the trial. A private consulting room is available to complainants. This is, however, an experimental project and its success or failure will determine whether similar courts will be instituted elsewhere. It appears to be appropriate to outline the reasons for the introduction of the Special Court for Sexual Offences briefly.

3.33 Advocates of women who have experienced male violence have long highlighted the unsympathetic, disbelieving and inappropriate responses or secondary victimisation that women experience at the hands of society in general and at each stage of the criminal justice process

which exacerbate the effects of the sexual assault upon women. The State has also been criticised for its failure to respond to this secondary victimisation and for not providing any victim support infrastructure. There has never been an in-depth research done on the victimisation of the survivors of sexual assault.

3.34 At every stage of the criminal justice system a variety of indicators of secondary victimisation by state officials have been identified including:

- (i) **The Police Official** - disbelieving and insensitive responses when women report sexual assault, discouraging or preventing women from laying charges, no immediate access to private waiting or report taking facilities, not taking statements in the language of complainant; insensitive treatment; lack of time and effort put into investigation, not providing women with information on procedures or updating on the investigation process, not providing protection from the perpetrator, not returning phone calls, biased criteria are used in deciding whether a charge is unfounded or needs to be closed, lack of women police officials and not providing women with copies of their statements.

- (ii) **Health Services Officials** - long waiting periods before being medically treated, being seen by untrained and biased staff, district surgeons not following written guidelines for examinations, insensitive attitudes, allowing people who are not medical assistants into examination room, not explaining why certain questions need to be asked or procedures followed, refusing to examine certain women, no access to free treatment and support for immediate and long term physical or psychological consequences resulting from the sexual assault, inadequate and inaccessible procedures for legal abortions for pregnancies which are a result of rape.

- (iii) **Court Officials** - lack of private waiting facilities, long time delays between reporting of incident and appearing in court, perpetrators being released on bail without adequate protection for complainant, prosecutors not consulting with complainants before trial, biased criteria used by prosecutors in deciding whether to

prosecute or withdraw a case, not involving complainants in or informing them about decisions that are taken, not ensuring police have thoroughly investigated cases, inadequate preparation for court cases, not making use of expert witnesses, little or no information of court procedures or the progress of cases, not objecting to inappropriate cross-examination and inadequate sentences.

In court stereotypes of who is a genuine sexual assault survivor are reflected to deny, justify or excuse male violence and to blame women or question their credibility.

(ii) Equipment

3.35 The Criminal Law Amendment Act, 1991, also has as its objective the protection of witnesses under the age of 18 years who find giving evidence in criminal proceedings traumatic, which may result either in the witness not being willing to testify or in the case being dropped. Section 170A, of the Criminal Procedure Act, 1977, provides that when criminal proceedings are pending before any court and it appears to that court that a witness under the age of 18 years will be exposed to undue mental stress or suffering if he/she testifies at such proceedings, the court may appoint any competent person as an intermediary. Special equipment with regard to the giving of evidence through an intermediary was installed at 73 courts nationwide. Four “mobile units” are also available should a need arise for the use thereof at a court where a unit was not initially installed.

CHAPTER 4

POSSIBLE SOLUTIONS

(A) VICTIM EMPOWERMENT AND COMMUNITY PARTICIPATION

* Background

4.1 Like the rest of the world the United Nations was also far more concerned with the rights of offenders than the rights of victims. The first United Nations Congress on the Prevention of Crime and the Treatment of Offenders dealt mainly with offenders' and prisoners' rights. Only at the Seventh Congress in Milan in 1985 did victims of crime appear on the agenda. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power contains the following statement in respect of victims of crime:¹

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have required such information;

1 United Nations 1992 Compendium of United Nations standards and norms in crime prevention and criminal justice. United Nations: New York 1992 211 ff.

- (b) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
 - (c) providing proper assistance to victims throughout the legal process;
 - (d) taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (e) avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.
9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:
- (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
 - (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.
13. The establishing, strengthening and expansion of national funds or compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

Assistance

14. Victims should receive the necessary material, medical, psychological and social assistance through government, voluntary, community-based and indigenous means.
15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims and guidelines to ensure proper and prompt aid.
17. In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3 above.”

*** Co-ordinated victim support services**

4.2 Present support services for victims of crime and violence in South Africa seem to be limited, fragmented, unco-ordinated, reactive in nature, and therefor ineffective. The planning and establishment of these services are often not community-driven and happen on an *ad hoc* basis which results in difficulties. Services do not cater sufficiently for the diversity of the population and certain services are over-utilized for example services that focus on women and children, while others tend to be inaccessible as regards their location and service fees or are poorly marketed and therefor not used. Furthermore, there is also a lack of long term planning and unawareness of the plight of victims and what services are available. Many victims go unsupported, remain traumatised, become victims again or even turn to crime and violence themselves.

4.3 The existing “prisoner’s friend” system in South Africa is insufficient and even the name of the service does not serve the interests of victims. When, for example, the Attorney-General decides not to institute a prosecution for technical reasons or because of a lack of evidence, the victim should be informed. In particular where the offender is acquitted the victim should be informed of the acquittal and of the reasons therefor.

4.4 Where the offender has been convicted and sentenced the victim should be informed about the nature of the sentence and as to what it entails. Where the offender is sentenced to

imprisonment the victim should be referred to a person employed by the Department of Correctional Services who should be required to inform the victim about the date of release. Where the offender is considered for early release due to amnesty or good behaviour the circumstances should be explained to the victim in order to ensure that the punishment is not regarded as a mere symbolic act.

4.5 The advantage of consultation between the prosecutor and victim lies in the improvement of the community's confidence in the justice system as a result thereof. The increase in the workload of prosecutors arising from the consultation process should be balanced with the value it will have for victims of crime.

*** The need for legislation to co-ordinate victim support services in South Africa**

4.6 Although a victim support movement is at present gaining momentum in South Africa it will take years before the needs of victims will be addressed satisfactorily unless a permanent Council or Body is established by legislation to co-ordinate the establishment of services needed. Comments are invited on the following proposals:

- (a) A Victim's Advisory Council or an office for a Victims of Crime Co-ordinator should be established through legislation to address the plight of victims.**
- (b) The Council should comprise representatives from government agencies such as the Departments of Justice, Health, Welfare, Police Services and community based representatives from NGOs and CBOs.**
- (c) Legislation should provide for a number of principles which should govern the treatment of victims. The following principles are proposed:**
 - victims should be dealt with at all times in a sympathetic, constructive and reassuring manner and with due regard to his or her personal situation, rights and dignity;**

- **victims should be informed at reasonable intervals of the progress of police investigations concerning the offence, except where such disclosure might jeopardise the investigation;**
- **victims should be informed of the charges laid against the accused;**
- **victims should be informed of any decision concerning the accused to accept a plea of guilty to a lesser charge or a guilty plea in return for a recommendation on sentencing;**
- **victims should be informed of any decision not to proceed with a charge against the accused;**
- **where any property of a victim is held by the crown for purposes of investigation or evidence, inconvenience to the victim should be minimised and the property returned promptly;**
- **a victim should be informed about the trial process and of the rights and responsibilities of witnesses;**
- **a victim should be protected from unnecessary contact with the accused and defence during the course of the trial;**
- **a victim's residential address should be withheld unless the court directs otherwise;**
- **a victim should be given an explanation of the outcome of criminal proceedings and of any sentence and its implications; and**
- **a victim who is known to have expressed concern about the need for protection from an offender should be informed of the offender's impending release from custody.**

(d) Legislation should spell out the functions of the Victims Advisory Council, for example:

- **to promote the principles outlined above;**
- **to encourage the provision of efficient and effective services for victims;**
- **to promote reforms to meet the needs of victims;**
- **to develop educational and other programs to promote awareness of the needs of victims;**
- **to disseminate information concerning the operation of the Act and the functions of the Council;**
- **to ensure, as far as practicable, that victims receive the information and assistance they need in connection with their involvement in the administration of justice;**
- **to advise the Minister on matters relating to victims; and**
- **any other function assigned to the Council.**

(e) The following proposals in respect of consultation between victims, the police and prosecutors are submitted for comment:

- **Guidelines should be issued to the police and prosecutors on the treatment of victims of crime in the criminal justice process.**
- **Guidelines should be developed by the Victim Advisory Council.**

- **If necessary, legislation should be adopted to enforce these guidelines.**

*** The victim impact statement**

4.7 At present victim impact statements are not formally recognised in South Africa. The following proposals are submitted for comment:

- **Victim impact statements ought to be generally admissible at sentencing hearing. The purpose of such statements should be to provide a measure of the seriousness of the offence and it should be spelled out in legislation.**
- **Victim impact statements should only be admissible in respect of cases where they furnish the court with particulars that are not already before the court in evidence or in a pre-sentence report.**
- **For the purpose of such a statement “victim” should be defined as the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injury as a result of the offence.**
- **Victims should have the option to tender a statement and the right to request the prosecutor to refrain from presenting the court with details of injury.**
- **Victim impact statements should be signed, or otherwise acknowledged as accurate by victims before they are received by the sentencing court.**
- **Such statements in sworn form ought to be tendered by the prosecution at the sentencing process.**
- **The statements ought to address the actual physical psychological, social and financial consequences of the offence on the victim and not the question of an appropriate sentence which ought to be imposed.**

- **The court should have the discretion to disallow a statement and the author should always be subject to cross-examination on the contents of the statement.**

*** Victim-offender mediation**

4.8 Schemes involving mediation between victims and offenders ensure wider victim participation in the justice system by allowing victims to take part in the resolution of the case. Mediation may be organised without face to face contact between the parties and one of its main aims is to address the concerns of the victim. The following proposals are submitted for comment:

- **Referral by the court to a mediation process should be considered when the victim and the offender wish to come to an agreement about the offender's future contact with the victim or where the parties desire some form of compensation or reconciliation.**

(i) Family group conferences

- **Family group conferences involving the offender, the victim, the supporters of each of them and an independent mediator should be considered where appropriate.**

(ii) Community Youth Conferences

- **Legislation should provide for Community Youth Conferences to deal with sentencing of young offenders. Matters may be referred to the CYC by the police or the Children's Court and victims may be allowed to participate in the process and outcomes can involve apology, reparation to the victim or to the community in the form of community work.**

(iii) Community Aid Panels

- **Community Aid Panels should be considered in appropriate cases, in particular where the community has an interest in the outcome of the case and where the panel may be required to recommend a course of action which will involve voluntary community work, skills training or counselling.**

(iv) Circle sentencing

- **Circle sentencing may be considered in order to involve persons affected by the crime as well as those who can contribute to resolving the issues involved, eg relatives, neighbours and friends.**

(B) A COMPENSATION SCHEME FOR SOUTH AFRICA: PROPOSALS FOR COMMENT

*** Introduction**

4.9 In what follows the Commission raises some of the issues which should be dealt with when considering the introduction of a compensation scheme for South Africa. In the course thereof certain proposals are made and the purpose thereof is to elicit comments, suggestions and proposals for reform of this aspect of the law. The Commission would welcome any suggestions and proposals for law reform on this matter and the provisional proposals submitted for comment are discussed below under the different headings.

*** The necessity for a compensation scheme**

4.10 South Africa is far behind the rest of the world in respect of victim support in general and victim compensation in particular. From the information available to the Commission it appears that the introduction of a central compensation scheme for victims of crime in South Africa has become a matter of urgency. The right of a victim to recover damages by way of a civil action is of little comfort to a victim having regard to the financial position of most criminals, their ability to compensate victims and the unprecedented crime wave that is sweeping our country. In order to address this problem, there appears to be a need to

introduce a compensation scheme which will restore confidence in the administration of justice through a just and fair functioning. In order to achieve this, consideration should be given to a number of factors. The introduction of a compensation scheme will, however, place a heavy financial burden on the State and the first question that needs to be addressed is whether such a scheme should be established and whether or not alternative procedures should be considered to achieve the same results.

4.11 The Commission invites any suggestions, proposals and comments on the necessity for the introduction of a compensation scheme for victims of crime in South Africa. The Commission would also appreciate comments on alternative methods to redress the plight of victims of crime. One possibility is to amend the Criminal Procedure Act to compel the courts to consider the compensation of victims of crime by providing for an compensation order as a condition to the suspension of sentence, wholly or partially.

* The establishment of a compensation scheme

4.12 If a compensation scheme is to be introduced in South Africa a number of factors should be considered. The Commission therefore also invites comments on specific aspects related to a compensation scheme which are outlined below.

(i) Rationale for the introduction of a compensation scheme

4.13 The rationale for the introduction of a compensation fund in South Africa should be that the State has a moral duty to compensate victims. Victims should have a right to compensation and it should be awarded out of sympathy, goodwill and for humanitarian reasons.

(ii) The administration of the scheme

4.14 The compensation scheme should be known as the "Criminal Injuries Compensation Scheme" and its administration entrusted to an independent and newly created Board known as the "Criminal Injuries Compensation Board".

4.15 The members of the Board should be appointed by the Minister of Justice. The Chairperson should be a judge or a person with a legal background while the other members should represent the following occupations:

**law;
medical science;
penology; and
police services.**

5.16 The enabling statute should provide for the Minister of Justice in co-operation with the Minister of Finance to regulate the details of the management of the Fund, the procedure relating to grants from the Fund, the form in which applications should be made, the manner in which the accounts of the Fund should be kept and any other matter which is considered necessary or expedient to prescribe in relation to control of the Fund.

(iii) The sources of the compensation fund

4.17 The compensation scheme should be funded from the following sources:

- Twenty percent (20%) of all fines imposed by courts should be paid into the fund. Exceptions should be provided for, for example fines paid to local authorities;**
- a surcharge of R50 for every conviction in court should be paid by the accused;**
- money confiscated in terms of the Act on the Proceeds of Crime;**
- an amount to be determined annually in the budget known as a “Grant in Aid”.**

(iv) The definition of victim

4.18 For purposes of payment to victims, victims should be defined as:

- **any person who directly suffered injuries as a result of the commission of a violent crime (including survivors of sexual assault);**
- **the dependants of a direct victim who suffered loss or damage as a result of the death of the victim; and**
- **persons generally referred to as good Samaritans who assisted in the arrest of the offender, assisted the law enforcement officials in the performance of their duties and who assisted in restoring law and order or peace.**

(v) The nature and extent of the scheme

4.19 Compensation should be awarded to:

- **Any “victim” of so-called violent crimes including offences where the violence may be defined as indirect such as arson, poisoning or intimidation;**
- **victims of offences such as drug trafficking, sexual exploitation of children (child prostitution, child trafficking etc);**
- **the dependants of victims contemplated above;**
- **any person injured in an attempt to prevent the commission of a crime or when assisting a law enforcement officer;**
- **any South African citizen, visitor to the country or guest labourer within the country who is a victim of the crimes contemplated above;**

- **victims of human rights violations should at this stage not be included since they are to be dealt with in terms of the Promotion of National Unity and Reconciliation Act.**

4.20 In order to qualify for compensation victims should be required to:

- **Report the crime to the police within a reasonable time;**
- **apply for compensation within a year of the report to the police;**
- **assist the police in its investigation;**
- **be prepared to disclose his or her role in the commission of the offence.**

4.21 A tariff in terms of which the amount of the reward is fixed should not be considered with the introduction of the scheme.

(vi) The status of the applicant

4.22 Should compensation be considered where -

- **the victim and the offender are members of the same household; and**
- **the offence is committed against a victim while he/she is serving a term of imprisonment?**

4.23 Injuries justifying an application for compensation must relate to actual bodily harm, which may include emotional or physical harm and even pregnancy caused by or arising from a recognised offence.

(vii) Minimum and maximum compensation awards

4.24 Most jurisdictions include a mechanism in terms of which a minimum award is allowed as well as a ceiling for maximum awards. When considering the reasons for minimum and maximum awards it appears to be easier to determine the minimum amount than to determine the maximum amount. With reference to the minimum amount it denies a number of persons or victims the opportunity to apply for compensation. In most jurisdictions this has little effect since most claims are for pain and suffering.

4.25 The effect of a maximum award for compensation is, however, problematic. It would be difficult to make proposals without consultation. It would also depend on the approach and policy adopted by the Board. In this regard the Board would be confronted with important questions namely, should damages be awarded as in the case of actions brought under the common law and if the maximum award is exceeded should it be reduced to the prescribed maximum? Furthermore, the question arises as to whether the Board should award damages based on the seriousness of the injuries in proportion to the maximum amount allowed by law. It is suggested that in order to make the fund viable and to get the fund off the ground, a maximum amount of, for example, R30 000 should be determined.

4.26 A minimum amount which would justify a claim should be fixed by law (for example R200).

4.27 In order to make the scheme viable and cost effective a maximum award for compensation (for example R30 000) should be fixed by law.

(viii) General guidelines

4.28 The following proposals are submitted for comment:

- The State should be allowed to institute a civil action against the offender only after the victim has elected not to institute a claim.**
- Payment for compensation should be allowed either in a single amount or in instalments.**

- **Restitution for monetary loss should include loss of income, loss of maintenance to a dependant of the victim and funeral costs.**
- **Claims for loss of property should not be allowed under the scheme although exceptions may be considered. (In cases of the so-called good Samaritan.)**
- **Claims for compensation for pain and suffering should be allowed.**
- **Claims for compensation should be considered in accordance with the principles of the common law as applied in civil actions.**

CHAPTER 5

THE WAY FORWARD

5.1 It is suggested that the issues and options outlined above ought to be debated thoroughly before any particular direction is embarked upon. Based on the outcome of such discussions legislation in respect of the treatment of victims of crime in the criminal justice system will be proposed. The comments of all parties who feel that they have an interest in this topic or may be affected by the type of measures discussed in this paper are therefore of vital importance to the Commission. All respondents are invited to indicate their preferences in respect of the options examined and to indicate whether there are other issues or options that must be explored. All the relevant role players and institutions that are likely to be affected by the proposed measures should therefore participate in this debate.

5.2 To facilitate a focussed debate, respondents are requested to formulate crisp submissions with the following in mind:

- Is there a need for legislation to regulate the support services for and treatment of victims of crime?
- Is there a need for the establishment of a State compensation scheme for victims of crime?
- Is there a need to involve the community in the criminal justice process and to provide for community participation in the sentencing process?
- Is it agreed that the principal issues are those set out in this paper?
- What, specifically, is proposed in relation to those issues (or any further issues) as an effective basis for reformatory legislation?

5.3 The Minister of Justice has indicated that the matter is regarded as one of great importance to restore legitimacy to the criminal justice system and to assist in the fight against crime which is sweeping the country. Interested parties are requested to consider this paper and to respond before 31 May 1997.