South African Law Reform Commission

DISCUSSION PAPER 176

OFFENCES AND COMPETENT VERDICTS IN THE CRIMINAL PROCEDURE ACT 51 OF 1977

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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REQUEST FOR COMMENTS

1 This discussion paper forms part of a series of discussion papers that have been developed to seek to address any perceived gaps in the Criminal Procedure Act 51 of 1977 (CPA). The investigation is intended to result in the enactment of new criminal procedure legislation that will address the extensive challenges facing the criminal justice system.

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

3 This discussion paper, along with other discussion papers, forms part of the comprehensive reform of the criminal procedure law that is envisaged to culminate in the extensive reform of the current law of criminal procedure.

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ABBREVIATIONS AND ACRONYMS

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

EXECUTIVE SUMMARY

1 The South African criminal justice system (CJS) makes use of substantive criminal law provisions to enforce non-compliance with the law of criminal procedure. The first part of this discussion paper examines these provisions in terms of their current context, primarily in the Criminal Procedure Act 51 of 1977, in order to assess their ongoing usefulness in the envisaged new criminal procedure legislation. The proper and effective administration of the criminal justice system is one of the core functions of government and underpins orderly co-existence within societies. The criminal law is implemented and enforced by means of an extensive system of criminal courts presided over by judges and magistrates.

2 The criminal justice system itself is essentially regulated in terms of the Criminal Procedure Act 51 of 1977, which contains a series of offences that are designed to ensure the smooth and effective running of the system. These offences range from methods and means of securing attendance of the accused and witnesses in court (in the form of offences that punish failure to comply with notices to appear in court or a specified date and time) through to a prohibition on publishing certain aspects of court proceedings or prohibiting the production or submission of false evidence and documentation.

3 The offences in the Act will be discussed in order to ascertain their ongoing utility in any envisaged reconstituted statute regulating criminal procedure. The discussion will be divided into categories, for ease of reference. In each case the elements of the offence will be taken into account, along with any possible constitutional considerations, and any recommendations for reform.

4 The second part of the paper discusses the existing competent verdicts under the Criminal Procedure Act 51 of 1977, to ascertain whether these provisions have a role to play in the envisaged new criminal procedure dispensation. This section thus deals with verdicts of guilty to crimes which are not the same as the crimes with which the accused has been charged, known as “competent verdicts”. These verdicts are “lesser” offences rather than alternative charges (which are permitted by s 83 of the Criminal Procedure Act 51 of 1977) and are applied when the evidence before the court fails to prove the charge but proves another crime.

5 Indeed, the use of competent verdicts seeks to obviate the need for a range of express alternative charges (that s 83 provides for), and thus may prevent unnecessary cluttering and the risk of duplication of convictions. Competent verdicts may be considered where the evidence might fall short of proving the crime charged but succeeds in proving beyond reasonable doubt the commission of some other offence *not* specifically formulated as an alternative charge, in terms of s 83 of the Act, to the charge in the indictment or charge sheet, as the case may be.

OFFENCES AND COMPETENT VERDICTS IN THE CRIMINAL PROCEDURE ACT 51 OF 1977

A Offences in the Criminal Procedure Act 51 of 1977

1 Introduction[1]

1 The proper and effective administration of the criminal justice system is one of the core functions of government and underpins orderly co-existence within societies. The criminal law is implemented and enforced by means of an extensive system of criminal courts presided over by judges and magistrates. These courts are established and regulated by the Superior Courts Act[2] (in respect of criminal trials being heard in the High Court) and the Magistrates Courts Act[3] (in regard to criminal trials in the lower courts). In addition, prosecutions are undertaken on behalf of the State through the office of the National Director of Public Prosecutions. This office is regulated in terms of the National Prosecuting Authority Act[4] and controls public prosecutors that are attached to the various criminal courts throughout the country.

2 The criminal justice system itself is essentially regulated in terms of the Criminal Procedure Act,[5] which contains a series of offences that are designed to ensure the smooth and effective running of the system. These offences range from methods and means of securing attendance of the accused and witnesses in court (in the form of offences that punish failure to comply with notices to appear in court or a specified date

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1 The structure of the discussion of the offences relating to criminal procedure will follow that of SV Hoctor "Offences relating to the administration of criminal justice" in JRL Milton, MG Cowling & SV Hoctor *South African Criminal Law and Procedure* 2ed (Juta loose-leaf, RS 30, 2020) *Vol III: Statutory Offences* paras C1-1-46 (*SACLP*). The text that follows is similarly based on the current author's discussion in this source.

2 Act 10 of 2013.

3 Act 32 of 1944.

4 Act 32 of 1998.

5 Act 51 of 1977.

and time) through to a prohibition on publishing certain aspects of court proceedings or prohibiting the production or submission of false evidence and documentation.

3 It bears noting that there are a range of similar offences located in the National Prosecuting Authority Act, as well as in other statutes. These will be mentioned, as appropriate, but the focus of the discussion that follows will be on the offences in the Criminal Procedure Act ("the Act").

4 The offences in the Act will be discussed in categories, for ease of reference. In each case the elements of the offence will be taken into account, along with any possible constitutional considerations, and any recommendations for reform.

2 Offences relating to securing attendance at trial and other criminally related hearings

(a) Introduction

5 Securing attendance of accused persons and witnesses is an important aspect of the criminal process.[6] One of the fundamental principles of criminal justice is that criminal trials can only be conducted in the presence of the accused in open court[7] and through the *viva voce* testimony of witnesses. As a result, the conducting of criminal trials is ultimately dependent upon the presence of the accused and witnesses at such trials.

6 Other than arrest, the Act[8] contains provisions for serving accused with summonses and written notice and subpoenas in respect of witnesses.[9]

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6 Hoctor in *SACLP* C1-2.

7 Various limited exceptions are contained in s 153 of the Act.

8 Act 51 of 1977.

9 Section 24 of the Child Justice Act 75 of 2008 provides for the release of a child into care of a parent, appropriate person or guardian or on his or her own recognisance at preliminary inquiry or child justice court. In terms of s 24(4) of this Act the presiding officer must, when releasing a child in terms of this section, warn him or her to appear on a specified date and at a specified time and place and may impose one or more conditions. These instructions are binding on a parent, appropriate person or guardian (s 24(5)), and failure to ensure that the child attends as required may lead to such parent, appropriate person or guardian incurring criminal liability by contravening the offence set out in s 24(7)(*e*).

(b) The accused

(i) Introduction

7 Securing the attendance of an accused in court is an essential prerequisite to the commencement of any criminal trial.[10] Whereas the most obvious and effective means of achieving this is by way of arrest, this is generally regarded as a drastic procedure as well as constituting a serious restriction of the individual's freedom of movement, and can also affect his or her dignity and privacy.[11] As a result, arrest should only be resorted to in circumstances where other less drastic methods would prove to be ineffective.[12]

8 Summons and written notice are two such methods. Both of these are documents that are served upon an accused person indicating the date and time when he or she must appear in court in order to answer a specified charge. Summonses apply to less serious cases (in circumstances where arrest seems to be unnecessary) and a summons is served on the accused by the messenger of the court, whereas a written notice is issued to the accused by a peace officer in the case of a minor offence that would not justify a summons.[13] This occurs where such peace officer is of the opinion that, in respect of the offence concerned, a magistrate would not impose a fine in excess of a stipulated sum of money.[14]

9 Since it is vital for the proper functioning of the summons process that all such summonses should be obeyed, it follows that any failure to obey constitutes a criminal offence.[15]

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10 Hoctor in *SACLP* C1-2.

11 Etienne du Toit et al *Commentary on the Criminal Procedure Act* (Juta loose-leaf RS 74 2025) 5-1.

12 *S v More* 1993 (2) SACR 606 (W) 608h-j.

13 Section 56(1) of the Act.

14 Section 56(1) stipulates that the amount of the fine should not exceed an amount determined by the Minister by notice in the *Gazette.* In terms of GN R62 in *GG* 36111 of 30 January 2013 this amount has been set at R5000.

15 In addition, the National Prosecuting Authority Act 32 of 1998 in s 7 creates an Investigating Directorate which has as its aim the carrying out of investigations with a view to instituting criminal proceedings in respect of certain criminal activities. In order to do so certain powers and functions have been conferred upon such Investigating Directorate in order to carry out these investigations in terms of chapter 5. One of these powers is the power to conduct investigations into certain specified offences, i.e. any matter falling within the broad area of organised criminal activities (s 1). In this regard, the Investigating Director is empowered to summons any person who is believed to be

(ii) Failure to obey summons in criminal proceedings

(aa) Introduction

10 The Act provides for accused persons suspected of having committed certain specified offences to be served with a summons specifying the place, date and time for appearance in court on charges of having committed those offences.[16] Such summonses are usually issued by the clerk of the court and served by police officers[17] and must either be served personally on the accused or delivered at his or her residence or place of employment.[18] It can also be served on any person apparently over sixteen years and apparently employed or residing there.[19] In the case of High Court trials, these documents (referred to as indictments) are served by the sheriff.[20]

(bb) The offence

11 Failure to appear at the place on the date and at the time specified in the summons constitutes an offence.[21]

(cc) Substantive aspects

12 The offence involves the following elements: (i) X (the accused) must be eighteen years or older;[22] (ii) X has been summoned to appear at criminal proceedings in terms

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able to furnish any information on the subject of the investigation to appear before such Director at a specified place and time (s 28(6)).

16 Section 54(1)*(a)*.

17 In terms of s 329 of the Act.

18 Section 54(2)*(a)*.

19 Ibid.

20 Section 144(4)*(a)* of the Act together with s 43 of the Superior Courts Act 10 of 2013.

21 Section 55(1) of the Act, which provides that, subject to s 4(2) of the Child Justice Act 75 of 2008, an accused who is eighteen years or older and who is summoned under s 54 to appear at criminal proceedings and who fails to appear at the place and on the date and at the time specified in the summons or who fails to remain in attendance at such proceedings, shall be guilty of an offence. Section 4(2) of the Child Justice Act 75 of 2008 provides for the possibility of diversion of a person under the age of 21 years when issued with a summons.

22 The provisions of s 46 of the Child Justice Act 75 of 2008 govern the non-attendance of an accused under eighteen years at a preliminary inquiry (s 55(1A)). Liability for this offence is conditional upon the applicability of s 4(2) of the Child Justice Act, which provides for the possibility of diversion for young accused persons.

of s 54 of the Act;[23] (iii) proof of service (iv) X has failed to appear as specified in the summons (whether at the stipulated place, date or time).[24]

13 While the requirements relating to the unlawful conduct required for liability under this section are clearly set out, the offence does not clearly indicate what has to be proved in respect of *mens rea*. The content of this requirement is dependent upon the meaning of the word "fails", which is contingent on the context in which it is used.[25] In the present context, it is submitted that the term ought to be construed as indicating culpability in the form of negligence (*culpa*).[26] In this way, X is held liable for an unreasonable mistake of omitting to perform a duty of which he or she has previously been made aware.[27]

(dd) Procedural aspects

14 The procedure to be followed with regard to cases of this nature is to initially establish that the accused has failed to appear on the specified date.[28] This is usually achieved in practice by the court orderly calling out the accused's name and, in the absence of any response, informing the court of the accused's absence while satisfying itself that the accused received the summons.[29] Thereafter the court will issue a warrant of arrest[30] authorising that the accused be arrested and brought before the court to answer a charge of contravening s 55(1).

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23 In terms of s 55(2), the court must be satisfied from the return of service referred to in paragraph *(b)* of section 54 (2) that the summons was served on the accused in terms of paragraph *(a)* of that section.

24 In terms of s 55(2), the court must be satisfied that the accused has failed to appear at the place and on the date and at the time specified in the summons.

25 *Goldschagg v Minister van Polisie* 1979 (3) SA 1284 (T) 1298.

26 "Culpability" is the term used in this paper to incorporate both intention (i.e. presence of a blameworthy state of mind) and negligence (i.e. absence of a blameworthy state of mind) as forms of fault. As the term "mens rea" has historically been used for this purpose (see, e.g. Visser and Maré *Visser & Vorster's General Principles of Criminal Law through the Cases* 3ed (1990) 445ff) this term will be indicated alongside "culpability".

27 See *S v Arenstein* 1963 (3) SA 243 (N) 246; *S v Arenstein* 1964 (1) SA 361 (A) 366.

28 Hoctor in *SACLP* C1-2.

29 By means of a return of service in terms of s 54(2)*(b)*.

30 Section 55(2) of the Act.

15 At this stage, the key jurisdictional fact for the issuing of the warrant of arrest is the non-appearance of the accused, together with the court being satisfied that the accused had received the summons. The court thus does not concern itself with the reasons for the non-appearance.[31] However, it is quite possible that the return of service could be defective in one way or another[32] with the result that the accused remained unaware of the existence of the warrant. In order to minimise this risk in practice warrants of arrest will only be authorised in cases where personal service of the summons occurred.[33]

16 The issuing of a warrant of arrest constitutes *prima facie* proof of a contravention of s 55(1).[34] Thereafter once the accused is brought before the court on the warrant, it can now *mero motu* summarily enquire into the reasons for the accused's failure to attend.[35] There is an evidentiary burden on the accused to adduce evidence to satisfy the court that his failure to attend was not due to any fault on his part. The current phrasing of the provision is "unless the accused satisfies the court that the failure was not due to any fault on his part".[36] The constitutionality of the summary trial bears further examination.

(ee) Penalty

17 The current penalty for this offence is a R300 fine or imprisonment of three months.[37] Whilst in terms of the Adjustment of Fines Act of 1991,[38] the maximum fine would amount to R10 000, it is evident that a new formulation of this offence should provide for an updated sentencing provision, which in line with current practice ought not

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31 *Minister van Polisie v Goldschagg* 1981 (1) SA 37 (A).

32 Such as where it was left at some residence or place of employment or business in terms of s 54(2)(a) and was ultimately not passed on to the accused.

33 Du Toit 6-5.

34 *S v Du Plessis* 1970 (2) SA 562 (E).

35 This inquiry need not necessarily be undertaken by the same magistrate who issued the warrant and the subsequent magistrate conducting the inquiry may rely on the record of proceedings at the initial stage—particularly the fact that the warrant had been issued (*S v Du Plessis* 1970 (2) SA 562 (E) 565).

36 Section 55(2).

37 Section 55(2). In terms of s1(2) of the Adjustment of Fines Act 101 of 1991, the maximum fine which may be imposed is R10 000.

38 Section 1(2) of the Adjustment of Fines Act 101 of 1991.

to reflect the amount of the fine. Consideration could also be given to a possible increase in the maximum sentencing period in respect of imprisonment, so as to provide a more severe deterrent for disobedience of the provisions of the Act. It is unclear whether this is indeed necessary. The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(ff) Question/recommendation for consideration in redrafting

18 There may be value in redrafting this provision to: (i) more clearly delineate the culpability (*mens rea)* requirement for this offence; (ii) more clearly indicate that an evidentiary burden is contemplated, rather than a reverse onus; and (iii) the redrafting may seek to update the ambit and phrasing of the penalty clause.

(iii) Failure to obey a written notice to appear at criminal proceedings

(aa) Introduction

19 In the case of certain minor offences[39] an accused may be issued with a written notice to appear in court on a specified date and time to answer charges of having committed certain offences.[40] This notice is accompanied by a certificate completed by the peace officer issuing the notice to the effect that he or she has handed the original of such written notice to the accused and that he has explained to the accused the import thereof.[41]

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39 Where a peace officer on reasonable grounds believes that the magistrate will not impose a fine exceeding R5000 (s 56(1)). This amount was determined by the Minister of Justice in GN R62 in *GG* 36111 of 30 January 2013.

40 Section 56(1)*(b)*, which provides that: "If an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall

(b) call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;…"

41 In terms of s 56(1)*(d)*, in terms of which "such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof."

(bb) The offence

20 It is an offence for any person who has been handed a written notice to appear in court in terms of s 56 to fail to comply with such order—in particular, failing to appear at the place and on the date and time specified in the notice.[42] The actual offence is created in terms of s 55[43] since s 56(5) simply states that the provisions of s 55 shall *mutatis mutandis* apply with reference to a written notice handed to an accused in terms of s 56(1).

(cc) Substantive aspects

21 This offence involves the following elements: (i) X (the accused) has been issued with a written notice in accordance with the requirements in section 56 requiring X to be present at criminal proceedings;[44] and (ii) X has failed to appear as specified in the written notice (whether at the stipulated place, date or time).[45]

22 While the requirements relating to the unlawful conduct required for liability are clearly set out, the offence does not clearly indicate what has to be proved in respect of culpability (*mens rea*). The content of this requirement is dependent upon the meaning of the word 'fails', which is contingent on the context in which it is used.[46] In the present context, it is submitted that the term ought to be construed as indicating culpability (*mens rea*) in the form of negligence (*culpa*). In this way, X is held liable for omitting to perform a duty of which he or she has previously been made aware.[47]

(dd) Procedural aspects

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42 Section 56(5).

43 Pertaining to summonses.

44 In terms of s 55(2), the court must be satisfied from the production of the duplicate original of the written notice that the written notice was handed to the accused.

45 In terms of s 55(2), the court must be satisfied that the accused has failed to appear at the place and on the date and at the time specified in the written notice.

46 *Goldschagg v Minister van Polisie* 1979 (3) SA 1284 (T) 1298.

47 See *S v Arenstein* 1963 (3) SA 243 (N) 246; *S v Arenstein* 1964 (1) SA 361 (A) 366.

23 The procedure is substantially the same as that pertaining to failing to obey a summons in terms of s 55(1). Thus, the peace officer's certificate[48] will constitute *prima facie* proof that the accused received the notice and the warrant of arrest will serve to indicate that the accused failed to appear on the specified date.

24 Thereafter the second phase of the inquiry will focus on whether the accused is able to advance a valid reason for failure to appear. There is an evidentiary burden on the accused to adduce evidence to satisfy the court that his failure to attend was not due to any fault on his part. The current phrasing of the provision is "unless the accused satisfies the court that the failure was not due to any fault on his part".[49]

25 Because of the minor nature of offences in respect of which this process operates, provision is made for an accused to admit his or her guilt[50] without having to appear in court. It seems clear that the purpose of this procedure is "to expedite the course of justice in minor offences".[51] Should an accused pay an admission of guilt fine, this would put an end to the process. The payment of an admission of guilt fine, however, involves the waiving of important procedural rights.[52]

(ee) *Penalty*

26 The penalty for this offence is a R300 fine or three months' imprisonment.[53] Whilst in terms of the Adjustment of Fines Act of 1991,[54] the maximum fine would amount to R10 000, it is evident that a new formulation of this offence should provide for an updated sentencing provision, which in line with contemporary practice ought not to reflect the amount of the fine. Consideration could also be given to a possible increase in the maximum sentencing period in respect of imprisonment, so as to provide a more

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48 In terms of s 56(1)*(d)*.

49 Section 55(2).

50 In terms of s 57 of the Act.

51 J Joubert (ed) *Criminal Procedure Handbook* 13ed (Juta 2020) 150.

52 Du Toit 7-3. The J534 contains an annexure explaining the accused's rights and the deemed consequences that follow payment of the fine of conviction and sentence. This follows decisions such as *S v Parsons* 2013 (1) SACR 38 (WCC) and *S v Tong* 2013 (1) SACR 346 (WCC).

53 Section 55(2).

54 Section 1(2) of the Adjustment of Fines Act 101 of 1991.

severe deterrent for disobedience of the provisions of the Act. It is unclear whether this is indeed necessary. The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(ff) Question/recommendation for consideration in redrafting

27 There may be value in redrafting this provision to: (i) more clearly delineate the culpability (*mens rea*) requirement for this offence; (ii) more clearly indicate that an evidentiary burden is contemplated, rather than a reverse onus; and (iii) the redrafting may seek to update the ambit and phrasing of the penalty clause.

(iv) Failure to appear after release on warning

(aa) Introduction

28 In regard to offences not of a serious nature[55] any accused who has been arrested on charges of such offences may be released from custody and thereafter warned to appear before a specified court at a specified time on a specified date.[56]

29 This constitutes an alternative means of securing the attendance of an accused in court.[57] It developed as a practice whereby an accused could be released on own recognisance after having been arrested on any charge—despite the fact that there was no provision for this procedure in the 1955 Criminal Procedure Act.[58] The accused must be eligible to be released on bail—either at the instance of a police official[59] or the courts.[60]

(bb) The offence

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55 That is, offences that are not referred to in Part II or III of Schedule 2 of the Act.

56 Section 72(1)*(a)*, subject to s 4(2) of the Child Justice Act 75 of 2008, which provides for the possibility of diversion of a person under the age of 21 years. Persons under the age of 18 are dealt with in terms of the Child Justice Act – see s 24 of this Act.

57 Hoctor in *SACLP* C1-4.

58 Du Toit 10-2.

59 In terms of s 59.

60 In terms of s 60.

30 It is an offence for any accused who is released under s 72(1)*(a)* to fail to appear in court at the specified time and date as set out in the warning.[61] Thus it must be established that the accused:

(1) was duly warned to appear at a specified court on a specified date and at a specified time (such warning must either take the form of a written notice in respect of police bail or, in the case of release at the instance of the courts, such warning must form part of the court record);[62] and

(2) failed to appear in accordance with that warning.

(cc) Substantive aspects

31 This offence involves the following elements: (i) X (the accused) has been issued with a warning requiring X to be present at criminal proceedings; [63] and (ii) X has failed to appear as specified in the warning (whether at the stipulated place, date or time). [64] While the requirements relating to the unlawful conduct required for liability are clearly set out, the offence does not clearly indicate what has to be proved in respect of culpability (*mens rea*). The content of this requirement is dependent upon the meaning of the word "fails", which is contingent on the context in which it is used.[65] In the present context, it is submitted that the term ought to be construed as indicating culpability (*mens rea*) in the form of negligence (*culpa*). In this way, X is held liable for an unreasonable mistake of omitting to perform a duty of which he or she has previously been made aware.[66]

(dd) Procedural aspects

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61 Section 72(2)*(a)*.

62 Section 72(3)*(a)* and *(b)*.

63 In terms of s 55(2), the court must be satisfied from the production of the duplicate original of the written notice that the written notice was handed to the accused.

64 In terms of s 55(2), the court must be satisfied that the accused has failed to appear at the place and on the date and at the time specified in the written notice.

65 *Goldschagg v Minister van Polisie* 1979 (3) SA 1284 (T) 1298.

66 See *S v Arenstein* 1963 (3) SA 243 (N) 246; *S v Arenstein* 1964 (1) SA 361 (A) 366. This is consistent with s 72(4) of the Act.

32 As is the case with summonses and written notices to appear,[67] once a court has established that an accused was duly warned to appear and the accused has failed to appear on that date, the court may issue a warrant of arrest. Once this warrant is executed and the accused is brought before the court, the latter may summarily enquire into whether failure to comply was due to the fault of the accused, and—if that is the case—to duly convict the said accused.[68]

33 However, in *S v Singo*[69] it was held that this summary procedure violated rights to a fair trial in terms of s 35(3) of the Constitution. That was due to the inquisitorial nature of the procedure as well as the reverse onus which requires the accused or custodian to satisfy the court that failure to comply was not due to any fault on their part.

34 This decision would obviously have implications for the same procedure applicable in respect of failure to comply with summonses and written notices[70] and it is difficult to envisage how the courts could function effectively if these cases could not be dealt with by way of a summary procedure. However, this decision in *Singo's* case was overturned by the Constitutional Court where it was held that, owing to the fact that the elements of any charge in cases of this nature are likely to be simple and the accused is always at liberty to request further particulars, this summary procedure does not in general terms limit the accused's right to a fair trial, insofar as the accused's right to adduce and challenge evidence is not limited by the provision.[71] However, the Constitutional Court held that the right to remain silent is indeed limited by this provision, that it is therefore appropriate to read in words necessary to establish an evidentiary burden, and consequently that s 72(4) should be read as though words "there is a reasonable possibility that" appear therein between words "that" and "his failure".

(ee) Penalty

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67 See (b)(ii) and (b)(iii) above.

68 Section 72(4).

69 *S v Singo* 2002 (1) SACR 576 (V).

70 In terms of ss 55 and 56 set out above.

71 *S v Singo* 2002 (2) SACR 160 (CC).

35 The penalty for this offence is a fine not exceeding R300 or imprisonment for a period not exceeding three months. [72] Whilst in terms of the Adjustment of Fines Act of 1991,[73] the maximum fine would amount to R10 000, it is evident that a new formulation of this offence should provide for an updated sentencing provision, which in line with contemporary practice ought not to reflect the amount of the fine. Consideration could also be given to a possible increase in the maximum sentencing period in respect of imprisonment, so as to provide a more severe deterrent for disobedience of the provisions of the Act. It is unclear whether this is indeed necessary. The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(ff) Question/recommendation for consideration in redrafting

36 There may be value in redrafting this provision to: (i) more clearly delineate the culpability (*mens rea*) requirement for this offence; (ii) more clearly indicate that an evidentiary burden is contemplated, rather than a reverse onus, in line with the Constitutional Court judgment in *Singo*; and (iii) the redrafting may seek to update the ambit and phrasing of the penalty clause.

(v) Failure to appear after an adjournment

(aa) Introduction

37 Despite the manner in which an accused who is not in custody is brought before the court—i.e. whether it be by way of summons,[74] written notice[75] or release on warning[76]—unless such accused pleads guilty on the first appearance, it is extremely unlikely that the trial will be concluded at the outset.[77]

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72 Section 72(4). In terms of s1(2) of the Adjustment of Fines Act 101 of 1991, the maximum fine which may be imposed is R10 000.

73 Section 1(2) of the Adjustment of Fines Act 101 of 1991.

74 See (b)(ii) above.

75 See (b)(iii) above.

76 See (b)(iv) above.

77 Hoctor in *SACLP* C1-6.

38 This necessitates that the matter be adjourned, which means that the accused will have to appear at a subsequent specified date. The method of securing the subsequent attendance of the accused at court after an adjournment is by way of a warning from the court to appear at a specified date and time.

(bb) The offence

39 It is an offence[78] for an accused to fail to appear at the place and on the date and at the time to which such proceedings have been adjourned. This offence presupposes that the accused has duly and properly been warned to appear and that such warning should form part of the court record.[79]

(cc) Procedural aspects

40 The procedure relating to these offences takes the form of a summary procedure after an accused has been brought before the court on a warrant of arrest.[80] Such a warrant would have been issued once the court has established that the accused failed to appear on the specified date and time.

41 Any person who is summonsed in a representative capacity[81] is personally liable for failure to so appear and hence is liable to punishment under s 170(1) for failure to do so.[82] The procedure and penalty are the same as cases involving an individual accused.[83]

(dd) Penalty

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78 Section 170(1).

79 *S v Du Plessis* 1970 (2) SA 562 (E).

80 Section 55(2).

81 In terms of s 332, which provides for prosecution of corporations and other artificial persons.

82 Ibid.

83 See *Ex parte Prokureur-Generaal, Transvaal* 1984 (2) SA 283 (T).

42 The penalty is a fine not exceeding 3 months or a R300 fine.[84] Whilst in terms of the Adjustment of Fines Act of 1991,[85] the maximum fine would amount to R10 000, it is evident that a new formulation of this offence should provide for an updated sentencing provision, which in line with contemporary practice ought not to reflect the amount of the fine. Consideration could also be given to a possible increase in the maximum sentencing period in respect of imprisonment, so as to provide a more severe deterrent for disobedience of the provisions of the Act. It is unclear whether this is indeed necessary. The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(ee) Question/recommendation for consideration in redrafting

43 This provision is clearly drafted, serves an important function, and does not appear to require substantive amendment, although the penalty clause may be amended in scope and ambit.

(vi) Failure to remain in attendance

(aa) Introduction

44 Securing the attendance of the accused at a criminal trial by way of summons,[86] written notice,[87] release on warning[88] and warning after an adjournment[89] forms only a part of the objective of these provisions.[90] The other important aspect is ensuring that the accused remains in attendance. This is particularly relevant as a result of the fact that the court might not be ready to proceed with an accused's trial at the time specified in the summons, notice or warning.

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84 Section 170(2). In terms of s1(2) of the Adjustment of Fines Act 101 of 1991, the maximum fine which may be imposed is R10 000.

85 Section 1(2) of the Adjustment of Fines Act 101 of 1991.

86 In terms of s 54.

87 In terms of s 56.

88 In terms of s 72.

89 In terms of s 170(1).

90 Hoctor in *SACLP* C1-7.

45 This means that the accused will be compelled to wait and it is imperative to the proper working of the criminal justice system that the accused should remain in attendance during this period.

(bb) The offence

46 It is an offence for any accused who is summonsed to appear in court,[91] has received written notice to so appear[92] or has been warned to appear after release on warning[93] or after an adjournment[94] to fail to remain in attendance.[95]

47 This means that the accused must remain for the entire court day until called upon or excused. Although there are no cases or authority on this point, common sense dictates that the accused should remain in the vicinity of the actual courtroom to which he or she has been summoned in order to be able to hear his or her name being called out.

(cc) Penalty

48 The penalty for this offence is a fine of R300 or three months' imprisonment.[96] Whilst in terms of the Adjustment of Fines Act of 1991,[97] the maximum fine would amount to R10 000, it is evident that a new formulation of this offence should provide for an updated sentencing provision, which in terms of current practice ought not to reflect the amount of the fine. Consideration could also be given to a possible increase in the maximum sentencing period in respect of imprisonment, so as to provide a more severe deterrent for disobedience of the provisions of the Act. It is unclear whether this is indeed necessary. The choice will have to be made between a legislative limit on the extent of

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91 In terms of s 54. The offence is set out in s 55(1).

92 In terms of s 56 The offence is set out in s 56(5).

93 In terms of or s 72(1) or s 60. The offence is set out in s 72(2)*(a).*

94 In terms of s 170(1).

95 The offence is set out in s 72(2)*(a).*

96 S 170(2). In terms of s1(2) of the Adjustment of Fines Act 101 of 1991, the maximum fine which may be imposed is R10 000.

97 Section 1(2) of the Adjustment of Fines Act 101 of 1991.

the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(dd) Question/recommendation for consideration in redrafting

49 This provision is clearly drafted, serves an important function, and does not appear to require substantive amendment, although the penalty clause may be amended in scope and ambit.

(vii) Failure to appear after release on bail

(aa) Introduction

50 Bail is a process in terms of which an accused who has been arrested and is being held in custody is released on payment of a stipulated sum of money.[98] However, the release of the accused is only part of the bail process. The other important aspect is that, after having been released on bail, the accused must be warned to appear in court at a specified date and time.[99] Thus, the object of the bail process is to ensure as far as possible that accused persons enjoy pre-trial liberty (which recognises the constitutional rights of individual freedom as well as the fundamental principle of innocence until proven guilty) while at the same time attempting to guarantee that such accused will stand trial.[100]

51 It is obvious from the above that authorising the release of an accused on bail without ensuring that he or she subsequently appears in court will drastically undermine the proper functioning of the criminal process. However, prior to 1995 the legislature had not seen it fit to outlaw failing to appear or failing to remain in attendance at the court. Instead, the Act made provision for the provisional forfeiture of bail monies and the issue of a warrant of arrest for the accused should he or she fail to appear.[101] Thereafter, the accused could approach the court within 14 days after the warrant of arrest was issued. If the accused was unable to satisfy the court that the failure to appear was not due to

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98 Section 58 of the Criminal Procedure Act.

99 Joubert 209.

100 See Joubert 209-211.

101 Section 67(1).

his or her fault, the provisional order for the forfeiture of bail would be made final and the accused would be committed to custody.[102]

52 However, the Act was amended[103] by the creation of the offence of failing to appear on the specified date.[104] The reason for this was that certain cases[105] emphasised that in the absence of the existence of an offence of failing to appear, subsequent non-appearance could not be criminally punishable. Thus forfeiture of bail money and loss of liberty were the only sanctions.[106]

53 This resulted in two major problems: firstly, situations could arise where mere forfeiture of bail and loss of liberty might not be viewed as adequate.[107] In *Mabaso's* case[108] in order to address this problem, the court concluded that the accused could be charged with contempt of court[109] or the statutory offence created by s 108 of the Magistrate's Courts Act.[110] Secondly, in the absence of any specified offence for failure to appear, courts have refused to link such failure to any other (more general) offences relating to such failure.[111] Thus it was held that an accused who was on bail and failed to appear could not be convicted of contravening s 170 (which deals with failure to appear after an adjournment). It is submitted that these issues have been addressed by the amendment.

(bb) The offence

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102 This is similar to the procedure in respect of failure to obey a summons or written notice except for the objective of bail.

103 With the insertion of s 67A (by the Criminal Procedure Second Amendment Act 75 of 1995).

104 Section 67A of the Criminal Procedure Act.

105 For example, *S v Sibuya* 1979 (3) SA 192 (T) and *S v Nkosi* 1987 (1) SA 581 (T).

106 Du Toit 9-115.

107 *S v Mabaso* 1990 (1) SACR 675 (T). MG Cowling "Bail reform: An assessment of the Criminal Procedure Second Amendment Act 75 of 1995" (1996) 9(1) *SACJ* 50 at 59 comments that this change was to be welcomed on the basis that the forfeiture of the bail money as a sanction was "totally inadequate" especially where bail was set at an amount considered too low.

108 Supra.

109 In the form of contempt of court *ex facie curiae.*

110 Act 32 of 1944. This is a formal statutory contempt of court.

111 For example in *S v Ndwayana* 1983 (1) PH H93 (E).

54 It is an offence[112] for any person who has been released on bail to subsequently fail to appear on the date and at the place determined for his or her appearance. Such failure must be without good cause.

(cc) Substantive aspects

55 This offence contains the following elements: (i) X (accused) has been released on bail; (ii) X fails without good cause to appear on the date or at the place determined for his or her appearance; (iii) culpability (*mens rea)*

56 As regards (i), release on bail is governed by the provisions of Chapter 9 of the Act. In respect of (ii), the lack of good cause has to be established beyond reasonable doubt by the state.[113] This position may be contrasted with the offences requiring that the accused "show" good cause or "satisfy the court" regarding the presence of good cause.[114]

57 In terms of (iii), according to Du Toit *et al*[115] culpability (*mens rea*) (in the form of *dolus* or *culpa* on the part of the accused) is obviously an essential requirement. Thus, it must be shown that the failure to attend was either wilful or as a result of negligence on the part of the accused. Consequently, as a minimum X must have negligently failed to attend as required.

(dd) Procedural aspects

58 The procedure governing this offence has become complicated as a result of the fact that s 67 contains its own peculiar procedure designed to deal with forfeiture. In this regard, an accused is given an opportunity[116] to appear before the court within 14 days

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112 In terms of s 67A.

113 *S v Williams* 2012 (2) SACR 158 (WCC) par 4.

114 Du Toit 9-116.

115 Du Toit 9-115.

116 In terms of s 67(2)*(a)*.

of such failure to appear[117] in order to satisfy the court that such failure was not due to any fault on his or her part in terms of s 67(2)(*a*). On failure (either to appear during the 14-day period or to satisfy the court that such failure to appear was not the accused's fault) the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.[118]

59 In regard to s 67A, Du Toit *et al*[119] submit that the burden of proof should be on the prosecution to establish the absence of good cause beyond reasonable doubt. This is because s 67A creates a statutory offence and, as pointed out by Du Toit *et al,*[120] there is no reason why the normal rules and standards should not apply.

60 Thus, according to *S v Mabuza,*[121] a charge sheet must be drawn in the usual manner and a formal trial must be held whereby the guilt of the accused is proved beyond reasonable doubt.

(ee) Penalty

61 The penalty for this offence is an unspecified fine or a maximum of one year's imprisonment.[122] Du Toit *et al* remark that the fact that bail money has been forfeited should play an important role in the imposition of any fine imposed for the contravention of s 67A.[123]

(ff) Question/recommendation for consideration in redrafting

62 This provision is clearly drafted, serves an important function, and does not seem to require amendment.

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117 During which time the forfeiture of bail will be deemed to be of a provisional nature (in terms of s 67(1)) and the execution of the warrant will be suspended.

118 Section 67(2)*(c)*.

119 Du Toit 9-115.

120 Ibid.

121 *S v Mabuza* 1996 (2) SACR 239 (T).

122 Section 67A.

123 Du Toit 9-116.

(c) Witnesses and other persons

(i) Introduction

63 In most criminal trials the principal means of placing evidence before the court is by way of *viva voce* testimony. This means that each side (i.e. the prosecution and the defence) will rely on witnesses to testify in support of their respective versions. It is general practice for each side to ensure the presence of its own witnesses at a criminal trial.[124]

64 However, the Act[125] confers discretion on a presiding judicial officer to secure the attendance of witnesses at criminal proceedings by means of a subpoena.[126] The latter is a document (similar in purpose to a summons)[127] that is served on any potential witness requiring such person to appear in a specified court on a specified date and time.

65 The court's discretion is limited in the sense that, as pointed out above, in any adversarial system it is up to the parties themselves to decide which witnesses they want and to secure their attendance at court. Thus, the fact that the court is given this power *mero motu* in terms of s 186 to subpoena witnesses is tantamount to introducing an inquisitorial element into our adversarial criminal procedure system.[128] To this end, the court should only call a witness in terms of s 186 where it is of the belief that the evidence of that witness appears essential to the just decision of the case.[129]

66 Other offences have been created to deal with the failure to attend a hearing, which fall outside of the Act. These include the failure to attend proceedings in a child justice court by the parent or guardian of a child accused, who has been duly warned to be present there;[130] the failure by the parent or guardian of a child accused to remain in

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124 Hoctor in *SACLP* C1-10.

125 Section 186.

126 See Hoctor & Milton *SACLP* C2-5 for a discussion on the subpoena of witnesses in civil cases.

127 See A2(*b*)(*i*) above.

128 *S v Von Molendorff* 1987 (1) SA 135 (T).

129 Du Toit 23-14C.

130 In terms of s 65(7) of the Child Justice Act 75 of 2008, read with s 24(7)*(e)* of this Act. The penalty is a fine or imprisonment for a period not exceeding three months.

attendance at court, having been duly warned to do so;[131] failure to obey a summons issued by an Investigating Director under the National Prosecuting Authority Act, to appear at the time and the place specified in the summons, without sufficient cause;[132] and failure to appear at an examination in terms of the International Co-operation in Criminal Matters Act.[133]

(ii) Failure to obey a subpoena

(aa) The offence

67 Any witness who is subpoenaed to attend a criminal trial must attend the said proceedings in accordance with the details (such as the date, venue and time) specified in the subpoena.[134] Failure to attend the said proceedings constitutes an offence.[135]

(bb) Procedural aspects

68 The procedure in respect of this offence (in terms of s 188(2)) takes the form of a summary enquiry after the person in question has been brought before the court under a warrant of arrest.[136]

(cc) Penalty

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131 In terms of s 65(7) of the Child Justice Act 75 of 2008, read with s 24(7)*(e)* of this Act. The penalty is a fine or imprisonment for a period not exceeding three months.

132 In terms of s 28(6)(*a*), read with s 28(10)(*a*), of the National Prosecuting Authority Act 32 of 1998. The penalty is an unspecified fine or imprisonment not exceeding 15 years or both.

133 Section 10(1) of the International Co-operation in Criminal Matters Act Act 75 of 1996. The penalty is an unspecified fine or imprisonment not exceeding three months.

134 Section 187.

135 Section 188.

136 See Hoctor in *SACLP* C1-2.

69 The penalty for a conviction of the above offence is a R300 fine or three months' imprisonment.[137] This penalty applies in terms of s 170(2) of the Act.[138] Whilst in terms of the Adjustment of Fines Act of 1991,[139] the maximum fine would amount to R10 000, it is evident that a new formulation of this offence should provide for an updated sentencing provision, which in terms of current practice ought not to reflect the amount of the fine. Consideration could also be given to a possible increase in the maximum sentencing period in respect of imprisonment, so as to provide a more severe deterrent for disobedience of the provisions of the Act. It is unclear whether this is indeed necessary. The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(dd) Question/recommendation for consideration in redrafting

70 This provision is clearly drafted, serves an important function, and does not appear to require substantive amendment, although the penalty clause may be amended in scope and ambit.

(iii) Failure to remain in attendance

(aa) Introduction

71 Any person who has been summoned or subpoenaed to attend court (and who duly appears) must remain in attendance until no longer required. The practice in criminal trials is for witnesses who have completed their testimony to be formally excused by the court.[140]

72 In *S v Mkize*[141] it was held that the original subpoena applies to adjournment dates as well. This means that it is not necessary to subpoena witnesses in respect of

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137 Section 188(2). In terms of s1(2) of the Adjustment of Fines Act 101 of 1991, the maximum fine which may be imposed is R10 000.

138 This is the same procedure as that applicable in respect of failure of an accused to appear after an adjournment.

139 Section 1(2) of the Adjustment of Fines Act 101 of 1991.

140 Section 187 expressly indicates that such witness shall remain in attendance unless he or she has been "excused by the court".

141 *S v Mkize* 1963 (3) SA 218 (N).

each adjournment. However, it is important that such witnesses are warned to appear and advised of the date because, in the absence of such warning or a subpoena, there will be no obligation to return.[142]

(bb) The offence

73 It is an offence for any witness subpoenaed in terms of s 186 of the Criminal Procedure Act to fail to remain in attendance.[143] The extent of the obligation to so remain in attendance would differ from that of the accused since the latter is required to remain in attendance for the entire duration of the trial whereas witnesses are only required to be present in order to testify. On the other hand, it is important to ensure that witnesses do not wait around unnecessarily, and it is submitted that this is a factor to be taken into consideration when determining whether or not a witness has failed to remain in attendance.

74 While the requirements relating to the unlawful conduct required for liability are clearly set out, the offence does not clearly indicate what has to be proved in respect of culpability (*mens rea*). The content of this requirement is dependent upon the meaning of the word "fails", which is contingent on the context in which it is used.[144] In the present context, it is submitted that the term ought to be construed as indicating culpability (*mens rea*) in the form of negligence (*culpa*). In this way, X is held liable for omitting to perform a duty of which he or she has previously been made aware.[145]

(cc) Procedural aspects [146]

75 The Act makes provision for a summary procedure in regard to prosecuting this offence that commences with a court establishing that the witness has indeed failed to appear and thereafter authorising the issue of a warrant of arrest. The second stage of

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142 *R v Belinsky* 1925 AD 363.

143 Section 188.

144 *Goldschagg v Minister van Polisie* 1979 (3) SA 1284 (T) 1298.

145 See *S v Arenstein* 1963 (3) SA 243 (N) 246; *S v Arenstein* 1964 (1) SA 361 (A) 366. This is consistent with s 72(4) of the Act.

146 For a full discussion of this aspect, see Hoctor in *SACLP* C1-2.

this process begins with the execution of that warrant and the accused being brought before a court to explain the failure to remain in attendance.[147]

76 Where the court holds a summary inquiry in terms of sub-section (2) into a failure to attend, considerations of justice and common sense demand that the court must inform the accused that there is an onus on him to tender a reasonable excuse—in the unlikely event, that is, that this reverse onus passes constitutional muster.[148] In *Cooper v District Magistrate, Cape Town*,[149] the court held that the magistrate had failed to explain to the applicant the position regarding the onus of proof, and had materially misdirected himself by applying the reverse onus.[150] The court drew attention to the similarities between the s 170(2) inquiry and the inquiry set out in s 72(4), and pointed to the finding by the Constitutional Court in *S v Singo*[151] that the imposition of a reverse onus in s 72(4) was unconstitutional. The Constitutional Court in that case held that s 72(4) had to be read as though the words 'there is a reasonable possibility that' appeared between the words 'that' and 'his failure'. Although the court in *Cooper* did not go this far, its rejection of the reverse onus in s 170(2) would suggest that this interpretation would have met with its approval. Such an approach would, it is submitted, be appropriate.[152]

(dd) Penalty

77 The penalty for this offence is the same as that in respect of an accused person who is convicted of failing to remain in attendance.[153] Thus, any person convicted of contravening s 188 is liable to a fine of R300 or three months' imprisonment.[154] Whilst in terms of the Adjustment of Fines Act of 1991,[155] the maximum fine would amount to

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147 Section 188(2) which makes reference to s 170(2).

148 Du Toit 22-105 cite the cases of *S v Ngubeni* [2009] 1 All SA 185 (T) at [15]; *S v Dludla* (unreported, FB case no R210/2018, 13 September 2018) at [8]) in this regard.

149 *Cooper v District Magistrate, Cape Town* 2018 (1) SACR 369 (WCC).

150 As discussed in Du Toit 22-105.

151 *S v Singo* 2002 (2) SACR 160 (CC).

152 Du Toit 22-105.

153 In terms of s 170(1).

154 Section 170(2). In terms of s1(2) of the Adjustment of Fines Act 101 of 1991, the maximum fine which may be imposed is R10 000.

155 Section 1(2) of the Adjustment of Fines Act 101 of 1991.

R10 000, it is evident that a new formulation of this offence should provide for an updated sentencing provision, which in terms of current practice ought not to reflect the amount of the fine. Consideration could also be given to a possible increase in the maximum sentencing period in respect of imprisonment, so as to provide a more severe deterrent for disobedience of the provisions of the Act. It is unclear whether this is indeed necessary. The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(ee) Question/recommendation for consideration in redrafting

78 There may be value in redrafting this provision to: (i) more clearly delineate the culpability (*mens rea*) requirement for this offence; (ii) more clearly indicate that an evidentiary burden is contemplated, rather than a reverse onus, in line with the Constitutional Court judgment in *Singo*; and (iii) the redrafting may seek to update the ambit and phrasing of the penalty clause.

(iv) Failure to inform police of whereabouts

(aa) Introduction

79 In order to ensure the general availability of witnesses in criminal proceedings, the Criminal Procedure Act places an obligation on witnesses to keep certain specified police officers informed at all times of their full residential addresses or any other addresses where they might conveniently be found.[156] The object of this is for both investigatory as well as evidentiary purposes since the supply of information by witnesses covers all stages of the criminal process—and not just that period when witnesses are due to appear in court. In addition, this provision appears to remain applicable notwithstanding that the witness might have been subpoenaed (since s 183 does not contain any exception in such cases).

80 This obligation only becomes operable once the police have advised the witnesses to this effect in writing. In addition, the persons must also be advised that they will be required as witnesses in criminal proceedings and the obligation will continue in

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[156] Section 183.

operation until such time as the respective criminal proceedings have been finally disposed of or until these persons have been officially advised that they will no longer be required as witnesses.[157]

(bb) The offence

81 It is an offence[158] to fail to comply with these provisions. [159] The penalty for such an offence is a fine not exceeding R300 or three months' imprisonment.[160] Whilst in terms of the Adjustment of Fines Act of 1991,[161] the maximum fine would amount to R10 000, it is evident that a new formulation of this offence should provide for an updated sentencing provision, which in terms of current practice ought not to reflect the amount of the fine. Consideration could also be given to a possible increase in the maximum sentencing period in respect of imprisonment, so as to provide a more severe deterrent for disobedience of the provisions of the Act. It is unclear whether this is indeed necessary. The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(cc) Question/recommendation for consideration in redrafting

82 This provision is clearly drafted, serves an important function, and does not appear to require substantive amendment, although the penalty clause may be amended in scope and ambit.

(v) Failure to heed warning of court

(aa) Witnesses about to abscond

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157 Section 183(1).

158 In terms of s 183(2).

159 As set out in s 183(1).

160 Section 183(2). In terms of s1(2) of the Adjustment of Fines Act 101 of 1991, the maximum fine which may be imposed is R10 000.

161 Section 1(2) of the Adjustment of Fines Act 101 of 1991.

83 Situations might arise where the State becomes aware of the fact that a witness is either evading service of a subpoena or intends to abscond. In order to deal with this issue, the Act contains provisions that seek to ensure that witnesses nonetheless appear in court when required to testify.

84 Where a court is informed upon information in writing and on oath that a witness[162] is about to abscond, the court is empowered to issue a warrant of arrest in respect of that witness.

85 Thereafter the witness (once he or she has been arrested) must be brought before the court issuing the warrant and will be warned to appear at the relevant proceedings at a stated time, place and date. Once a witness has been warned to appear, he or she will be released. Such release can be subject to any appropriate conditions usually applicable to situations of release on bail.[163] These conditions include reporting to a specified person in authority,[164] prohibition on entering certain places[165] or any other appropriate conditions.[166]

(bb) The offence

86 Any person who has been warned to appear and who subsequently fails to appear shall be guilty of an offence.[167]

87 It is not clear whether this offence covers failure to observe any conditions imposed in terms of s 184(2) or whether it is restricted to failing to appear. In this regard it is submitted that the interests of justice would require that failing to observe conditions fall within the ambit of the offence. The reason for this is that s 184 makes reference to any person who fails to comply with a warning under s 184(2). This would include not only the warning to appear but also the warning to observe any conditions imposed in

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162 Defined in terms of s 184(1) as any person who is likely to give material evidence in criminal proceedings with reference to any offence.

163 In terms of s 62.

164 In terms of s 62*(a)*.

165 In terms of s 62*(b)*.

166 In terms of s 62*(e)*.

167 In terms of s 184(3)(*a*).

terms of s 184(2). In addition, there is no mention made in s 184(2) or (3) of any reference to s 67A (which imposes criminal liability in respect of failure to appear after release on bail or failure to observe any bail condition) and hence the only means of enforcing any condition is by way of the offence contained in s 184(3).

88 A further offence is created in the Act, in terms of which, where any court is provided with information on oath and in writing that a material witness is evading service of the relevant subpoena, such court may issue a warrant of arrest.[168]

89 Thereafter the procedure is the same as that applicable in the case of witnesses about to abscond.[169]

(cc) Penalty

90 The penalty for this offence is the same as that for an accused who fails to appear after an adjournment or to remain in attendance.[170] This provides for the issuing of a warrant of arrest and the holding of a subsequent summary enquiry. If found guilty, the accused is liable to a fine not exceeding R300 or three months' imprisonment.[171] Whilst in terms of the Adjustment of Fines Act of 1991,[172] the maximum fine would amount to R10 000, it is evident that a new formulation of this offence should provide for an updated sentencing provision, which in terms of current practice ought not to reflect the amount of the fine. Consideration could also be given to a possible increase in the maximum sentencing period in respect of imprisonment, so as to provide a more severe deterrent for disobedience of the provisions of the Act. It is unclear whether this is indeed necessary. The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(dd) Question/recommendation for consideration in redrafting

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168 In terms of s 184(4).

169 See above.

170 In terms of s 170(2).

171 Section 184 (3). In terms of s1(2) of the Adjustment of Fines Act 101 of 1991, the maximum fine which may be imposed is R10 000.

172 Section 1(2) of the Adjustment of Fines Act 101 of 1991.

91 These provisions clearly serve an important function, but it seems that redrafting should take account of the apparent vagueness contained in s 184(2), and the penalty clause may be amended in scope and ambit.

3 Refusal to co-operate with officials dealing with the administration of criminal justice

(a) Introduction

92 Securing the co-operation of certain individuals in respect of certain processes is an important aspect of the administration of justice. Thus, in order to ensure the smooth passage of the justice system, a number of statutory offences have been created dealing with such aspects as refusing to be sworn in or to make an affirmation before various tribunals and inquiries, together with various forms of failure to provide certain information.[173]

93 There is a range of offences relating to obstruction of officials dealing with the administration of justice. The interest protected is the smooth functioning of the criminal justice system, which requires that certain role-players within the system are protected from being obstructed or hindered in the performance of their duties. These offences are, however, located in statutory instruments other than the Act and will consequently not be discussed here. Examples of such offences are obstructing the police,[174] obstructing

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173 In terms of the National Prosecuting Authority Act 32 of 1998, offences have been created in respect of the failure to co-operate with the investigating directorate. These offences take the form of the failure to produce evidence (s 28(10)(*b*)(i)); the refusal to be sworn in or to make an affirmation (s 28(10)(*b*)(ii)) and the failure to answer question (s 28(10)(*c*)(i)). Furthermore, this Act also makes the failure to furnish information to an Investigating Director an offence (s 29(12)(*b*)(ii)).

174 Section 67(1)(a) of the South African Police Services Act 68 of 1995.

court officials;[175] contempt of court;[176] and obstructing or hindering prosecution officials.[177]

94 Although not regarded as creating criminal offences, reference will firstly be made to provisions relating to recalcitrant witnesses and failure to furnish information to a judicial officer.

95 Specific offences relating to obstructing the police[178] and escaping from custody[179] are dealt with below.

(b) Measures which are not offences[180]

(i) Detention of witness

(aa) Introduction

96 Section 185 of the CPA currently authorises a Director of Public Prosecutions (DPP) and a Judge of the High Court to order the detention of a prospective witness under certain circumstances. The person to be detained must be a likely witness to an offence in Part III of Schedule 2, which includes serious offences such as treason, sedition, terrorism, public violence, and includes common-law crimes such as murder, kidnapping, robbery and housebreaking with intent to commit a crime. The scope of offences relevant to section 185 is extensive. The length of detention in a particular case depends on who has ordered it.

97 If the detention was ordered by the DPP himself or herself, the period must

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175 Section 46(*a*) of the Superior Courts Act 10 of 2013, s 107(1) of the Magistrates' Courts Act 32 of 1944; and s 47(*a*) of the Small Claims Court Act 61 of 1984.

176 Section 108(1) of the Magistrates' Courts Act 32 of 1944. For discussion of the common-law crime of contempt of court, see Burchell, Schwikkard & Mosaka *Burchell's Principles of Criminal Law* 6ed (Juta 2025) 839; Hoctor *Snyman's Criminal Law* 8ed (LexisNexis 2025) 295; Hoctor & Milton *SACLP* C2-9ff.

177 Section 29(12)(*a*) of the National Prosecuting Authority Act 32 of 1998.

178 See 3(c)(i) & (ii) below; SV Hoctor & MG Cowling "Obstructing the police and escaping from custody" in JRL Milton, MG Cowling & SV Hoctor *South African Criminal Law and Procedure* 2ed (Juta loose-leaf, RS 26, 2016) *Vol III: Statutory Offences* paras C4-1-36 at C4-11-12 (*SACLP*).

179 See 3(c)(v) below; Hoctor & Cowling in *SACLP* C4-13-30.

180 Though not criminal offences as such, it is appropriate to discuss these provisions here.

not exceed 72 hours.[181] But this period may be extended by a judge.[182] A detention ordered by a judge may be in force until the relevant trial is concluded.

(bb) Discussion of provision and procedural aspects

98 Under the provision it is the DPP who determines which prospective witness is a candidate for detention.[183] Section 185(1) provides that if in the opinion of the DPP a person is likely to be a witness in a crime listed in Part III of Schedule 2, the DPP may apply for the detention of such person, provided one of the conditions enumerated in the subsection exists. The DPP may request detention if he/she is of the opinion that the personal safety of that person is in danger, or that he or she may abscond, or that the witness may be tampered with, or that the witness may be intimidated, or that it is in the interests of such witness or the administration of justice that he or she be detained.

99 The application submitted to a Judge is made by way of affidavit and the applicant must be the DPP. If it is refused, the DPP may resubmit it, based on new facts.[184] The decision of the Judge in relation to such matters is final and cannot be challenged in a court of law. Such application is shrouded in security. They are made to a judge in private (in chambers) as opposed to an open court and there is a prohibition that prevents publication of those applications.[185]

100 Where a period of six months lapses without the relevant trial commencing, the detained witness must be released from detention.[186] But during detention, access to the detained witness is forbidden.[187] He or she can be seen by public officials including a magistrate who must visit him or her once a week.[188]

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181 S 185(1)(*b*).

182 S 185 (2), (3), (4).

183 Joubert *et al* 71 note the concern that the function of the DPP is prosecutorial and not judicial, and that anything that relates to the liberty of a person in principle ought to be determined by a court, rather than a DPP.

184 For discussion of the procedure relating to s 185, see Du Toit *et al* 23-9.

185 S 185(9).

186 S 185(4).

187 S 185(5).

188 S 185(6).

101 As to whether section 185 is consistent with the Constitution,[189] regard may be had to a paper of the Commission which addresses the subject of witnesses in general and which is published together with this paper.

(ii) Recalcitrant witnesses

(aa) Introduction

102 Criminal trials in South Africa rely extensively on the *viva voce* testimony of witnesses as the basis for evidence before the courts. It is therefore necessary not only to secure the attendance of witnesses at criminal trials but also to ensure that such witnesses co-operate by revealing relevant information and telling the truth.[190]

103 In order to ensure that this occurs, s 189 of the Act provides for the court to be able to compel witnesses unwilling to co-operate by means of punishment. While section 189 does not actually create an offence, it provides for a period of imprisonment following a summary inquiry.

(bb) Discussion of provision

104 Any person present at criminal proceedings who is required to give evidence and fails in one way or another to do so may be imprisoned. Such failure to co-operate may take the following forms: refusal to be sworn in or make affirmation as a witness; refusal to answer questions or refusal or failure to produce any book, paper or document required by the court.[191]

105 The following elements must be established:

1. The person concerned must be present at criminal proceedings and required to give evidence at such proceedings. This includes all compellable witnesses.[192]

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189 Du Toit et al 23-9 state that the constitutional status of this provision must be open to serious doubt.

190 Hoctor in *SACLP* C1-16.

191 Section 189(1).

192 Du Toit *et al* page 23-15.

2. The person concerned must fail or refuse to co-operate in one of the areas outlined above. In regard to a refusal to answer questions this does not arise exclusively from silence. Thus in *R* v *Nani*[193] it was held that a refusal can be constituted by other evidence of improper answers to questions. In *S v Mthempane*[194] it was held that mere refusal to testify is sufficient. This means that it is not necessary to put specific questions to the witness.
3. The refusal or failure to co-operate must be with just excuse. It is submitted that any form of privilege will constitute just excuse which in turn will justify any refusal to co-operate. Thus, spouse evidence is privileged[195] as is evidence by the accused of previous convictions.[196] Communications between spouses during the marriage will also be exempted[197] along with any testimony of a self-incriminating manner.[198] Legal practitioners will also enjoy exemption in respect of clients[199] whereas s 202 provides for a general privilege from disclosure on broad grounds of public policy or interest.

106 However, particularly as a result of the advent of the Constitution, the term 'just excuse' cannot be restricted to lawful excuses arising from the rules of privilege, compellability of witnesses or the admissibility of evidence.[200] In *Nel v Le Roux,*[201] the Constitutional Court considered the provisions of s 205 of the Criminal Procedure Act.[202] It was held that persons could not be compelled to furnish any information that constituted an infringement of any constitutional right contained in the Bill of Rights.

107 It is hence submitted that it is not possible to give an *a priori*, all-embracing definition of the term "just excuse". Instead, the circumstances of each case will have to

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193 *R* v *Nani* 1930 EDL 12.

194 *S v Mthempane* 1979 (2) SA 105 (A).

195 In terms of s 195.

196 Section 197.

197 In terms of s 198.

198 Section 203.

199 In terms of s 201.

200 This was already held in the pre-Constitutional era, in *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A).

201 *Nel v Le Roux* 1996 (1) SACR 572 (CC).

202 This provision obliges persons to furnish certain information and hence the legal implications are identical to the situation in s 189.

be examined to determine whether providing such information would infringe a constitutional right or whether there are other circumstances that amount to a just excuse. In *S v Weinberg*[203] it was held that a just excuse would arise if a witness were in a situation where it could be considered "humanly intolerable" to testify—although this should be applied as a guideline rather than a rule.

108 It is ultimately necessary to weigh the public interest in receiving the relevant testimony against the likely disadvantages that the witness would suffer.[204]

(cc) Procedural aspects

109 Although s 189 specifically endorses a summary procedure in place of the ordinary trial process, this does not mean to say that the rules of natural justice need not be complied with.[205] Thus, the witness must be afforded a reasonable opportunity to prepare for the proceedings and is also entitled to legal representation.[206] This is especially important since the penalty does not provide for an option of a fine and provision is made for a fairly lengthy prison sentence.[207] In addition, provision is also made for the continuation of this process once a sentence has been served.[208] This means that an accused who has completed the specified time in prison can be brought before a court by way of a summary procedure in the case of subsequent refusal to co-operate.

(dd) Penalty

110 The penalty is two years' imprisonment or five years' imprisonment in cases where the proceedings in question relate to an offence referred to in Part III of Schedule 2 of the Act.[209]

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203 *S v Weinberg* 1966 (4) SA 660 (A).

204 Du Toit 23-16.

205 Du Toit 23-16A.

206 Ibid.

207 See below.

208 In terms of s 189(2).

209 These are all serious offences.

(ee) Question/recommendation for consideration in redrafting

111 While the purpose of this provision is clear, the summary procedure requires careful delimitation to accord with constitutional concerns.

(iii) Failure to furnish information to a judicial officer

(aa) Introduction

112 In order to gather information about certain criminal activities and the commission of alleged offences, s 205 of the Criminal Procedure Act authorises the Director of Public Prosecutions[210] to request a judicial officer to require the attendance of any person who is likely to give material or relevant information as to any alleged offence to appear before a judicial officer[211] in order to be examined. The general purpose of this provision is to compel a person who refuses to make a statement to the police to furnish the required information under oath.

(bb) "Just excuse" and justification

113 Thus, such person may be compelled to take the oath and to answer questions put to him or her unless there exists a just excuse for such refusal.[212] Although s 205 does not expressly provide the justification of "just excuse" for failure to provide information, s 205(2) stipulates that s 189[213] shall apply with reference to proceedings under s 205(1).

114 As is the case with recalcitrant witnesses,[214] s 205 does not actually create an offence of failing to give the contemplated information. Instead, the judge or magistrate

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210 Or any public prosecutor so delegated in writing.

211 This includes magistrates, regional magistrates and judges.

212 Du Toit 23-51.

213 Which deals with recalcitrant witnesses and contains the "just excuse" justification for failure to testify. See 3(b)(i) above for a discussion of this aspect.

214 In terms of s 189. See 3(b)(i) above.

before whom such person has to appear has a discretion to sentence such person to a period of imprisonment.[215]

115 In addition to the 'just excuse' for refusing or failing to give the information,[216] no person who fails or refuses to comply shall be imprisoned unless the judge or magistrate is of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.

116 This means that such judicial officers must yield to the "wider considerations of public interest".[217] Thus, in *S v Cornelissen*[218] the court recognised that journalists did not enjoy any legal privilege that would result in immunity from having to give information—such as, for example, attorney and client privilege. However, the court was nonetheless prepared to accept that journalists had to rely on the public in order to ensure effective news-gathering and that divulging details about the source of such information could harm this relationship. This could also cause serious damage to a journalist's reputation as well as the capacity for gaining access to important sources of news. As a result, the court concluded that the potential public advantage to be gained from subjecting the journalist in this particular case was outweighed by the potential public prejudice such a step would cause.

(cc) Constitutional aspects

117 The Constitution has also impacted on justification in broad terms.[219] In *Nel v Le Roux*[220] it was held that the giving of any information in terms of s 205 should not infringe any of the fundamental rights contained in Chapter 2 of the Constitution unless it can be shown that, in the particular circumstances of that particular case, such infringement would be justified in terms of the limitations clause.[221]

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215 This is in accordance with the procedures laid down in terms of s 189. Thus express provision is made for a summary process as well as a penalty. See 3(b)(i) above.

216 See 3(b)(i) above.

217 *Davis v Regional Magistrate, Johannesburg* 1989 (4) SA 299 (W) 303H-I.

218 1994 (2) SACR 41 (W).

219 Du Toit 23-52.

220 *Nel v Le Roux* 1996 (1) SACR 572 (CC).

221 That is, in terms of s 36(1) of the Constitution.

(dd) Procedural aspects

118 While s 205 does not stipulate that the person expected to divulge information should be subpoenaed, it has generally become recognised that the issuing of a subpoena is the most practical and effective means of ensuring that the said person duly appears before a judicial officer.[222] It is the function of the judicial officer issuing the subpoena to ascertain whether circumstances placed before him or her warrant the issue of a subpoena upon such person.[223]

119 Thereafter, at the actual inquiry it is incumbent upon the judicial officer charged with this function to ensure that the subpoena was correctly issued in the sense that he or she must be satisfied, for example, that the topic to be examined concerns an offence or that the prosecutor requesting it has been authorised in writing to do so. Thus, the decision of the judicial officer who issued the subpoena concerning the existence of the "jurisdictional facts" that justified the issuing of that subpoena is not *res judicata* for the purpose of the second stage of the proceedings before the judicial officer conducting the inquiry.[224] This affords the person being questioned an opportunity to raise these points as a form of defence[225] to a subsequent refusal to give any information.

(ee) Penalty

120 A period of imprisonment may be imposed, as contemplated in s 189.[226]

(ff) Question/recommendation for consideration in redrafting

121 While the purpose of this provision is clear, it requires careful delimitation and application to accord with constitutional concerns.

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222 *S v Matisonn* 1981 (3) SA 302 (A).

223 *S v Haysom* 1979 (3) SA 155 (C).

224 *S v Cornelissen* 1994 (2) SACR 41 (W).

225 Which would obviously include an attack on the validity of a subpoena.

226 See 3(b)(i) above.

(c) Offences relating to refusal to co-operate with officials

(i) Failure to provide name and address to police[227]

(aa) Introduction

122 As Du Toit et al point out, ordinarily there would not be any obligation on a person to make a statement to the police, or to provide the police with information.[228] This provision, however, imposes an obligation on persons falling into certain categories to provide their names and addresses to peace officers.

(bb) The offence

123 In terms of s 41(1) of the Act a peace officer[229] may call upon any person —

> *(a)* whom he has power to arrest;
> *(b)* who is reasonably suspected of having committed or of having attempted to commit an offence;
> *(c)* who, in the opinion of the peace officer, may be able to give evidence in regard to the commission or suspected commission of any offence,
> to furnish such peace officer with his full name and address.

A person who, when so called upon, fails to do so or furnishes a false or incorrect name and address, commits an offence.[230]

(cc) Substantive aspects

124 The elements of the offence are that the accused (i) unlawfully (ii) failed to provide a correct name or address (iii) culpability (*mens rea*)

125 In terms of (i), the offence is only committed by a person who falls into one of the categories stated in the section: “The peace officer cannot arbitrarily demand the full

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227 Hoctor & Cowling in *SACLP* C4-11.

228 Du Toit 5-16A.

229 As defined in s 1 of the Act: “peace officer” includes any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), any person who is a peace officer under that section.

230 Section 41(2) of the Act.

name and address of any citizen without more ado; his powers are limited to the three sets of circumstances mentioned."[231] It is thus essential to allege and prove that the accused is a person who falls into such a category.[232] The categories are as follows:

(a) people the peace officer has the power to arrest, which includes the list of persons mentioned in s 40 of the Act, which provides for arrest by a peace officer without a warrant. The peace officer may take the names and addresses of such persons instead of arresting them.[233]

(b) people reasonably suspected of having committed or of having attempted to commit an offence. A peace officer who seeks to rely on this provision must show that he investigated elements of the crime in question, before a reasonable suspicion can be formed.[234] Du Toit et al however submit that a reasonable suspicion can exist despite uncertainty, and that a suspicion can be reasonable even if there is insufficient evidence to establish a *prima facie* case against the accused.[235]

(c) People who in the opinion of the peace officer may be able to give evidence in regard to the commission or suspected commission of an offence.

126 In terms of (ii), the unlawful act encompasses both the failure to provide a full name and address, and the furnishing of a name and address that the peace officer reasonably suspects to be false. The existence of such grounds at the time of the suspicion arising in the mind of the peace officer is tested objectively.

127 In terms of (iii), it seems clear that the withholding of personal information, or the furnishing of false personal information, involves intentional conduct.

(dd) <u>Procedural aspects</u>

128 A police official effecting an arrest in terms of s 41 is required to inform the person being arrested of the reason for the arrest there and then,[236] failing which the arrest may

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231 *R v Weyer* 1958 (3) SA 467 (GW) 473.

232 *R v Weyer* (supra); *R v Sotiralis* 1950 (4) SA 481 (T).

233 See A Kruger *Hiemstra's Criminal Procedure* (LexisNexis loose-leaf RS 18 2025) (Kruger/Hiemstra) 5-13

234 *R v Nkala* 1962 (1) SA 248 (SR)

235 Du Toit 5-17.

236 *R v Du Plessis* 1943 EDL 56 at 60.

be unlawful.[237] Justifiable refusal to provide a name and address militates against the person being arrested by the peace officer.[238]

129 A charge of contravening s 41 must specify into which category of persons the accused allegedly fell.[239]

(ee) Penalty

130 In terms of s 41(2), the penalty for contravening this provision is a fine not exceeding R300 or imprisonment for a period not exceeding three months. In light of current practice, it is suggested that the redrafted provision include an unspecified fine.

(ff) Question/recommendation for consideration in redrafting

131 Hiemstra points out[240] that there appears to be an unnecessary overlap between the first and second categories of persons under a duty to provide details. This may be remedied in the redrafting. Hiemstra further notes the inconsistency in the wording of s 41, in that s 41(1) refers to a false name *or* address, whereas s 41(2) refers to the furnishing of "a false or *incorrect* name *and* address". This difference in terminology could give rise to inconsistent application and ought to be remedied in redrafting. It is further suggested that the redrafted provision includes an unspecified fine.

(iv) Failure to assist in an arrest[241]

(aa) Introduction

132 The duty to assist a police official in an arrest is recognised in a number of jurisdictions, but may be framed, as is the case in the English Police Act of 1996, in terms of "resisting or wilfully obstructing" a constable in the execution of his duty.[242] While an

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237 *R v Kleyn* 1937 CPD 288; Du Toit 5-17; Kruger/Hiemstra 5-13.

238 Kruger/Hiemstra 5-13.

239 Du Toit 5-17.

240 Kruger/Hiemstra 5-13.

241 Hoctor & Cowling in *SACLP* C4-12. The discussion of this provision needs to be aligned with that contained in the discussion paper on arrest which forms part of this project.

242 Section 89(2) of the Police Act 1996.

analogous offence of "resisting, wilfully hindering or obstructing" a member of the SA Police Services in the exercise of his or her powers is set out in the South African Police Services Act of 1995,[243] the failure to assist in an arrest is specifically criminalised in the Act. This reflects the seriousness with which the legislature regards the duty to aid a police official.[244]

(bb) The offence

133 In terms of s 47(1) of the Act every male inhabitant of the Republic of an age not below sixteen and not exceeding sixty years is obliged, when called upon by any police official to do so, to assist such police official —

(a) in arresting any person;

(b) in detaining any person so arrested.

134 In terms of s 47(2), a person who is so called upon and who, without sufficient cause, fails to assist a police official as provided in section 47(1), commits an offence.

(cc) Substantive aspects

135 The elements of this offence are: that the accused (i) unlawfully (ii) failed to assist a police official (iii) culpability (*mens rea*).

136 In terms of (i), the offence is not committed if the accused had "sufficient cause" not to assist in the arrest. In *R v Mgwenya* 1925 TPD 288 it was held that physical disability constituted sufficient cause. The duty is applicable to males between the ages of 16 and 60, and consequently anyone not fitting into this gender or age restriction will not be acting unlawfully in terms of this section in refusing assistance. Moreover, it is not unlawful not to assist an arrest, or attempted arrest, which is in itself not lawful.[245]

137 In terms of (ii), the term "failure" would seem to bear its ordinary dictionary definition of "an omission of an expected action, occurrence, or performance".[246]

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243 Section 67(1) of the South African Police Services Act 68 of 1995.

244 Du Toit et al 5-21

245 *R v Rosenthal* 1927 TPD 470.

246 *Black's Law Dictionary* s.v. "failure".

138 In terms of (iii), although not specifically mentioned in the section, culpability (*mens rea*) in the form of intent is an element of this offence.[247] X must thus be aware that the person calling upon him to assist is a police official,[248] and thus police officials in plain clothes need to ensure that they identify themselves accordingly.[249]

(dd) Procedural aspects

139 While the onus of proof of culpability (*mens rea*) lies with the State, upon prima facie proof of mens rea, it is incumbent on the accused to demonstrate a reasonable doubt as to the existence of intent, and so where the police official in plain clothes has identified himself, the accused will have to show good cause for disbelieving the police official.[250] Similar considerations apply where the accused accepts the police officer's identification, but does not believe in the lawfulness of the arrest.[251]

(ee) Penalty

140 The penalty is a fine not exceeding R300 or imprisonment for a period not exceeding three months.[252] In the light of current practice, the fine could be adjusted to an unspecified amount. The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(ff) Question/recommendation for consideration in redrafting

141 While the analogous offence of obstructing the police may be employed in the context of failing to assist a police official with the arrest or detention of a person, the need for a specific, tailored offence for this particular context seems evident. One possible consideration in redrafting is whether, in the light of the unrestricted duty in

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247 *R v Lakier* 1934 TPD 240.

248 *R v Lakier* supra 251.

249 *R v Brewis* 1934 NPD 54 at 57.

250 Du Toit 5-22; *R v Brewis* supra 54.

251 Du Toit 5-22.

252 Section 47(2) of the Act.

respect of gender and age in relation to the analogous offence of obstructing the police, such restrictions should apply - and if so, to what extent - in respect of the present offence. The present offence seems to anticipate the need to provide physical assistance to restrain the detainee, but this may not necessarily be the case.

(v) Failure to furnish information during bail proceedings

(aa) Introduction

142 Bail is an integral component of the criminal justice system designed to secure the release from custody of accused persons who have been arrested pending the finalisation of their criminal trials. The bail process itself takes the form of a hearing whereby information is placed before a presiding judicial officer which provides the basis as to whether or not the accused should be released on bail and, if so, what conditions should apply in respect of such release.

143 Certain aspects of this information are vital in order to enable the presiding officer to make an appropriate decision which, in turn, means that it is important that this information is brought to the said officer's attention. This issue has become particularly important since the advent of the Constitution because a perception has been created that in ordinary bail applications the State bears the proof of showing that the accused should not be released on bail. [253]

144 Some of the most important examples of this type of information are whether the accused has any previous convictions, whether there are any other charges pending against the accused and whether he or she has been released on bail pending these charges. This information is obviously within the personal knowledge of the accused, whereas it could prove to be quite difficult for the prosecution to secure it. Obtaining such information could also prove to be time-consuming, which militates against the urgent nature of the bail process and the inherent requirement that it be dealt with in a speedy manner.

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[253] *Magano v District Magistrate Johannesburg* (1) 1994 (2) SACR 307 (W) 309*h-j.* See also Du Toit 9-54D ff.

145 It is for this reason that the Act[254] requires the accused to divulge this information at a bail application.

(bb) The offence

146 Section 60(11B)*(a)* requires every accused who applies for bail to inform the court during the bail proceedings: whether or not he or she has previously been convicted of any offence;[255] whether there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges,[256] whether an order contemplated in s 5 or 6 of the Domestic Violence Act, 1998;[257] s 3 or 9 of the Protection from Harassment Act, 2011,[258] or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still in force;[259] and whether[260] the accused is, or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in s 73 of the Correctional Services Act, 1998.[261]

147 Where the accused's legal adviser responds on behalf of the accused[262] (whether orally or in writing), the latter shall be required by the court to declare whether or not he confirms such information.

148 Any accused who wilfully fails or refuses to comply with this provision or furnishes the court with false information in this respect shall be guilty of an offence.[263]

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254 In terms of s 60(11B).

255 In terms of s 60(11B)*(a)*(i).

256 In terms of s 60(11B)*(a)*(ii).

257 Act 116 of 1998.

258 Act 17 of 2011.

259 In terms of s 60(11B)(*a*)(iii).

260 In terms of s 60(11B)(*a*)(iv).

261 Act 111 of 1998.

262 This is in terms of s 60(11B)*(a)*, where reference is made to the accused or his or her legal adviser.

263 Section 60(11B)*(d)*(i) (in relation to refusal to comply) and (ii) (in relation to furnishing false information).

(cc) Substantive aspects

149 There are two aspects to this offence. The first is the refusal or failure to comply with the requirement to provide the information. This obviously translates into a failure or refusal to inform the court of any previous convictions, charges, orders or that the accused is a sentenced offender placed under correctional supervision or parole.[264] The second aspect relates to the furnishing of information by the accused[265] where that information turns out to be false. However, it is submitted that there is no real distinction between non-compliance and furnishing false information since it can be assumed that the obligation to furnish the information applies only to truthful information, which means that giving false information constitutes a form of non-compliance.

150 It is submitted that culpability (*mens rea*) in the form of *dolus* is an element of this offence. This can be imputed by the fact that s 60(11B)*(d)* expressly stipulates that such non-compliance must have been done "wilfully". In *S v Thusi*[266] it was pointed out that the State "would no doubt have difficulty in establishing that an unrepresented accused who was not warned…that he was obliged to disclose previous convictions and pending charges acted wilfully in failing so to disclose".[267] Thus it would seem that it is incumbent upon the court or the prosecution to elicit this information from the accused and failure to do so would render it impossible to convict the accused.

(dd) Procedural aspects

151 Du Toit *et al* submit that the provision (i.e. the creation of the offence of non-compliance with s 60(11B)*(a)*) "cannot be reconciled" with the constitutional rights of the accused:[268]

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264 Section 60(11B)*(d)*(i).

265 In terms of s 60(11B)*(d)*(ii).

266 *S v Thusi* 2000 (4) BCLR 433 (N).

267 At 437J-438A.

268 Du Toit 9-68D.

152 "Exclusion of the information at the subsequent trial does not alter the fact that the accused is called upon to furnish information to the prosecution, and thereby assisting the latter to gain access to information which may influence the outcome of the bail application. It is true that previous convictions are relevant in a bail application. But such convictions should be proved in a procedurally regular fashion – and not by breaching the constitutional passive defence right of arrested and accused persons".

153 Cowling disagrees,[269] arguing that there is no indication of precisely what rights are involved despite Du Toit et al's reference to the fact that the accused is called upon to assist the prosecution to "gain access to information which may influence the outcome of the bail application".[270] Cowling submits that a clear distinction should be drawn between acquiring knowledge of previous convictions during a bail application and the situation where a court seeks information about previous convictions during a trial after conviction where the prosecution fails to prove any.[271]

154 No provision is made for any summary procedure (unlike failure to obey a summons or contempt of court proceedings). Therefore it is submitted that any accused charged with contravening s 60(11B)*(d)* would be charged and tried according to the standard criminal procedure commencing with the issuing of a charge sheet.

(ee) <u>Penalty</u>

155 The penalty for any conviction is an unspecified fine or imprisonment for a period not exceeding two years. [272]

(ff) Question/recommendation for consideration in redrafting

156 Given the concerns expressed about the constitutionality of this provision, careful consideration should be given to these issues in redrafting.

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269 See Hoctor in *SACLP* C1-23 (this source was originally authored by Cowling).

270 Du Toit 9-68D.

271 *S v Khambule* 1991 (2) SACR 277 (W) and *S v Hlangomva* 1999 (1) SACR 173 (E).

272 Section 60(11B)(*d).*

(vi) Failure to produce document

(aa) Offence

157 Section 338 of the Act provides as follows: “Where any law requires any person to produce any document at any criminal proceedings at which such person is an accused, and such person fails to produce such document at such proceedings, such person shall be guilty of an offence, and the court may in a summary manner enquire into his failure to produce the document and, unless such person satisfies the court that his failure was not due to any fault on his part, sentence him to any punishment provided for in such law, or, if no punishment is so provided, to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.”

(bb) Substantive aspects

158 As pointed out in *Hiemstra*,[273] this provision anticipates the accused bringing a document to court upon which, pursuant to an order of that court, an endorsement must be made by the court, or a clerk of the court. It provides for a criminal sanction which may serve as an incentive to the accused who is reluctant to furnish such a document, knowing that an endorsement relating to a criminal offence will be made on it.

159 From a constitutional perspective, there are two aspects which require attention. First, whether the summary procedure provided for in this section could be regarded as violating the accused’s right to a fair trial.[274]

160 Secondly, the constitutionality of the reverse onus in the provision may be doubted. The Constitutional Court has consistently struck down reverse onus provisions[275] and consequently it seems that this provision should be reframed in the form of an evidentiary burden, rather than a reverse onus. This evidentiary burden could be expressed in the following terms: “in the absence of evidence to the contrary which raises a reasonable doubt, failure to produce the document shall be sufficient evidence of guilt”.

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273 Kruger/Hiemstra 33-16.

274 See the discussion of the summary procedure regarding s 72(4) and s 170(2).

275 See discussion in Burchell, Schwikkard and Mosaka 17.

161 The fault requirement relating to this provision could be satisfied either by proof of intention or negligence.

(cc) Penalty

162 The current stipulated maximum sentence for this provision was established in 1986, and in line with contemporary drafting practices, the penalty clause could provide for "a fine or…imprisonment for a period not exceeding three months."

(dd) Question/recommendation for consideration in redrafting

163 As indicated, the institution of an evidential burden, clarity on the nature of the culpability (*mens rea*) requirement, and an amendment in the framing of the penalty clause appear to be necessary amendments.

(vii) Escaping and aiding escaping before incarceration[276]

(aa) Offence

164 Section 51 of the Act provides as follows:

> "(1) Any person who escapes or attempts to escape from custody after he or she has been lawfully arrested and before he or she has been lodged in any correctional facility, police-cell or lock-up, shall be guilty of an offence and liable on conviction to the penalties prescribed in section 117 of the Correctional Services Act 111 of 1998.
> 2) Any person who rescues or attempts to rescue from custody any person after he or she has been lawfully arrested and before he or she has been lodged in any correctional facility, police-cell or lock-up, or who aids the person to escape or to attempt to escape from custody, or who harbours or conceals or assists in harbouring or concealing any person who escapes from custody after he or she has been lawfully arrested and before he or she has been lodged in any correctional facility, police-cell or lock-up, shall be guilty of an offence and liable on conviction to the penalties prescribed in section 117 of the said Correctional Services Act 111 of 1998."
> (3) Notwithstanding anything to the contrary in any law contained, a lower court shall have jurisdiction to try any offence under this section and to impose any penalty prescribed in respect thereof."

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276 See Hoctor & Cowling in *SACLP* C4-13ff; Hoctor/Snyman 316.

(bb) Substantive aspects

165 There are, generally speaking, three offences or groups of offences relating to escaping from lawful custody, namely the common-law crime of escaping; contravention of section 51 of the Criminal Procedure Act 51 of 1977, and contravention of certain provisions of the Correctional Services Act 111 of 1998. Thus, in terms of the common law, it is a crime to escape from a prison or other place of lawful detention. People who assist in the escape, rescue a prisoner from gaol or harbour an escaped prisoner are similarly guilty of an offence in terms of the common law.[277] Although the statutory offences cover the same misconduct, the common-law crime remains extant. In *PE* it was held that the common-law crime of escaping from custody was the appropriate charge where the escape was from a child and youth care centre.[278]

166 Section 117 of the Correctional Services Act 111 of 1998 provides that any person who escapes from custody commits an offence. Any person who conspires with any other person to procure his or her own escape or that of another inmate, or who assists or incites any inmate to escape, also commits an offence. Further, any person who is in possession of any document or article with intent to procure his or her own escape or that of another inmate commits an offence. Any person who in any manner collaborates with a correctional or custody official or any other person to leave the correctional centre without lawful authority or under false pretences also commits an offence. Further, any person subject to community corrections who absconds and thereby avoids being monitored, commits an offence.

167 Section 51 of the Act deals with escape after a lawful arrest but before the arrested person is lodged in a prison or police cell. Section 51(1) provides that any person who escapes or attempts to escape from custody after he has been lawfully arrested and before he has been lodged in any correction facility, police cell or lock-up, commits an offence. The custody must be lawful.[279]

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277 *R v Msuida* 1912 TPD 419.

278 *S v PE* 2015 (2) SACR 392 (GP).

279 *S v Mafora* 2010 (1) SACR 269 (NWM) par 10; *S v Evilio* 2012 (1) SACR 367 (GSJ). In *S v Busuku* 2006 (1) SACR 96 (E) the court emphasised that where X had escaped after he had been lodged in police cells, he should not be charged under s 51 of the Criminal

168 Section 51(2) provides that any person who rescues or attempts to rescue from custody any person after he has been lawfully arrested and before he has been lodged in any correctional facility, police cell or lock-up, or who aids such person to escape or to attempt to escape from such custody, or who harbours or conceals or assists in harbouring or concealing any person who escapes from custody after he has been lawfully arrested and before he has been lodged in any correctional facility, police cell or lock-up, commits an offence.

(cc) Penalty

169 The punishment for the offences in s 51(2) is the same as those provided for in the Correctional Services Act 111 of 1998 for escaping from lawful custody. The punishment for these offences is a fine or imprisonment for a period not exceeding 10 years, or imprisonment without the option of a fine, or both.[280]

(dd) Question/recommendation for consideration in redrafting

170 This provision is clearly drafted, serves an important function, and does not appear to require amendment.

Procedure Act, but with contravention of s 117 of the Correctional Services Act 111 of 1998.

280 If the provisions of the Adjustment of Fines Act 101 of 1991 are taken into account, the maximum fine that may be imposed is R40 000 ×3 = R120 000 in the case of a Magistrate's Court which is not a Regional Court, and in the case of a Regional Court R40 000 × 10 = R400 000. It was held in *PE supra* that the offences under s 117 do not apply to escape from a child and youth care centre.

4 Other Offences relating to the furnishing of false information[281]

(a) Offences under the 1955 and 1977 Acts

(i) Introduction[282]

171 The criminal justice system is heavily reliant on reliable information. Thus, a number of measures are in place to ensure that certain forms of information [283] are truthful. This is particularly important in situations where a special dispensation has been granted for the production of certain evidence in court by means other than *viva voce* testimony under oath. In this latter case any untruthful witness can be revealed by means of cross-examination and convicted of perjury. On the other hand, where provision is made for the mere production of certificates, endorsements et cetera, the legislature has sought to create specific offences outlawing the production of false information.[284]

(ii) Issuing false certificates in regard to expert evidence

(aa) Introduction

172 Courts frequently rely on the testimony of experts in order to enlighten them in particular areas of expertise. In this regard it is common practice to utilise affidavits or

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281 The offence of making conflicting statements under different oaths contained in s 319(3) of the Criminal Procedure Act 56 of 1955 is contained in this part of the discussion paper, as it forms a part of the set of offences relating to the furnishing of false information in the context of criminal justice.

282 For additional comment on statutory perjury in the administration of civil justice, see SV Hoctor & JRL Milton "Offences relating to the administration of civil justice" in JRL Milton, MG Cowling & SV Hoctor *South African Criminal Law and Procedure* 2ed (Juta loose-leaf, RS 36, 2025) *Vol III: Statutory Offences* paras C2-1-45 at C2-27ff.

283 That is, other than the *viva voce* testimony of witnesses in open court.

284 Apart from the offences created in the Act, which will be discussed below, the furnishing of false or misleading information to an Investigating Director is criminalized in terms of s 29(12)(b) of the National Prosecuting Authority Act 32 of 1998.

certificates as vehicles for adducing expert testimony.[285] The Act expressly provides for this process[286] in certain specified areas of expertise.

173 This applies in respect of any fact established by an examination or process requiring skill in a wide variety of areas.[287] Where such fact is or may become relevant to the issue in criminal proceedings, an affidavit can be submitted by an expert[288] setting out that he or she has established such fact by means of an examination or process. The effect of this is that such affidavit upon its mere production at such proceedings shall constitute *prima facie* proof of such fact. This is subject to a proviso that in any case where skill is required in chemistry, anatomy or pathology, a certificate rather than an affidavit may be issued.

174 It is submitted that this is an important provision to facilitate the criminal process since it allows the submission of affidavits in regard to a wide range of spheres of expertise to pronounce upon factual situations in a scientific (and hence objective manner) that is usually not going to be contested. This obviates the need to call these experts as witnesses and is regularly utilised in regard to blood-alcohol tests, post - mortem reports and ballistics tests.

(bb) The offence

175 It is an offence for any person to issue a certificate in terms of this process[289] that wilfully states anything false.[290] The precise ambit of this offence is somewhat complicated by the fact that the object of the process is to ensure that evidence submitted by way of the mere production of a certificate is reliable. Thus, there is a whole range of safeguards in place, such as the requirement that the deponent must be an expert

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285 Du Toit 24-27.

286 In terms of s 212(4)*(a)*.

287 These are set out in s 212(4)*(a)*(i)-(vi) and include all areas of science, computer science and engineering. It also encompasses medical sciences such as anatomy and pathology and human behavioural science, as well as ballistics, finger- and palm-prints and the examination of disputed documents.

288 This expert must be in the service of the state (or provincial administration), a university or other body designated by the Minister.

289 That is, in terms of the procedure set out in s 212(4)*(a)*.

290 In terms of s 212(4)*(b)*.

attached to an institution linked to such expertise and that the establishment of such fact must result from a scientific process involving a particular skill. This is notwithstanding the fact that these processes may be aided by a mechanical system. Thus in *S v Greeff*[291] it was held that the process for determining an accused's blood alcohol content, as reflected in a report by a chemist, was a chemical process requiring skill in chemistry notwithstanding that a computer was relied on to facilitate the process. However, in *S v Dlamini*[292] it was held that genetics is not a skill specified in this section.

176 The relevance of this in determining the ambit of this offence is whether or not it extends to situations where the safeguards are not in place and hence the courts are not prepared to admit the certificate as *prima facie* proof. Thus, for example, in *S v Ramgobin*[293] the court adopted a narrow approach in regard to what constituted expert testimony for purposes of this section. The consequence of this is that certain evidence would be excluded.

177 But this prompts the question as to whether, in circumstances where a person had knowingly submitted a false certificate which did not comply with the other safeguards, that person could still be found guilty in terms of s 212(4)*(b).* In this regard it is submitted that what is in issue for purposes of the commission of this offence is the submission of the false certificate, and not whether that certificate—had it not been false—complied with all the requirements set out in s 212(4)*(a)* that are designed to ensure that it is sufficiently reliable to constitute *prima facie* proof.

178 *Culpability (mens rea*) in the form of *dolus* is an element of this offence since the falsity must be willingly made.

(cc) Penalty

179 The penalty for this offence is the punishment prescribed for the offence of perjury.[294]

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291 *S v Greeff* 1995 (2) SACR 687 (A).

292 *S v Dlamini* 2004 (1) SACR 178 (NC).

293 *S v Ramgobin* 1986 (4) SA 117 (N).

294 Section 212(4)*(b)*.

(dd) Question/recommendation for consideration in redrafting

180 This provision serves an important function. The question relating to redrafting would be based on the clarity of the provision in terms of its ambit.

(iii) Making false endorsements on blood samples

(aa) Introduction

181 When conducting blood tests it is important to ensure that all blood samples are free from any substance or contamination which would materially affect the result of any analysis. A vital constituent of this process is that any receptacles containing blood samples should likewise be contaminant-free.

182 In order to do this, a process has been put in place[295] that prescribes the conditions and requirements relating to the cleanliness and sealing of receptacles and syringes intended for the storing of blood.[296]

183 However, it is also necessary to ensure the fact that these requirements and conditions have been complied with before a court of law. To this end, the Act stipulates that any syringe or receptacle that has been sealed immediately prior to its use for storing blood shall be deemed to constitute *prima facie* proof that the syringe or receptacle was free from any substance or contamination which could materially affect the result of the analysis in question. In order to further facilitate this process, provision is also made for the sealing of all such receptacles prior to use[297] together with an endorsement thereon to the effect that the conditions and requirements prescribed by the Minister have been complied with.[298]

184 To further expedite the process of proving in court that a particular receptacle was contaminant free, s 212(11)*(b)* provides that any person taking samples of blood can declare in an affidavit that he or she is satisfied that, immediately before use, the

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295 In terms of s 212(11).

296 These conditions and requirements have been prescribed by the Minister of Justice by way of Notice in the *Government Gazette.*

297 In terms of s 212(11)*(a)*(i).

298 In terms of s 212(11)*(a)*(ii).

syringe or receptacle in question was sealed in accordance with the prescribed conditions and requirements and that the said seal was intact at the time it was used.[299] The affidavit may also contain confirmation that the syringe or receptacle has been endorsed.[300] This endorsement confirms that the prescribed requirements and conditions have been complied with.

185 The mere production of this affidavit at relevant criminal proceedings shall constitute *prima facie* proof that the syringe or receptacle was so sealed, that the seal was intact at the relevant time and that it was endorsed.

(bb) The offence

186 It is an offence to make any false endorsement on any syringe, receptacle or holder of blood samples.[301] Such false endorsement must be made in the knowledge that it is false, which necessarily entails that *mens rea* in the form of dolus is a requirement of this offence.

(cc) Penalty

187 The penalty for this offence is the punishment prescribed for the offence of perjury.[302]

(dd) Question/recommendation for consideration in redrafting

188 This provision is clearly drafted, serves an important function, and does not appear to require amendment.

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299 Section 212(11)*(b)*(i).

300 In accordance with s 212(11)*(a)*(ii).

301 Section 212(11)(*c*).

302 Section 212(11)(*c*).

(iv) Making false statements[303]

(aa) Introduction

189 Section 213 of the Criminal Procedure Act allows for written statements of persons to be submitted to a court during criminal proceedings and, provided there are no objections to the statement,[304] the mere production of these statements will result in their being admitted as evidence in the relevant criminal proceedings.[305]

190 This then constitutes an exception to the requirement that witnesses must give their evidence *viva voce,* which is required in terms of s 161 of the Act.[306] It must also be noted that these provisions are broad since the term "written statement" means that it does not have to be in affidavit form on oath, whereas the fact that s 213(1) stipulates that it can be made by 'any person' means that the making of such statements is not restricted to public officials—as is the case with s 212.[307]

(bb) The offence

191 It is an offence to make any written statement in terms of this section that falsely states anything which, if sworn, would have amounted to perjury.[308] The making of such false statements shall be deemed to be the offence of perjury.

192 It must be noted that this offence only applies in respect of statements that have been admitted as evidence. This means that all the formalities set out in paragraphs *(a), (b),* and *(c)* of section 213(2) must be complied with. Thus, the statement must be signed by the person making it and shall contain a declaration by such person to the effect that it is true to the best of his or her knowledge and that the statement was made in the knowledge that, if it were tendered in evidence, the maker of the statement would be

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303 See, in addition, Hoctor & Milton in *SACLP* C2-*27* ff below for a discussion on legislative extensions to the common-law offence of perjury within the context of the administration of civil justice.

304 A procedure for making such objections is set out in s 213(2)*(c)*.

305 In terms of s 213(3).

306 Du Toit 24-36X.

307 See Hoctor in *SACLP* C1-31.

308 In terms of s 213(6).

liable to prosecution if he or she wilfully stated in it anything he or she knew to be false or which he or she did not believe to be true.[309] In addition, a copy of the statement must be furnished to all parties to the proceedings and thereafter any of them may object to the statement being tendered in evidence.[310]

193 If these requirements are not complied with or, if one of the parties has objected to the admission of such a statement, then it cannot be said to have been "admitted as evidence under this section" — which means that it does not fall within the ambit of the offence.

194 Culpability (*mens rea*) in the form of *dolus* is a requirement of this offence since the false statement must be made "wilfully".

(cc) Penalty

195 Since any person convicted of this offence is deemed to have committed the offence of perjury, the punishment is that prescribed for the offence of perjury.[311]

(dd) Question/recommendation for consideration in redrafting

196 This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(v) False certification of documents

(aa) Introduction

197 The Act makes provision for proving original official documents by certifying a copy (or extract) as a true copy (or extract).[312] Such documents must be in the custody or control of any state official by virtue of his or her office and the certification must be

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309 In terms of s 213(2)*(a)*.

310 In terms of s 213(2)*(c)*.

311 Section 213(6).

312 In terms of s 234(1).

made by the head of department concerned or any other state official authorised by such head.

198 Thus, once this certification has been made the said document or extract may be produced as evidence in criminal proceedings. The effect of this provision is to protect the originals of official documents by allowing them to be substituted by certified copies or extracts.[313] To this end, s 234 forbids the production of original official documents at criminal proceedings unless this is ordered by the Director of Public Prosecutions.[314] This provision is further strengthened by s 234(2)*(b)*, which stipulates that it is not necessary for the head of the department concerned to appear in person to produce the original documents. Instead, such a document can be produced by any person authorised by the head.

(bb) The offence

199 It is an offence for any official to certify any copy or extract of an original official document in terms of s 234(1) as true while knowing such copy or extract to be false.[315]

200 In *Cremer v Afdelingsraad Vryburg* [316] it was held that the term "official document" should be restrictively interpreted since a literal interpretation could lead to absurd results. Thus, in *S v Mvulha*[317] it was held that a report of a probation officer was not an official document. This is important since it would constitute a defence to a charge in terms of this section if the document in question could not be classified as an official document.

201 *Mens rea* in the form of *dolus* is an element of this offence since the falsification must be done knowingly.

(cc) Penalty

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313 *R v Sookdew* 1938 NPD 15.

314 Section 234(2)*(a)*.

315 Section 234(3).

316 *Cremer v Afdelingsraad Vryburg* 1974 (3) SA 252 (NC).

317 *S v Mvulha* 1965 (4) SA 113 (O).

202 No provision is made for a fine in regard to this offence. Instead, anyone convicted of contravening this section shall be liable to imprisonment for a period not exceeding two years.[318]

(dd) Question/recommendation for consideration in redrafting

203 This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(vi) False certification of judicial proceedings

(aa) Introduction

204 The Act makes it possible to prove judicial proceedings by merely producing a copy of the record of these proceedings.[319] However, in order to ensure reliability, accuracy and authenticity, these proceedings must be certified[320] by the relevant person.[321]

205 This certified copy will then constitute *prima facie* proof that any matter purporting to be recorded on the record was properly recorded. This provision can have a major impact on the criminal justice system (particularly trial procedure) since it is not necessary to call officers of the court to testify in order to prove that judicial proceedings have been correctly recorded.[322] In *S v Kimbani*[323] it was held that s 235(1) even applied in respect of interpreters. Thus it is not necessary to prove that what was said by the accused or a witness had been correctly interpreted.

(bb) The offence

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318 In terms of s 234(3).

319 This is provided for in terms of s 235.

320 In terms of s 235(1).

321 This should either be the registrar or clerk of the court (or their deputies) or any other officer having custody of the said record. This will also include the person who transcribed the proceedings in cases where they are taken down in shorthand or by mechanical means.

322 Du Toit 24-110.

323 *S v Kimbani* 1979 (3) SA 339 (E).

206 It is an offence to certify any copy as true knowing that such copy is false.[324] It would appear that this offence can only be committed by a person who is authorised to certify such proceedings.[325]

(cc) Penalty

207 The penalty for this offence is imprisonment for a period not exceeding two years.[326]

(dd) Question/recommendation for consideration in redrafting

208 This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(vii) Making conflicting sworn statements [327]

(aa) *Introduction*

209 This offence was created to counter some of the difficulties associated with proof of common-law perjury. These probative problems gave rise to persons who had made false declarations under oath escaping convictions of perjury. Merely making two conflicting statements under two different oaths did not in itself amount to perjury. A conviction for perjury could only be established if the state proved that one of the statements was false, and that the person making the statement knew that it was false – thus, that such person had intended to lie. Proving this fact was difficult, given that X (the accused) may have changed his mind, or at least could allege as a defence that he had changed his mind.

(bb) The offence

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324 Section 235(2).

325 For example, the registrar or clerk of the court et cetera as set out above.

326 Section 235(2).

327 See Hoctor & Milton in *SACLP* C2-27 ff; Hoctor/Snyman 314.

210 Hence, a new statutory offence was created,[328] which is often referred to simply as "statutory perjury".[329] Having been originally enacted in the Criminal Procedure and Evidence Act of 1917,[330] it was re-enacted in s 319(3) of the Criminal Procedure Act of 1955.[331] When in 1977 this Act was replaced by the new Criminal Procedure Act 51 of 1977, this provision was not repealed and therefore s 319(3) remains extant and in force:

> "If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true."

(cc) Substantive aspects

211 For liability under this provision it is required of the state to prove (*a*) that X on two different occasions made two statements under oath, and (*b*) that the statements conflict with each other.[332]

212 In respect of (*a*), it is of no essential consequence whether one or both of the oaths are in writing or oral; neither is it material whether either was made in the course of a legal proceeding.[333] The provision refers only to statements under oath, but it seems that the offence is also committed if one or both of the statements are made after an affirmation or declaration to speak the truth, as section 2 of the Interpretation Act of

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328 Other difficulties may be mentioned, such as proving that the statement was made in the course of legal proceedings - cf the discussion in *R v Shole* 1960 (4) SA 781 (A) 789.

329 The following points of difference may be noted between the common-law crime of perjury and the statutory offence: "(*a*) In common-law perjury only one statement comes into the picture, whereas in statutory perjury there are two. (*b*) Common-law perjury can be committed in the course of a legal proceeding only; in statutory perjury neither of the statements need be made in the course of a judicial proceeding (although at least one of them usually is) (Hoctor/Snyman 316).

330 S 131(3) of the Criminal Procedure and Evidence Act 31 of 1917.

331 Criminal Procedure Act 56 of 1955.

332 *R v Mahomed* 1951 (1) SA 439 (T) 442; *R v Shole supra* 789; *S v Kibi* 1978 (4) SA 173 (E) 175.

333 *Ex parte Minister of Justice: in re R v Bhyala* 1943 AD 135; *R v Mahomed supra* 441G–H.

1957[334] provides that where the word "oath" occurs in a statute, it includes an affirmation or declaration to speak the truth.

213 The two statements must be contained in two different oaths. Making conflicting statements under the same oath does not constitute the offence. If (as is customary in practice) after an adjournment of the court a witness resumes his evidence which he started to give before the adjournment and is warned by the judicial officer that he is still under oath, his evidence after the adjournment is not evidence under another or a different oath, as contemplated by the section.[335]

214 In order to prove that a witness made an extra-judicial statement *under oath* the state must prove that the oath was administered and the statement made in accordance with the provisions of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 and the regulations regarding the form of the oath and the way in which it has to be administered, which are promulgated from time to time in terms of s 10(1)(*b*) of this Act.[336] The person administering the oath must have the necessary authority to do so.

215 As regards requirement (*b*) mentioned above, namely that the statements must conflict with each other, it is not required to prove which statement is false.[337] Whether or not the statements do conflict is for the most part a question of fact.[338] In *S v Ramdas*,[339] the Appellate Division held that the two statements must not be capable of reconciliation, and that they must be mutually destructive. Louw has criticised this approach, arguing that the test applied by the court was too narrow, in that it "effectively allows a deponent to frustrate a criminal investigation by withholding material information".[340] On this basis, Louw contends that a better test would be that there be a

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334 Interpretation Act 33 of 1957.

335 *R v Butelezi* 1952 (1) SA 511 (O).

336 Cf *R v Rajah* 1955 (3) SA 276 (A); *R v Shole supra*; S v *Khan* 1963 (4) SA 897 (A); *S v Khoza* 1973 (4) SA 511 (T); *S v Bacela* 1988 (2) SA 665 (E). It is evident from the latter case that a statement under oath will not qualify for the purposes of this section if the person making the statement was coerced to do so.

337 *R v Mahomed* 1951 (1) SA 439 (T) 442.

338 *R v Shole supra* 789; *S v Mazwai* 1979 (4) SA 484 (T) 486.

339 *S v Ramdas* 1994 (2) SACR 37 (A) 40*e*. The court relies upon a formulation of "conflict" set out in *R v Handel* 1933 SWA 40, such that it is only where statements cannot be reconciled, and are thus mutually destructive, that they can be said to be in conflict.

340 R Louw "Recent cases: Specific crimes" (1994) 7(3) *SACJ* 393 395.

material difference between the statements.[341] Nevertheless, the statement in *Ramdas* is authoritative, and no change in the wording of the provision is necessary.

216 If the second statement consists in only a denial that the first statement was made, there are not two conflicting statements.[342]

(dd) *Procedural aspects*

217 The present formulation of the section does not require that the state prove that at the time of the making of each of the two statements the accused believed that what he was saying was untrue. In other words, the state need not prove that the accused intentionally told an untruth. An onus is placed on the accused to prove the absence of any intention to lie; more particularly, it is required of the accused to prove that on both occasions he believed that what he was saying was the truth.

218 It is submitted that this onus is unconstitutional, since it conflicts with s 35(3)(*h*) of the Constitution, which grants the accused the right to be presumed innocent. There is an extensive body of case law holding that reverse onus provisions, such as that created by s 319(3), are not reasonable and justifiable.[343] It is submitted that the normal rule relating to the onus of proof in criminal matters applies also to prosecutions for contravening s 319(3). This means that the state bears the onus of proving intention. If the state has led evidence that the accused had made two conflicting statements, in certain cases the *prima facie* inference can, depending upon the facts, be drawn that during at least one of the two occasions the accused realised that he was not speaking the truth.

(ee) *Question/recommendation for consideration in redrafting*

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341 Ibid.

342 *R v Mofokeng* 1957 (2) SA 162 (O).

343 Cf *S v Zuma* 1995 (1) SACR 568 (CC); *S v Bhulwana* 1995 (2) SACR 748 (CC); *S v Mbatha* 1996 (1) SACR 371 (CC); *S v Julies* 1996 (2) SACR 108 (CC); *S v Coetzee* 1997 (1) SACR 379 (CC); *S v Ntsele* 1997 (2) SACR 740 (CC).

219 The provision needs to be redrafted to make it clear that an evidential burden, rather than a reverse onus, is placed on the accused. An accordingly amended version of this provision should appear in the redrafted version of the Act.

(viii) Ascertainment of bodily features of persons in the form of fingerprints

(aa) The offence

220 Du Toit et al state that:[344]

> "Chapter 3 [of the Act] makes serious inroads upon an individual's personal rights to privacy, dignity and bodily integrity. But these inroads should be seen in the light of the fact that the ascertainment of the bodily features and 'prints' of an accused often forms an essential component of the investigation of crime and is in many respects a prerequisite for the effective administration of any criminal justice system, including the proper adjudication of a criminal trial."

221 This chapter provides certain powers to police officers and authorised persons, and the lawful use of these powers is enforced by means of offences provided for in s 36B (dealing with powers in respect of fingerprints of accused and convicted persons).

(bb) Offence relating to fingerprints

222 In terms of the Act, it is an offence for any person with regard to any fingerprints, body-prints or photographic images referred to in Chapter 3 of the Act to:

> (i) use or allow the use of those fingerprints, body-prints or photographic images for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or
>
> (ii) tamper with or manipulate the process or the fingerprints, bodyprints or images in question; or
>
> (iii) falsely claim such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source.[345]

(cc) Substantive aspects

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344 Du Toit 3-2.

345 S 36B(6)(*d*).

223 While “fingerprints” and “photographic images” are not specifically defined in this Chapter, “body-prints” are defined in s 36A(1)(*c*) as “prints other than fingerprints, taken from a person and which are related to a crime scene, but excludes prints of the genitalia, buttocks or breasts of a person”.[346]

224 In respect of the form of the offence set out in (i), this echoes the prohibition set out in s 36B(6)(*b*) that where fingerprints have been stored on the national fingerprint database,[347] and retained in terms of this section, “may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution”. This prohibition is extended to body-prints or photographic images for the purposes of the offence set out in (i). The conduct which is prohibited in terms of this offence includes both an act of commission – use - and an omission – allowing the use – of the probative elements. Both forms of conduct are clearly indicative that *mens rea* is required, and moreover that the form of *mens rea* in question is intention rather than negligence. To “use” is to “cause to act or serve for a purpose”,[348] thus relating to purposeful or intentional conduct. The word “allow” has consistently been associated with “a state of mind which requires proof of both knowledge and consent on the part of the accused”.[349]

225 With regard to the form of the offence set out in (ii), the prohibited conduct “tamper with” or “manipulate” are clearly indicative of purposive, and thus intentional conduct. While tampering with or manipulating the various probative elements seems clear, the same conduct applied to “the process” is somewhat less so. This seems to be a result of using “the process” as inclusively as possible. This lack of clarity could be remedied by redrafting.

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346 An example of a body-print would be an ear print. For discussion of ear print evidence, see SV Hoctor ‘Ear print evidence’ (2009) 30(1) *Obiter* 175.

347 This database is maintained by the National Commissioner of the South African Police Service, as provided for in Chapter 5A of the South African Police Service Act 68 of 1995 (s 36B(3) of the Act).

348 *Concise Oxford Dictionary* 8ed (1991).

349 JRL Milton “General principles of liability” in JRL Milton, MG Cowling & SV Hoctor *South African Criminal Law and Procedure* 2ed (Juta loose-leaf, RS 9, 1997) *Vol III: Statutory Offences* paras 1-49 (*SACLP*) 2-33, and cases listed there.

226 Finally, the offence set out in (iii) is clear in its description of the prohibited conduct – a false allegation of the provenance of the probative materials. It is equally clear that such offence could only be committed intentionally, as the prohibition specifies that the accused knows that his allegation is false.

(dd) Penalty

227 The prescribed punishment for contravention of this section is imprisonment for a period not exceeding 15 years.

(ee) Question/recommendation for consideration in redrafting

228 This provision is clearly drafted, serves an important function, and does not seem to require amendment.

(ix) Offence relating to buccal samples, bodily samples and crime scene samples

(aa) The offence

229 Chapter 3 provides for certain powers to be given to police officers and authorised persons and the lawful use of these powers is enforced in s 36D (dealing with powers in respect of buccal samples, bodily samples and crime scene samples). The content of these offences is set out below.

230 Section 36D(7)(*c*) provides that any person who uses or allows the use of a bodily sample,[350] crime scene sample[351] or any forensic DNA profile[352] derived from such sample for any unauthorised purpose is guilty of an offence.

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350 A “bodily sample” means means intimate or buccal samples taken from a person (s 36A(1)(*c*A)). An ‘intimate sample’ means a sample of blood or pubic hair or a sample taken from the genitals or anal orifice area of the body of a person, excluding a buccal sample (s 36A(1)(*f*F)). A “buccal sample” means a sample of cellular material taken from the inside of a person's mouth (s 36A(1)(*c*B)).

351 A “crime scene sample” is defined as physical evidence which is retrieved from the crime scene or any other place where evidence of the crime may be found, and may include physical evidence collected from the body of a person, including a sample taken from a nail or from under the nail of a person (s 36A(1)(*f*A)).

352 The Act defines “forensic DNA profile” as the results obtained from forensic DNA analysis of bodily samples taken from a person or samples taken from a crime scene, providing a

231 In terms of s 36D, an authorised person[353] is permitted to take (or cause the taking of) such samples in certain circumstances.

(bb) Substantive aspects

232 The permitted use of this material is set out in s 36D(7)(*a*): "Any forensic DNA profile derived from such sample, taken under any power conferred by this section must only be used for the purposes referred to in s 15F of the South African Police Service Act." Section 15F of the South African Police Service Act[354] provides that the objective of the national forensic DNA database is to perform comparative searches for the following purposes:

> "*(a)* To serve as a criminal investigative tool in the fight against crime;
> *(b)* to identify persons who might have been involved in the commission of offences, including those committed before the coming into operation of this Chapter;
> *(c)* to prove the innocence or guilt of an accused person in the defence or prosecution of that person;
> *(d)* to exonerate a person convicted of an offence; or
> *(e)* to assist with the identification of missing persons or unidentified human remains."

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unique string of alpha numeric characters to provide identity reference: Provided this does not contain any information on the health or medical condition or mental characteristic of a person or the predisposition or physical information of the person other than the sex of that person (s 36A(1)(*f*D)).

353 An authorised person is defined in s 36A(1)(b) as: (i) with reference to photographic images, fingerprints or body-prints, any police official or a member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, in the performance of his or her official duties; and (ii) with reference to buccal samples, any police official or member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, who is not the crime scene examiner of the particular case, but has successfully undergone the training prescribed by the Minister of Health under the National Health Act, in respect of the taking of a buccal sample.

354 Act 68 of 1995. This provision is located in Chapter 5B of this Act, which deals with the establishment, administration and maintenance of a national forensic DNA database of South Africa.

233 As with the offence set out in s 36B, the conduct which is prohibited in terms of this offence includes "use" and "allowing the use" of the samples or profiles,[355] which in turn indicates that intention is required for liability in terms of this offence.

(cc) Question/recommendation for consideration in redrafting

234 This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(x) The offence of the expungement of certain criminal records

(aa) The offence

235 Section 271(D) of the Act provides that:

> "(1) The head of the Criminal Record Centre of the South African Police Service or a senior person or persons at the rank of Director or above, employed at the Centre, who has or have been authorised, in writing, by the head of the Centre to do so, must expunge the criminal record of a person if-
> (i) he or she is furnished with a certificate of expungement by the Director-General: Justice and Constitutional Development as provided for in section 271B (2) or section 271C (3) or by the Minister as provided for in section 271C (5); or
> (ii) that person qualifies for the automatic expungement of his or her criminal record as provided for in section 271C (1).
> (2) The head of the Criminal Record Centre of the South African Police Service must, on the written request of a person who-
> *(a)* has applied to have his or her criminal record expunged in terms of section 271B or section 271C (2); or
> *(b)* qualifies to have his or her criminal record expunged automatically in terms of section 271C (1),
> in writing, confirm that the criminal record in question has been expunged.
> (3) Any person who-
> *(a)* without the authority of a certificate of expungement as provided for in section 271B, 271C or this section; and
> *(b)* intentionally or in a grossly negligent manner,
> expunges the criminal record of any person or confirms that a criminal record has been expunged as provided for in subsection (2), is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and that imprisonment."

(bb) Substantive aspects

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355 See discussion at 4 (xiii) above.

236 The offence contained in s 271D(3) criminalises the unauthorised expungement of certain specified criminal records,[356] the unauthorised expungement of certain criminal records related to legislation pre-dating the Interim Constitution,[357] and the unauthorised expungement of certain criminal records at the Criminal Record Centre of the South African Police Service.[358]

237 The unlawful act is the unauthorised expungement of any such criminal record, or the wrongful confirmation that a criminal record has been expunged.[359] The requisite culpability (*mens rea*) could either be intention or gross negligence. The standard of gross negligence is not typically applied in South African criminal law and will require judicial interpretation. This high standard of negligence may possibly be fulfilled by wilful blindness on the part of the accused, where the accused ignores the possibility of his or her conduct being unlawful, or where, despite foresight of the significant possibility of acting unlawfully, the accused rules out this likely outcome.

(cc) Question/recommendation for consideration in redrafting

238 This provision serves an important function. It seems that there is a lack of clarity as to the nature of the unlawful act, especially in respect of confirmation of expungement. The wording should be amended accordingly.

(xi) Offences relating to community service

(aa) The offences

239 These offences are set out in s 297(8B) of the Act, which provides:

> "Any person who-

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356 As set out in s 271B.

357 As set out in s 271C, referring to the Constitution of the Republic of South Africa, Act 200 of 1993.

358 As set out in s 271D.

359 Mere confirmation of the expungement of a criminal record is required of the head of the Criminal Record Centre in terms of s 271D(2). Consequently, it appears that the words "confirms that a criminal record has been expunged as provided for in subsection (2)" must refer to a wrongful confirmation. However this lack of clarity should be addressed, particularly in the light of the significant punishment envisaged for a contravention of this provision.

> *(a)* when he reports to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose, is under the influence of intoxicating liquor or drugs or the like; or
> *(b)* impersonates or falsely represents himself to be the person who has been directed to perform the community service in question, to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose,
> shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three months."

(bb) <u>The offences: substantive aspects</u>

240 The first offence involves being under the influence of intoxicating liquor or drugs at the time of reporting to perform community service, to undergo instruction or treatment or to attend or reside at a specified centre for a specified purpose.[360] Being "under the influence" of alcohol or drugs essentially entails that the skill and judgement of the individual is diminished or impaired by such consumption or use.[361] It is submitted that, as with the offence of driving under the influence of alcohol or drugs,[362] the required culpability (*mens rea*) could be intention or negligence.[363]

241 The second offence entails the impersonation or false representation as the person directed to perform the community service in question, to undergo the instruction or treatment in question or to attend or reside at the specified centre for the specified purpose.[364] Such an act is clearly intentional in its nature and cannot be committed negligently.

(cc) <u>Question/recommendation for consideration in redrafting</u>

242 This provision is clearly drafted, serves an important function, and does not appear to require amendment.

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360 S 297(8B)(*a*).

361 Cf *R v Lloyd* 1929 EDL 270, in the context of driving under the influence of liquor or drugs.

362 S 65(1) of the National Road Traffic Act 93 of 1996.

363 See *S v Hartyani* 1980 (3) SA SA 613 (T).

364 S 297(8B)(*b*).

5 Other Offences relating to bail

(a) Bail offences under the Act

(i) Introduction[365]

243 In the past it was held that the issuing of a warrant of arrest (where circumstances justified it) and the forfeiture of bail monies were adequate sanctions for any failure to comply with bail conditions—including non-appearance in court at the stipulated time.[366] However, in 1995 the Criminal Procedure Act was amended[367] by the insertion of s 67A, which created the offence of failing to appear or comply with a condition of bail.

244 As a result, it is now possible for a court to order forfeiture of bail monies and cancellation of bail (which means the accused will be detained in custody) as well as to convict the accused of failing to appear or comply with a condition. Previously this had been achieved by way of charging an accused with contempt of court *ex facie curiae* or the statutory offence created by s 108[368] of the Magistrates Courts Act.[369] However, this was only done in rare cases.[370]

245 It is submitted that the creation of the statutory offence of failing to appear or comply with a bail condition has somewhat altered the situation because mere failure to comply per se constitutes commission of the offence whereas it was necessary to establish the elements of contempt when utilising s 108. Thus, in *Mabaso's* case,[371] the court held that failure to appear would not necessarily render an accused guilty of contempt of court. Instead, the court held that the "elements of the offence would have to be present". [372]

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365 For a general discussion of bail, see Joubert 209ff.

366 *S v Bobani* 1990 (2) SACR 187 (T).

367 In terms of s 9 of Act 75 of 1995.

368 See Hoctor & Milton in *SACLP* C2-10ff for a discussion of this offence.

369 Act 32 of 1944.

370 See, for example, the *dictum* in *S v Mabaso* 1990 (1) SACR 675 (T) 687d, where the court held that prosecution in addition to forfeiture would not be a "frequent occurrence as normally the loss of bail money will be adequate punishment".

371 Supra.

372 At 687*c*.

246 The offences of failure to appear in court after release on bail,[373] failure to remain in attendance,[374] and failure to appear in court after release on warning,[375] are discussed above, and thus will not be discussed further here.

(ii) Failure to comply with conditions of bail

(aa) Introduction

247 Any release of the accused on bail is subject to the payment of the bail money (if the accused has not been released on own recognisance) and is conditional upon his or her appearing in court on the stipulated date. However, courts may impose further conditions should circumstances require. [376]

(bb) The offence

248 It is an offence[377] to fail to comply with a condition of bail imposed by a court in terms of s 60 or s 62.[378]

249 Du Toit *et al* state that *mens rea* (culpability) in the form of *dolus* or *culpa* is obviously an essential requirement[379] of this offence because such failure to comply must be without good cause.

250 In addition, it should be noted that bail conditions should not be *contra bonos mores,*[380] vague or ambiguous,[381] or *ultra vires.*[382] Any condition must also be practically

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373 This offence is discussed above at 2(b)(vii).

374 This offence is discussed above at 2(c)(iii).

375 This offence is discussed above at 2(b)(iv).

376 In terms of s 62 of the Act.

377 In terms of s 67A.

378 This includes any amendments to such conditions in terms of s 63.

379 Du Toit 9-115.

380 *De Jager v Attorney-General, Natal* 1967 (4) SA 143 (D).

381 *S v Budlender* 1973 (1) SA 264 (C).

382 *R v Conradie* 1907 TS 455.

feasible.[383] This means that an accused can raise as a defence any of the above (where applicable) when charged with failing to comply with a condition of bail.

(cc) Procedure[384]

(dd) Penalty[385]

(ee) Question/recommendation for consideration in redrafting

251 This provision is clearly drafted, serves an important function, and does not appear to require amendment.

6 Offences related to the disclosure or publication of certain information

(a) Offences under the Act relating to unlawful publication of information

(i) Introduction

In certain circumstances confidentiality is an important ingredient of a properly functioning criminal justice system. It is for this reason that prohibitions are placed on the publication or disclosure of certain information. This is on the basis that publication or disclosure of this information would have the overall effect of undermining certain aspects of the criminal justice system.[386]

(ii) Publication of information relating to criminal proceedings

(aa) The offences

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383 *R v Fourie* 1947 (2) SA 574 (O).

384 See 2(b)(vii) above.

385 See 2(b)(vii) above.

386 Apart from the provisions discussed below, the unlawful disclosure of information obtained in the performance of functions contemplated in the National Prosecuting Authority Act 32 of 1998 is criminalized in terms of s 41(6) of this Act.

252 The Act contains prohibitions on the publication of certain information. These are as follows:[387]

(i) *Any information relating to any proceedings occurring behind closed doors.*[388] This prohibition only becomes effective once the court (in which the criminal proceedings in question are taking place) has directed that, in the interests of state security, good order, public morals or the administration of justice, the public or any class thereof should be excluded from the said proceedings.[389]

This also includes criminal proceedings where the accused is charged with any sexual offence or act for the purpose of furthering a sexual offence,[390] or extortion or any statutory offence of demanding and the court makes a similar declaration to the effect that proceedings should be held behind closed doors.[391] Finally, this also applies in the case of accused or witnesses who are under the age of eighteen years.[392]

Thereafter the court must direct that no information relating to the proceedings (or any part thereof) shall be published.[393]

This only applies to proceedings in respect of which an order has been made to the effect that the public (or any class thereof) shall not be present. Thus, it is not possible for a court to prohibit publication of any information relating to criminal proceedings that are conducted in public.

A proviso to this offence is that, in the ordinary course of events, any prohibition on publication of criminal proceedings shall not include (or prevent) the

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387 This excludes all prohibitions on publication of the identities of certain persons as these are set out below. See Hoctor in *SACLP* C1-44.

388 Section 154(1).

389 Section 153(1). This provision is further qualified by s 63(5) of the Child Justice Act 75 of 2008, which provides that no person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present.

390 As contemplated in s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

391 In terms of s 153(3).

392 Section 154(3).

393 Section 154(1).

publication of information relating to the name and personal particulars of the accused, the charge, the plea, the verdict and the sentence. Although this is subject to the qualification that a court may well direct that such information shall not be published if the publication thereof might defeat the object of the initial direction to hold the proceedings behind closed doors, it has been stressed that it is important to publish this information. [394] Thus, such a directive should not be lightly given.

Presumably it would be open to any accused person to challenge the legitimacy of any directive limiting access to the proceedings as well as publication thereof as a defence to any charge relating to this offence. And, it is submitted, such challenge will have to take account of the fundamental principle of transparency and the concept of justice being seen to be done as well as the right of the public to be informed about such issues. And, at the end of the day, this must always be evaluated within the context of the constitutional guarantee of the right to freedom of expression.

(ii) *Any information relating to the charge prior to the appearance of the accused in court upon a charge of indecent behaviour* [395] *or at any stage after such appearance but before the accused has pleaded.* This prohibition [396] applies from the date on which the offence was committed until the prohibition in terms of s 154(2)(b) commences, ie once the proceedings have commenced and a direction has been made that the proceedings shall be behind closed doors.

253 The reason for the enactment of s 335A is that it was held in *S v Zululand Observer (Pty) Ltd* [397] that a newspaper was entitled to publish a report on a rape charge which revealed the identity of the complainant before a specific person had been charged. This was because, in terms of s 154(2)*(b),* the prohibition on revealing the identity of the complainant only took effect once it had been directed by the court in which the proceedings were taking place. In order to redress this, s 335A makes reference to the date on which the offence was committed.

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394 *S v Niesewand* (1) 1973 (3) SA 581 (RA).

395 In terms of s 153(3), read with s 154(2).

396 In terms of s 335A.

397 *S v Zululand Observer (Pty) Ltd* 1982 (2) SA 79 (N).

(bb) Penalty

254 The penalty for these offences is a fine or imprisonment not exceeding three years or to both such fine and imprisonment if the person in respect of whom the publication or revelation of identity was done is over 18 years. If such person is under the age of 18 years, the penalty is a fine or imprisonment for a period not exceeding five years or both.[398]

(cc) Question/recommendation for consideration in redrafting

255 This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(iii) Publication of the identity of certain persons

256 Courts may prohibit the revealing of the identity of certain persons at criminal proceedings.

(aa) Complainants

257 Where a court has directed that criminal proceedings shall be held behind closed doors (by directing that any person or class thereof or the general public shall not be present at such proceedings), no person shall publish[399] any information which might reveal the identity of any complainant in the proceedings.[400]

258 This prohibition applies specifically in respect of criminal proceedings related to sexual offences[401] and includes any person whose presence is not necessary at the said proceedings.[402]

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398 In terms of s 154(5).

399 In any manner whatsoever.

400 In terms of s 154(2)*(a)*.

401 In terms of s 153(3).

402 In terms of s 153(3A).

259 This is subject to the proviso that a presiding judicial officer may authorise the publication of such information if he or she is of the opinion that such publication would be just and equitable.[403] The effect of this is that the prohibition on revealing the identity of the complainants would not come into effect.

(bb) Accused under the age of eighteen years

260 It is an offence to publish (in any manner) any information which could have the effect of revealing the identity of an accused person who is under the age of eighteen years.[404] In order to establish guilt, it is necessary to establish that the publication in question might have revealed or does in fact reveal the identity of the accused (under eighteen years) to a hypothetical, ordinary, average reader. It stands to reason that such a hypothetical reader would not have any prior or special knowledge of any of the incidents or persons referred to in the article.[405] In addition, Du Toit *et al* point out that the identification can either be direct or by way of inference. In the latter instance, however, any inference must be reasonable.[406]

(cc) Witness

261 In general terms, witnesses should be protected and their identity concealed by any directive in terms of s 154(5). However, express mention is made of witnesses under the age of eighteen years in s 154. [407]

(dd) Penalty

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403 Section 154(2)*(a)*.

404 Section 154(3) read with s 154(5). See further s 45(1) of the Child Justice Act 75 of 2008 in relation to s 154 applying to a preliminary inquiry involving a child, and s 63(6) of the same Act in relation to s 154(3) applying to a child justice court hearing.

405 *S v Citizen Newspapers (Pty) Ltd* 1980 (3) SA 889 (T). In *Centre for Child Law and others v Media 24 Ltd and others* [2019] ZACC 46 it was held that s 154(3) was unconstitutional in that it should also apply to child victims, and that the extension of identity protection beyond childhood should further be protected. Parliament is required to remedy these constitutional defects with 24 months, but pending this legislative amendment, the Constitutional Court has mandated an interim reading-in of words into s 154 to achieve these protections.

406 Du Toit 22-42V.

407 In terms of s 154(3).

262 The penalty for these offences is a fine or imprisonment not exceeding three years or to both such fine and imprisonment if the person in respect of whom the publication or revelation of identity was done is over 18 years. If such person is under the age of 18 years, the penalty is a fine or imprisonment for a period not exceeding five years or both. [408]

(ee) Question/recommendation for consideration in redrafting

263 These provisions are clearly drafted, serve an important function, and do not appear to require amendment.

(iv) Offence relating to publication of identity of persons towards or in connection with whom certain offences have been committed

(aa) The offence

264 Section 335A of the Act provides:

> "(1) No person shall, with regard to any offence referred to in section 153 (3) *(a)* and *(b)*, as from the date on which the offence in question was committed or allegedly committed, until the prohibition in terms of section 154 (2) *(b)* of the publication of information relating to the charge in question commences, publish any information which might reveal the identity of the person towards or in connection with whom the offence was committed or allegedly committed, except with the authorization of a magistrate granted on application in chambers, with due regard to the wishes of the person towards or in connection with whom the offence was committed.
> (2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment if the person whose identity has been revealed is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

(bb) Substantive aspects

265 The prohibited conduct in this offence is the publication of information which may reveal the identity of the complainant in a sexual offence (as specified in s 153(3)(*a*) and (*b*)), for the period from the date of alleged commission of the offence until the prohibition

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[408] Section 154(5).

of publication of information relating to the charge commences (as provided for in s 154(2)(*b*)) until the accused pleads to the charge. Hiemstra explains that s 335A clarifies any uncertainty which arose from the wording in s 154, by providing that the prohibition commences from the time of the commission or alleged commission of the offence, irrespective of whether a charge has been formulated.[409]

266 Hiemstra suggests that the requirement that the magistrate take into account the wishes of the complainant presumably envisages notice of the application and that person's right to be heard, although how notice will be given and how such person will be given a right of hearing, or the extent to which the magistrate will be guided by the wishes of the person involved are not specifically articulated.[410] The use of the word "wishes", however, indicates that the decision should lean in favour of that person.

267 In conformity with the insertion of s 153(3A), protection is here given to persons other than the accused who are involved in indecent offences.

(cc) Penalty

268 If the person whose identity has been revealed is over 18 years old, the highest penalty is three years' imprisonment, and if under 18, the maximum is five years. Subsection (3) was added by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, making a compensation order under s 300 possible where the person whose identity has been revealed has suffered physical, psychological or other injury or loss of income or support.

(dd) Question/recommendation for consideration in redrafting

269 This provision is clearly drafted, serves an important function, and does not require amendment.

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409 Kruger/Hiemstra 33-11.

410 Kruger/Hiemstra 33-11.

7 Miscellaneous

(a) Remaining provisions under the Act

(i) Offences relating to wrongful search

(aa) Introduction

270 The powers of search and seizure are vital components within the criminal justice system without which it would not be possible to enforce the criminal law. On the other hand, these powers must also be regarded as infringements on the rights of the individual to privacy and ownership.[411] It must also be noted that the right of privacy is constitutionally entrenched,[412] which means that these powers of search and seizure[413] must be exercised with extreme caution and only when necessary. Indeed, the lawfulness or otherwise of a search will depend upon it being justified in terms of the limitations clause in the Constitution.[414] It is evident that actions involving a search involve serious inroads on the privacy of citizens.

271 Besides civil remedies for wrongful search based on invasion of privacy, the Act also makes it a criminal offence to carry out any search without authority or in an unauthorised manner. Such authority is derived exclusively from chapter 2 of the Act and it is therefore important to recognise that every search and seizure operation is confined to the four corners of the Act or any other relevant legislation.[415] This means that there are no common-law powers of search and seizure.

272 Sections 21 and 25 provide for the issuing of search warrants by presiding judicial officers that authorise police officials to conduct searches of specified premises and to seize articles that are in any way linked to criminal activity. It is incumbent on a police

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411 Du Toit 2-1.

412 In terms of s 14 of the Constitution.

413 These are contained in chapter 2 of the Criminal Procedure Act 51 of 1977.

414 That is, s 36.

415 There are a number of other legislative provisions that authorise search and seizure operations in certain circumstances. Section 6(5) of the Businesses Act 71 of 1991 is a good example. However, since all such operations are ultimately guided by the Constitution, it is submitted that chapter 2 of the Criminal Procedure Act provides the general framework in this respect.

official to strictly adhere to the limits set out in the warrant.[416] However, the Act also provides for search without a warrant where the person concerned consents or where a police official on reasonable grounds believes that a search warrant would have been issued and that the delay in obtaining such a warrant would defeat the object of the search.[417] Given the wide powers afforded to police officials to act without a warrant on the basis of a reasonable belief that urgent action is required, militating against waiting for a warrant,[418] the prohibition in s 28 imposes an important limitation on excessive conduct by police officials.[419]

(bb) The offence

273 In terms of section 28 of the Act it is an offence to conduct a search of any person or premises or to seize any article without due authority.

(cc) Substantive aspects

274 The *actus reus* of this offence takes on the following forms:

1. *Acting contrary to a warrant issued under s 21 or s 25(1).*[420] The factual elements of this offence are that a police official must have been issued with a search warrant but he or she failed to confine themselves to the strict terms of the warrant. This could take the form of searching persons or premises other than those specified in the warrant, as well as failing to conduct the search in an orderly and decent manner.[421]
2. *Conducting a search and seizure operation without the requisite authority.*[422] This presupposes that a search has been undertaken in the absence of any warrant and that the police official did not operate within the parameters of s 22.[423]

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416 Kruger/Hiemstra 2-20.

417 Section 22.

418 Section 22(b); s 25(3); s 13 of the South African Police Services Act 68 of 1995.

419 Kruger/Hiemstra 2-21.

420 In terms of s 28(1)*(a)*.

421 As prescribed by s 29.

422 In terms of s 28(1)*(b)*(i).

423 This provides for searches without a warrant.

3. *Carrying out investigations envisaged in terms of s 25(1)*(b)*(i), (ii) and (iii) without the requisite authority.*[424] These provisions authorise the search of unspecified persons who happen to be on certain premises as well as the seizure of unspecified articles.

275 It is important to note that these offences can only be committed by police officials acting in their capacity as police officials at the time of their commission. As Hiemstra points out, the ambit of the section extends beyond search, and there appears to be an overlap between paragraph (a) and (b) of s 28(1).[425]

276 No express indication of the culpability (*mens rea*) requirement for this provision is indicated. Hiemstra contends[426] that while this section does not entail strict liability, which would arguably raise constitutional doubts about the provision,[427] the required form of fault for these offences is negligence (culpa), since the provision is founded on unreasonable conduct. On this basis, liability would therefore have to be ascertained on the basis of whether the accused acted as would the reasonable person in the position of the police officer in the circumstances.[428]

(dd) <u>Procedural aspects</u>

277 Due to the evident overlap between what is prohibited in paragraphs (a) and (b), which "creates a minefield for police officials", it appears that the uncertainty should be overcome by the formulation of charges in the alternative.[429]

278 Where a warrant is set aside, the remedy of spoliation may be employed in appropriate circumstances to return the seized property to the dispossessed person.[430]

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424 In terms of s 28(1)*(b)*(ii).

425 Kruger/Hiemstra 2-20.

426 Kruger/Hiemstra 2-21.

427 See Hoctor/Snyman 213, Burchell, Schwikkard & Mosaka 389.

428 Kruger/Hiemstra 2-21.

429 Kruger/Hiemstra 2-20.

430 Du Toit 2-33 to 2-34.

In terms of s 28(2), the court convicting someone of contravening s 28(1) may make an award for damages suffered as a consequence of the accused's unlawful conduct.[431]

(dd) Penalty

279 The penalty for this offence is a fine of R600 or 6 months' imprisonment.[432] It may be recommended that, in line with current practice, the penalty be restated in favour of a fine of unspecified amount. In addition, the accused may be liable to pay compensation to any person who suffered damages as a consequence of such unlawful activity. [433] The choice will have to be made between a legislative limit on the extent of the punishment of a fine for an offence, and the Ministerial power to adjust the quantum of fines.

(ee) Question/recommendation for consideration in redrafting

While this provision clearly serves an important function, the nature of unlawful conduct should be clarified, and the culpability (*mens rea*) form made overt.

(ii) Offences relating to witness services

(aa) The offence

280 In terms of s 191A of the Act, the Minister has the power to determine services to be provided to a witness who is required to give evidence in any court of law and may make regulations relating to various aspects of witness services. Any regulation made under this section may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding three years.[434]

(bb) Question/recommendation for consideration in redrafting

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431 Section 300 of the Act applies *mutatis mutandis* to such award of compensatory damages.

432 Section 28(1). In terms of s1(2) of the Adjustment of Fines Act 101 of 1991, the maximum fine which may be imposed is R20 000.

433 Section 28(2).

434 Section 191A(4).

281 This provision is clearly drafted. Whether it is constitutionally appropriate for the Minister to create an offence falls to be determined.

(iii) Extra provisions related to the criminal law

Apart from the provisions discussed above, the Act also makes provision for the use of traps,[435] which exonerates any state official from criminal liability in the course of such entrapment, provided that the trap or undercover operation was conducted in good faith.[436] There does not appear to be any reason to amend this provision in future iterations of the regulation of entrapment.

282 The Act also makes provision for a defence of truth and publication for the public benefit in relation to a defamation charge.[437] In the light of the repeal of the common-law crime of defamation,[438] this provision may be deleted in the redrafting process.

B Competent Verdicts

1 Verdicts in terms of Chapter 26 of the Act (ss 256-270)

(a) Introduction

283 Chapter 26 of the Act deals with verdicts of guilty to crimes which are not the same as the crimes with which the accused has been charged, known as “competent verdicts”.[439] These verdicts are “lesser” offences rather than alternative charges,[440] and are applied when the evidence before the court fails to prove the charge, but nevertheless proves another crime.[441]

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435 Section 252A. See Hoctor/Snyman125; Burchell, Schwikkard & Mosaka 197 for further discussion.

436 Section 252A(5)(*a*). In terms of s 252A(5)(*b*), no prosecution of an offence contemplated in subsection (*a*) against an official or his or her agent can be instituted without the written authority of the Director of Public Prosecutions.

437 Section 107.

438 In terms of s 34(1) of the Judicial Matters Amendment Act 15 of 2023.

439 Du Toit 26-1.

440 Alternative charges are permitted by s 83 of the Act.

441 Kruger/Hiemstra 26-1.

284 Indeed, the use of competent verdicts seeks to obviate the need for a range of express alternative charges (that s 83 provides for), and thus may prevent "unnecessary cluttering and the risk of duplication of convictions".[442] What competent verdicts entail, and how and why they are used, is clearly expressed in the following terms:[443]

> "It is possible that the evidence might fall short of proving the crime charged, but nevertheless succeeds in proving beyond reasonable doubt the commission of some other offence *not* specifically formulated as an alternative charge, in terms of s 83 of the Act, to the charge in the indictment or charge sheet, as the case may be. This type of situation is governed by the statutory rules pertaining to so-called competent verdicts, that is, the unexpressed or latent or implied charges which only surface once the crime charged is not proved but some other crime, which is normally lesser than or akin to the crime charged, is proved."

285 Relying on this explanation, Cameron J stated in the Constitutional Court decision in *S v Phakane*[444] that "the purpose of the competent verdict is to provide the state with the ability to prosecute an individual for a lower-level crime – which the evidence established – in the event that the more serious crime cannot be proven beyond reasonable doubt".

286 Hiemstra comments that the charges mentioned in chapter 26 of the Act have "tacitly included within themselves a number of alternative charges", usually less serious than the specified charge.[445] Unlike genuine alternative charges, which are required to be expressly stated on the charge sheet, competent verdicts are tacitly included on the charge sheet by operation of the provisions of Chapter 26, and thus are not required to be stated.[446] A competent verdict can only result if there is proof beyond reasonable doubt of such offence being committed.[447]

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442 Du Toit 26-1, see *S v BM* 2014 (2) SACR 23 (SCA) at pars 4-6.

443 Joubert (ed) *Criminal Procedure Handbook* 13ed (2020) 389, cited by Du Toit 26-1.

444 *S v Phakane* 2018 (1) SACR 300 (CC) par 55 (Mbha J concurring).

445 Kruger/Hiemstra 17-13.

446 Ibid.

447 Du Toit 26-1 to 26-2.

287 Du Toit et al summarise the general rules and principles applicable to competent verdicts as follows:[448]

(i) If the main charge is proved, an accused should be convicted thereof, and no resort may be taken to the provisions of ss 256-270 of the Act.

(ii) As a point of departure, an undefended accused should be informed timeously of possible competent verdicts which may apply to him. It is irregular for a trial court only to warn an accused of the risks of being convicted of a competent verdict after the court has noted the accused's admissions in respect of such competent verdict.

(iii) While it is not required that competent verdicts be formally mentioned in the indictment, reference in a charge sheet to the possible application of a competent verdict is useful and advisable. Where the accused is undefended, the explanation given by the judicial officer must be detailed and thorough. The constitutional implications are set out in the Supreme Court of Appeal case of *S v Mashinini*:[449]

> "Section 35(3)*(a)* of the Constitution provides that every accused person has a right to a fair trial which, inter alia, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge is sufficiently detailed and clear to an extent where an accused person is able to respond and, importantly, to defend himself or herself. In my view, this is intended to avoid trials by ambush."

However, where an appellant had legal representation at his trial, it was held that the absence of a judicial warning about competent verdicts did not affect the fairness of the trial.[450]

(iv) The legality of competent verdicts in terms of ss 256-270 is subject to the principle that the accused should not have been prejudiced in the presentation of his case. This is a factual question and, as held in *S v Mwali*,[451] prejudice is absent if the court is satisfied that an accused – had he been alerted to the possibility of a competent verdict – could not have

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448 Du Toit 26-2 to 26-4; 26-20

449 *S v Mashinini* 2012 (1) SACR 604 (SCA) par 11.

450 *S v Doma* [2013] ZAGPJHC 116 par 49.

451 *S v Mwali* 1992 (2) SACR 281 (A).

conducted his defence any differently or would not have had any other defence. Du Toit et al state in this respect:[452]

"The fact of the matter is that in most cases prejudice to an accused can be avoided if the possibility of a competent verdict (latent charge) is brought to the attention of the accused as soon as there are indications that such a verdict would probably have to be considered on the available evidence. Timeous intervention can avoid risks to which the accused may be exposed."

(v) There can in principle be no prejudice if the accused had legal representation.
(vi) Conviction on a competent verdict must be regarded as an acquittal on the main count, and does not debar an appeal on a question of law.[453]
(vii) Presiding judicial officers have a responsibility to consider competent verdicts on a specific charge and should not leave it to prosecutors to alert them to such possible verdicts, although neither should prosecutors leave it to the bench to raise issues regarding competent verdicts.

288 In the context of the plea of guilty regulated by s 112 of the Act, where the accused "pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea", the distinction between alternative charges and competent verdicts may be further illustrated and explained. As Hiemstra explains, these introductory words to s 112(1) apply to both: an alternative charge being an "offence charged", and a competent verdict being "an offence of which [the accused] may be convicted on the charge", with only the latter words being qualified by the words "and the prosecutor accepts that plea".[454]

289 Where an accused tenders a guilty plea in relation to a charge, but subsequently makes admissions during questioning which only accord with a lesser offence, there cannot be a conviction in relation to the charge. There are two options at this point: either to note a plea of not guilty under s 113, or it can be inquired of the accused whether the

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452 Du Toit 26-21.

453 *DPP, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) par 9, as cited in *S v Kwezi Risk Solutions CC* 2026 JDR 1614 (ECMk) par 5.

454 Kruger/Hiemstra 17-13. See *S v Tladi* 1994 (1) SACR 174 (NC) at 178b–d where it was held that the introductory words "and the prosecutor accepts that plea" refer not only to competent verdicts but also to related alternative charges. However apart from the fact that an alternative charge is clearly an offence charged, there is no comma after "charge".)

responses can be regarded as a guilty plea to the lesser offence, in which case the prosecutor can accept such plea.[455]

290 The presiding officer must, when there is a plea of not guilty to the main charge but guilty to an alternative, ensure that the accused's right to remain silent on the charge to which a plea of not guilty has been recorded is not infringed by questioning on the other charge.[456] Hiemstra points out that care must be taken to ensure that s 115 proceedings (relating to a plea of not guilty) with regard to the one charge did not overlap with the s 112(1)(*b*) proceedings in respect of the other. Keeping the border in place will protect the accused's rights and at the same time also acknowledge the prosecutor's procedural position of power in respect of properly formulated alternative charges.[457]

291 The prosecutor is, however, in the case of a plea of guilty to a competent verdict, obliged to decide at that stage whether the plea is to be accepted. Should the prosecution fail to prove the competent verdict, the accused goes scot-free.[458] The distinction between a plea of guilty to a true alternative charge and one to a competent verdict is therefore important. An important distinction appears from the fact that when there is a main charge which is withdrawn, or when there is an acquittal, all the competent verdicts also fall away.[459] A true alternative, on the other hand, does not fall away automatically in the same manner. Hiemstra states that a competent prosecutor will bear the distinction in mind when drafting the charge sheet.[460] An alternative charge is based on slightly different facts and is formulated by the prosecutor as a safety precaution, depending on what the state can prove.

292 Apart from the Act, competent verdicts have been included in other statutes, such as the Criminal Law Amendment Act of 1988,[461] and the Cybercrimes Act of 2020.[462]

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455 Kruger/Hiemstra 17-6.

456 Kruger/Hiemstra 17-13

457 Kruger/Hiemstra 17-13

458 Kruger/Hiemstra 17-14

459 *R v M* 1959 (3) SA 332 (A) at 335H.

460 Kruger/Hiemstra 17-14.

461 Criminal Law Amendment Act 1 of 1988; see discussion in Du Toit 26-4 to 26-6.

462 Cybercrimes Act 19 of 2020; see discussion in Du Toit 26-6.

293 *Question/recommendation for consideration in redrafting*: To what extent competent verdicts should all be contained in a single statute, to whit, the criminal procedural legislation?

(b) Competent verdicts

(i) Attempt

294 Section 256 of the Act provides as follows:

> "If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit that offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence."

295 An attempt to commit a crime is punishable in terms of the common law.[463] While there is no reason in principle why an attempt to commit a statutory offence should not also be prosecuted in terms of the common law, the legislature has specifically provided for this type of liability in s 18(1) of the Riotous Assemblies Act 17 of 1956. Whether there was a punishable attempt is a question for the substantive criminal law; s 256 has a procedural function. As with the other competent verdicts, where the main offence is proved, a verdict of attempt is not permitted in terms of s 256.[464] However, where the charge relates to an attempted offence, even if the completed offence is proved, the conviction should be for the attempted offence, and s 256 does not apply.[465] There can be no verdict of attempted culpable homicide on an attempted murder charge.[466]
A lesser punishment is usually imposed for attempt than for the completed crime.[467]

296 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not seem to require amendment.

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463 Hoctor/Snyman *Snyman's Criminal Law* 8ed (2025) 247.

464 Du Toit 26-7.

465 Du Toit 26-7, citing *S v Makhutla* [2012] ZAECGHC 6; *S v Sikhakhane* 1985 (2) SA 289 (N).

466 *R v Kadongoro* 1980 (2) SA 581 (R); Kruger/Hiemstra 26-3.

467 Hoctor/Snyman 257.

(ii) Accessory after the fact

297 Section 257 of the Act provides as follows:

> "If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence of which he may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence or, as the case may be, such other offence, and shall, in the absence of any punishment expressly provided by law, be liable to punishment at the discretion of the court: Provided that such punishment shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory."

298 An accessory after the fact is a person who, after the completion of a crime, "unlawfully and intentionally engages in conduct intended to enable the perpetrator of, or the accomplice in, the crime to evade liability for his crime, or to facilitate such person's evasion of liability".[468] The intention to assist the (co-)perpetrator or accomplice in evading justice is a crucial element of accessorial liability.[469]

299 While there are well-founded objections in principle to a person being held to be an accessory after the fact to her own crime, in *S v Jonathan* it was held that where several persons are charged with murder but it is unclear as to who committed the murder, all can be found guilty as accessories after the fact to murder if it is proved that all co-operated after the murder to conceal the corpse.[470]

300 Section 257 provides that the punishment of an accessory after the fact may not exceed that which may be imposed in respect of the offence of which he is convicted as an accessory. This is typically the case in practice.

301 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment.

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468 Hoctor/Snyman 243; see *S v Morgan* 1993 (2) SACR 134 (A).

469 See *S v Williams* 1998 (2) SACR 191 (SCA); *S v Nooroodien* 1998 (2) SACR 510 (NC); *S v Phallo* 1999 (2) SACR 558 (SCA).

470 *S v Jonathan* 1987 (1) SA 633 (A). Theft being a continuing crime, any person who intentionally assists a participant in the original theft is also guilty of theft – Du Toit 26-8; Kruger/Hiemstra 26-4.

(iii) Murder and attempted murder

302 Section 258 of the Act provides:

> "If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but-
> *(a)* the offence of culpable homicide;
> *(b)* the offence of assault with intent to do grievous bodily harm;
> *(c)* the offence of robbery;
> *(d)* in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth;
> *(e)* the offence of common assault;
> *(f)* the offence of public violence; or
> *(g)* the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law,
> the accused may be found guilty of the offence so proved."

303 Murder is the unlawful and intentional causing of the death of another human being.[471] Apart from the addition of culpable homicide as a competent verdict, the same competent verdicts apply to murder or attempted murder as to culpable homicide in s 259 of the Act. The discussion of the verdicts in respect of each of s 258 and 259 therefore applies, *mutatis mutandis*, to the other.

304 In terms of (*a*),[472] since intent is required for attempt[473] there can be no such verdict as attempt to commit culpable homicide.[474] An acquittal of murder on the basis of a lack of criminal capacity excludes the possibility of a verdict of culpable homicide.[475]

305 In terms of (*b*),[476] there can be no competent verdict of assault with intent to do grievous bodily harm where the court holds that the accused should be acquitted on the basis of acting in putative private defence,[477] and thus lacking knowledge of

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471 Hoctor/Snyman 413.

472 See discussion of s 259 below at (iv).

473 See discussion of s 256 above at (i).

474 *S v Ntanzi* 1981 (4) SA 477 (N) 482.

475 See *S v Ramdass* 2017 (1) SACR 30 (KZD) par 31.

476 See discussion of s 266 below at (xii), where the factors to be considered whether the assault was common assault or assault with intent to do grievous bodily harm are listed.

477 See Hoctor/Snyman 182-183.

unlawfulness, and consequently intent. Assault could also not serve as a competent verdict where there is no link between the assault and *actus reus* on which the murder charge was based.[478] This competent verdict may, however, apply upon an acquittal on a charge of attempted murder, whether or not there are serious physical injuries, and indeed, even if the unlawful conduct is in the form of a threat to inflict grievous bodily harm.[479]

306 In terms of (c), where there has indeed been theft by means of violence, but the accused did not intend to kill, then robbery could serve as a competent verdict.[480]

307 In terms of (*d*), the competent verdict of exposing an infant,[481] alternatively contravention of s 113 of the General Law Amendment Act 46 of 1935, which relates to disposing of the body of a child,[482] these verdicts would once again apply where there is no intention to kill.

308 In terms of (*e*), similar considerations would apply as to subsection (*b*).

309 In terms of (f), the competent verdict for public violence would similarly apply where, in the course of the accused acting together with a group of people, whilst acting in terms of the *actus reus* for public violence, the victim was fatally wounded, but that such fatal wounding was not carried out with intent to kill.

310 In terms of (*g*), the section should be read with s 120(6) of the Firearms Control Act 60 of 2000. In respect of the forerunner of s 120(6), the Supreme Court of Appeal has held that the weapon need not be cocked or loaded or otherwise capable of discharging ammunition, because the offence of pointing a firearm seeks to secure that fear is not induced in people who have firearms directed at them.[483]

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478 Du Toit 26-9; see *S v Phakane* 2018 (1) SACR 300 (CC) pars 43-44.

479 *S v Oosthuizen* 2020 (1) SACR 561 (SCA) pars 22-24.

480 See discussion of s 260 below at (v).

481 See Hoctor/Snyman 419.

482 See Hoctor/Snyman 407.

483 *S v Xabendlini* [2011] ZASCA 86, cited by Du Toit 26-10.

Conspiracy to assault is not a competent verdict on a charge of murder.[484]

311 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(iv) Culpable homicide

312 Section 259 of the Act provides:

> "If the evidence on a charge of culpable homicide does not prove the offence of culpable homicide, but-
> *(a)* the offence of assault with intent to do grievous bodily harm;
> *(b)* the offence of robbery;
> *(c)* in the case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth;
> *(d)* the offence of common assault;
> *(e)* the offence of public violence; or
> *(f)* the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law,
> the accused may be found guilty of the offence so proved."

313 Culpable homicide may be defined as the unlawful negligent killing of a human being.[485] The distinction between murder and culpable homicide is founded on the different *mens rea* requirements for these crimes: intention (*dolus*) for murder and negligence (*culpa*) for culpable homicide. Drawing this distinction, however, requires taking into account that *dolus* does not necessarily exclude *culpa*,[486] and that, consistent with the weight of judicial authority, on a charge of culpable homicide, there may be a conviction of this crime, even if the killing was intentional.[487] However, *dolus* and *culpa* are nevertheless distinct and do not overlap such that a finding that *dolus* has been established necessarily entails that *culpa* is proved.[488]

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484 *S v Mitchell* 1992 (1) SACR 17 (A).

485 Burchell, Schwikkard & Mosaka 534.

486 *S v Ngubane* 1985 (3) SA 677 (A); Du Toit 26-10A

487 Du Toit 26-10A; *S v September* 1972 (3) SA 389 (C); *S v Smith* 1981 (4) SA 140 (C); *S v Zoko* 1983 (1) SA 871 (N); *S v Breakfast* 1984 (3) SA 302 (E).

488 *S v Alexander* 1982 (4) SA 701 (T).

314 The same competent verdicts apply to murder or attempted murder in s 258 of the Act (with the addition of culpable homicide) as to culpable homicide in s 259 of the Act. The discussion of the verdicts in respect of each of s 258 and 259 therefore applies, *mutatis mutandis*, to the other.

315 In terms of (*a*), liability for assault with intent to do grievous bodily harm would arise where the accused had such intent, but a culpable homicide verdict would be excluded because the death of the victim was not reasonably foreseeable.[489]

316 In terms of (*b*), the competent verdict for robbery would similarly apply where in the course of the accused appropriating goods from the victim, whilst employing violence, the victim was fatally wounded, but that such fatal wounding was not reasonably foreseeable.[490]

317 In terms of (*c*), the competent verdict of exposing an infant,[491] alternatively contravention of s 113 of the General Law Amendment Act 46 of 1935, which relates to disposing of the body of a child,[492] as with the other competent verdicts, these would apply where the accused's conduct did not fall short of that of the reasonable person in the circumstances of the accused, but the accused nevertheless intentionally performed the unlawful conduct, which gave rise to the death.

318 In terms of (*d*), similarly to (*a*), liability for common assault would arise where the accused intentionally performed such unlawful conduct, but a culpable homicide verdict would be excluded because the death of the victim was not reasonably foreseeable.[493]

319 In terms of (*e*), the competent verdict for public violence would similarly apply where in the course of the accused acting together with a group of people, whilst acting in terms of the *actus reus* for public violence, the victim was fatally wounded, but that such fatal wounding was not reasonably foreseeable.[494]

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489 See discussion of s 266 below at (xii).

490 See discussion of s 260 below at (v).

491 See Hoctor/Snyman 419.

492 See Hoctor/Snyman 407.

493 See discussion of s 267 below at (xiii).

494 See *S v Whitehead* 2008 (1) SACR 431 (SCA) 438f-g.

320 In terms of (f), the section should be read with s 120(6) of the Firearms Control Act 60 of 2000.[495]

321 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(v) Robbery

322 Section 260 of the Act provides:

> "If the evidence on a charge of robbery or attempted robbery does not prove the offence of robbery or, as the case may be, attempted robbery, but-
> *(a)* the offence of assault with intent to do grievous bodily harm;
> *(b)* the offence of common assault;
> *(c)* the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law;
> *(d)* the offence of theft;
> *(e)* the offence of receiving stolen property knowing it to have been stolen; or
> *(f)* an offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955),
> *(g)* .....
> the accused may be found guilty of the offence so proved, or, where the offence of assault with intent to do grievous bodily harm or the offence of common assault and the offence of theft are proved, of both such offences."

323 Robbery is defined as the theft of property by intentionally using violence or the threat of violence to induce a person to submit to the taking of the property.[496] The competent verdicts only have application where robbery has not been proven. It has been stated that one of the objects of s 260 is to allow for the record to be cluttered up with a mass of alternative charges on a charge of robbery.[497] The accused should not be taken by surprise by the resort to a competent verdict.[498] However, in *S v Nyanga*,[499] where the accused, who had been charged with robbery, was convicted of theft on the basis of s 112(1)(*b*) admissions, it was held not to be prejudiced despite not being

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495 See discussion under s 258 above at (iii).

496 Burchell, Schwikkard and Mosaka 680.

497 *S v Jabulani* 1980 (1) SA 331 (N) 332B-C.

498 See discussion under 'Introduction' under (a) above.

499 *S v Nyanga* 2004 (1) SACR 198 (C).

informed of the competent verdict, as his conduct of the case would not have been different.[500]

324 Robbery might be described as theft by violence (or force),[501] and this brief description is revealing of the parts of the crime: theft and assault. It follows therefore that the competent verdicts for robbery in s 260 reflect this reality. Thus the inclusion of assault with intent to commit grievous bodily harm (*a*),[502] common assault (*b*)[503] and pointing a firearm (*c*) provide for the situation where the assault crime can be established, but the theft crime cannot. Similarly, the inclusion of theft (*d*), receiving stolen property knowing it to be stolen (*e*) and contravention of s 36 or 37 of the General Law Amendment Act 62 of 1955 provide for the situation where the theft crime can be established, but not the assault. And all the competent verdicts make provision for the situation where the crucial causal link between the force and the taking cannot be established.

325 Notably, in terms of s 260 the accused may be convicted of both common assault or assault with intent to do grievous bodily harm, and theft, if both are proved. As Du Toit et al point out, this does not amount to a permitted duplication of convictions, but in this regard "really only acknowledges the practical reality that the evidence on a charge of robbery might not disclose a causal link between the violence and the taking or removal of the object".[504] The separate convictions for theft and assault would give rise to separate sentences, although the court would have to take cumulative effect into account.[505]

326 It seems that it is possible to find robbery for one part of the course of conduct, and theft for another.[506]

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500 At 203c.

501 Hoctor/Snyman 471.

502 See discussion of s 266 below at (xii).

503 See discussion of s 267 below at (xiii).

504 Du Toit 26-11, who illustrate this statement with reference to the cases of *S v Chimola* [2021] ZAGPJHC 169, *S v Rautenbach* 2014 (1) SACR 1 (GSJ), and *S v Jiyane* [2018] ZASCA 111.

505 Du Toit 26-12; *S v Jabulani* 1980 (1) SA 331 (N) 332G.

506 Kruger/Hiemstra 26-15.

327 Theft by false pretences is a competent verdict on a charge of robbery.[507] In the context of bag-snatching or cellphone snatching, the key consideration which establishes a robbery, as opposed to theft and assault, is the anticipated resistance on the part of the actor: where force is used with the intention to prevent or forestall resistance which he thinks may be offered to the taking if the complainant were to become aware of his intentions, then this founds a conviction of robbery.[508]

328 Question*/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(vi) Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault

329 Section 261 of the Act provides as follows:

> "(1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of-
>
> *(a)* assault with intent to do grievous bodily harm;
>
> *(b)* common assault;
>
> *(c)* sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
>
> *(d)* compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
>
> *(e)* compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
>
> *(f)* incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
>
> *(g)* having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
>
> *(h)* having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,
>
> the accused may be found guilty of the offence so proved.
>
> (2) If the evidence on a charge of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the

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507 Du Toit 26-12.

508 See discussion in SV Hoctor "Examining the expanding crime of robbery" (2012) 25(3) *SACJ* 361.

> Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of-
>
> *(a)* common assault or;
>
> *(b)* having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,
>
> the accused may be found guilty of the offence so proved."

330 Section 261 was substituted by s 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, to give effect to the repeal of certain common-law crimes, and their replacement with statutory offences which were more gender-neutral and more detailed than the common-law antecedents. As a result, the list of competent verdicts contained in s 261 needed to be adjusted accordingly. Given the wide variety of possible competent verdicts, it is good practice to inform the accused of these before he has pleaded.[509]

331 While it was held in the High Court that the criminalisation provisions in the 2007 Act were rendered ineffective, and failing to disclose an offence, due to the absence of penalty clauses,[510] this decision was overturned by the Supreme Court of Appeal.[511] The subsequent insertion of s 56A into the 2007 Act, which creates a general penalty clause for purposes of this Act, has "now put the matter beyond any further dispute", and so "all the contraventions (and possible contraventions as competent verdicts) of Act 32 of 2007 as identified in s 261 of Act 51 of 1977 remain valid charges (and valid competent verdicts)".[512]

332 Section 256 of the Act already provides for a conviction of attempt where the charge alleges the actual crime, so it follows that there is no need to refer to an attempt in any of the subparagraphs of s 261, although there is such a reference in the opening words of s 261(1).[513]

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509 Du Toit 26-13, citing *S v Scheepers* [2020] ZAGPPHC 412.

510 *DPP, Western Cape v Prins* 2012 (2) SACR 67 (WCC).

511 *DPP, Western Cape v Prins* 2012 (2) SACR 183 (SCA).

512 Du Toit 26-13.

513 Du Toit 26-14.

333 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(vii) Trafficking in persons

334 Section 261A of the Act provides as follows:

> "(1) In this section-
> 'Basic Conditions of Employment Act' means the Basic Conditions of Employment Act, 1997 (Act 75 of 1997);
> 'Criminal Law (Sexual Offences and Related Matters) Amendment Act' means the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007);
> 'Immigration Act' means the Immigration Act, 2002 (Act 13 of 2002); and
> 'Prevention and Combating of Trafficking in Persons Act' means the Prevention and Combating of Trafficking in Persons Act, 2013.
> (2) If the evidence on a charge of trafficking in persons provided for in section 4 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, does not prove the offence of trafficking in persons or the involvement in the offence, but the offence of-
> *(a)* assault with intent to do grievous bodily harm;
> *(b)* common assault;
> *(c)* rape as provided for in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;
> *(d)* compelled rape as provided for in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;
> *(e)* sexual assault as provided for in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;
> *(f)* compelled sexual assault as provided for in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;
> *(g)* compelled self-sexual assault as provided for in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act;
> *(h)* debt bondage as provided for in section 5 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;
> *(i)* the possession, destruction, confiscation, concealment of or tampering with documents as provided for in section 6 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;
> *(j)* using the services of a victim of trafficking as provided for in section 7 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;
> *(k)* conduct facilitating trafficking in persons as provided for in section 8 or any involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;
> *(l)* transporting a person within or across the borders of the Republic knowing that the person is a victim of trafficking as provided for in section 9 (1) or any

involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act;

(m) entering or remaining in, or departing from the Republic as provided for in section 49 (1) *(a)* of the Immigration Act;

(n) knowingly assisting a person to enter or remain in, or depart from the Republic as provided for in section 49 (2) of the Immigration Act;

(o) employing a child as provided for in section 43 of the Basic Conditions of Employment Act; or

(p) forced labour as provided for in section 48 of the Basic Conditions of Employment Act,

the accused may be found guilty of the offence so proved."

335 In terms of the provisions of the Prevention and Combating of Trafficking in Persons Act 7 of 2013, s 261A was inserted into the Act.[514] The competent verdicts in s 261A of the Act apply to s 4 of this Act, which sets out the principal offence of trafficking in persons, along with s 10 of this Act, which provides for liability for attempt, incitement or conspiracy relating to any of the offences in this Act.

336 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(viii) Housebreaking with intent to commit an offence

337 Section 262 of the Act provides as follows:

"(1) If the evidence on a charge of housebreaking with intent to commit an offence specified in the charge, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit the offence so specified but the offence of housebreaking with intent to commit an offence other than the offence so specified or the offence of housebreaking with intent to commit an offence unknown or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

(2) If the evidence on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of housebreaking with intent to commit a specific offence, or the offence of malicious injury to property, the accused may be found guilty of the offence so proved.

(3) If the evidence on a charge of attempted housebreaking with intent to commit an offence specified in the charge, or attempted housebreaking with intent to

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514 For discussion of the offences in the Prevention and Combating of Trafficking in Persons Act 7 of 2013, see G Kemp (ed) *Criminal Law in South Africa* 4ed (Oxford University Press, 2022) 686; Hoctor/Snyman 440.

> commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of attempted housebreaking with intent to commit the offence so specified, or attempted housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of malicious injury to property, the accused may be found guilty of the offence so proved."

338 It should be noted that while s 262 provides for housebreaking with intent to commit an offence charges to be brought "under a statute or the common law", this does not reflect the current position, where the erstwhile provincial housebreaking offences have been repealed.[515] While the legislature has created a further statutory offence related to the common-law crime of housebreaking with intent to commit an offence, in the form of the offence of possession of housebreaking or vehicle-breaking implements,[516] this offence is not listed in s 262 as a competent verdict for the crime of housebreaking with intent to commit an offence. It seems that the section requires amendment to allow for this offence to serve as a competent verdict.

339 Housebreaking is not a crime *eo nomine* and must be accompanied by the intent to commit any offence, other than an offence forming part of the break-in itself. in the premises or structure entered.[517] Housebreaking without such intent, that is, the intentional damage to premises, is punished as malicious injury to property. Housebreaking with such further intent, but where the required unlawful act is incomplete, is punished as attempted housebreaking with the intent to commit an offence. There are always two separate offences involved, which are jointly charged, but sentenced as one, if both are proved. There can also be a finding of housebreaking accompanied only by the unlawful intent.[518] However, due to the existence of minimum sentences legislation in the Criminal Law Amendment Act 105 of 1997, the housebreaking crime and the related 'further intention' offence may be charged as separate offences.[519] It is clear that s 262 creates competent verdicts and not statutory offences.[520]

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515 See discussion of s 263 below at (ix).

516 S 82 of the General Law Third Amendment Act 129 of 1993.

517 *S v Livanje* 2020 (2) SACR 451 (SCA) par 14; Kruger/Hiemstra 26-18.

518 In terms of s 256, a finding of attempted housebreaking with intent to steal, for example, is possible.

519 *S v Maswetsa* 2014 (1) SACR 288 (GSJ).

520 Du Toit 26-17.

340 In terms of subsection (1), since two separate offences arise for consideration, the relationship between these offences must be examined. This may best be achieved in the context of the archetypal situation where housebreaking comes before the courts: housebreaking with intent to steal and theft. It may be, as indicated above, that where two persons are acting together, one who was involved in the housebreaking with the intent to steal and then withdraws, whereas the other, who was similarly involved in the housebreaking, continues to commit the envisaged theft. In such a scenario, the first offender could be convicted of only housebreaking with intent to commit a crime, whereas the other offender could be convicted of both the housebreaking and theft crimes.[521]

341 There has been some dispute as to the competent verdict that may apply in this context. In *S v Chauke*,[522] it was held that a verdict of receiving stolen property is not a competent verdict on a charge of housebreaking with intent to steal and theft. However, in *S v Maunye*,[523] it was held that the judgment in *Chauke* was wrong on this point, and that receiving stolen property is indeed a competent verdict in this context.[524] How might this be resolved? Receiving stolen property is certainly a competent verdict on a theft charge,[525] but this does not seem to be the case for housebreaking with intent to steal. As s 262(1) states, where the charge of housebreaking with intent to commit a particular offence is not established, the possible competent verdicts are: housebreaking with intent to commit an offence other than the offence so specified; housebreaking with intent to commit an offence to the prosecutor unknown;[526] malicious injury to property. Another factor militating against receiving stolen property functioning as a competent verdict for housebreaking with intent to steal is that the essential elements of the receiving crime are not contained within the charged crime, the housebreaking crime, as is required for

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521 *R v Chinyerere* 1980 (2) SA 576 (RA); Kruger/Hiemstra 26-18.

522 *S v Chauke* 1998 (1) SACR 354 (V).

523 *S v Maunye* 2002 (1) SACR 266 (T).

524 This approach also found favour in *S v Nell* 2009 (2) SACR 37 (C).

525 S 264(1)(*a*) of the Act.

526 In s 262(1), the wording of the provision is “housebreaking with intent to commit an offence unknown”, but this is vague and confusing on the face of it. It is clear that what is intended is “housebreaking with intent to commit an offence to the prosecutor unknown”, as formulated in s 262(2) and (3). It may be noted that this latter formulation is preferable to “housebreaking with intent to commit a crime unknown to the prosecutor”, which may inadvertently suggest deficiencies in the prosecutor’s training.

s 270. Nonetheless, as mentioned, the crime of receiving stolen property can function as a competent verdict for theft, where this crime is not proven.

342 In terms of s 262(1), on a charge of housebreaking with intent to steal and theft, the court may convict of housebreaking with intent to commit malicious injury to property, if the further intent to commit intentional damage to property can be established after the breaking and entry, or even just the crime of malicious injury to property.[527] A conviction of housebreaking with intent to trespass is similarly a competent verdict on a charge of housebreaking with intent to steal and theft.[528]

343 In terms of s 262(2), the word "evidence" includes answers furnished by an accused in terms of s 112(1)(*b*) according to *S v Andrews*.[529] The words "or the offence of malicious injury to property", inserted in terms of the Criminal Law Amendment Act 4 of 1992, widens the ambit of s 262(2), and as Du Toit et al point out, is consistent with the provisions contained in s 262(1).

344 Despite some doubts about the appropriateness of the verdict of housebreaking with intent to commit a crime to the prosecutor unknown, including doubts about its constitutionality,[530] it is evident that this provision fulfils an important purpose. In the words of Le Grange AJ in *S v Slabb*,[531] where perpetrators

> "are caught after unlawfully breaking and entering into premises and the evidence is overwhelming that *their intention was to commit (a) crime(s)*, but it is impossible for the prosecution to prove what crime(s) they intended to commit, the allegation that they intended to commit an offence unknown and to pronounce a verdict accordingly is, in my view, the proper one. To view it any differently will in effect force the State to resort to trespass prosecutions, or to speculate in respect of some known offences, which may lead to questionable decisions. This clearly will place the prosecution in an untenable position and will make s 262 of the Act redundant."

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527 Du Toit 26-16 to 26-17.

528 *S v Jasat* 1997 (1) SACR 489 (SCA).

529 *S v Andrews* 1984 (3) SA 306 (E); *S v Tshivhule* 1985 (4) SA 48 (V). While this approach has been doubted by Du Toit et al 17-19, as ignoring the distinction between "evidence" and "probative material", in *S v Nixon* 2000 (2) SACR 79 (W) 87d it was held a s 112(2) statement cured the defect in the charge sheet in terms of s 88 of the Act.

530 For discussion, see SV Hoctor "Some constitutional and evidential aspects of the offence of housebreaking with intent to commit a crime" (1996) 17(1) *Obiter* 160.

531 *S v Slabb* 2007 (1) SACR 77 (C) par 13, original emphasis.

345 In the event that an accused charged with housebreaking to commit an offence to the prosecutor unknown, and the accused tenders a valid plea of guilty establishing housebreaking with intent to steal, then the accused must be convicted of housebreaking with intent to steal.[532] However, s 262(2) does not allow for a conviction of theft on a charge of housebreaking with intent to commit an offence to the prosecutor unknown.[533] In the context of trespass, a verdict of housebreaking with intent to trespass is a competent verdict on a charge of housebreaking with intent to commit an offence to the prosecutor unknown, but a finding of the separate offence of trespass would not be permissible in terms of s 262(2).[534]

346 It has been held that a verdict of housebreaking with intent to rape is permitted on a charge of housebreaking with intent to commit an offence to the prosecutor unknown in terms of s 262, and that such verdict does not preclude a conviction of rape in a separate count related to the same housebreaking.[535] However, upon a conviction of the charged offence of housebreaking with intent to commit an offence to the prosecutor unknown, as well as indecent assault, it was held on review that in terms of s 262 the accused could only have been convicted of housebreaking with intent to commit indecent assault – and not of housebreaking with intent to commit indecent assault and indecent assault.[536]

347 In terms of s 262(3), this provision governs “attempts”, whilst subsections (1) and (2) relate to completed crimes.[537]

348 *Question/recommendation for consideration in redrafting*: There may be two matters that should be considered in redrafting: (i) acknowledgement of the statutory offence of possession of housebreaking implements (contained in s 82 of the General

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532 Du Toit 26-18; *S v Kesolofetse* 2004 (2) SACR 166 (NC).

533 *S v Jacobs* 1979 (2) SA 837 (C).

534 Du Toit 26-18

535 *S v Lekeka* [2020] 3 All SA 485 (FB) par 32, where it was further held that that in such an instance the two counts should be taken together for the purposes of sentencing (par 47). See *S v Blaauw* 1994 (1) SACR 11 (E) 13*g-h*.

536 *S v M* 1989 (4) SA 718 (T).

537 Du Toit 26-19.

Law Third Amendment Act 129 of 1993); and (ii) clarification as to whether receiving stolen property can serve as a competent verdict to housebreaking with intent.

(ix) Statutory offence of breaking and entering or of entering premises

349 Section 263 of the Act provides as follows:

> "(1) If the evidence on a charge for the statutory offence in any province of breaking and entering or of the entering of any premises with intent to commit an offence specified in the charge, does not prove the offence of breaking and entering or of entering the premises with intent to commit the offence so specified but the offence of breaking and entering or of entering the premises with intent to commit an offence other than the offence so specified or of breaking and entering the premises with intent to commit an offence unknown, the accused may be found guilty-
>
> *(a)* of the offence so proved; or
>
> *(b)* where it is a statutory offence within the province in question to be in or upon any dwelling, premises or enclosed area between sunset and sunrise without lawful excuse, of such offence, if such be the facts proved.
>
> (2) If the evidence on a charge for the statutory offence in any province of breaking and entering or of the entering of any premises with intent to commit an offence to the prosecutor unknown, does not prove the offence of breaking and entering or of entering the premises with intent to commit an offence to the prosecutor unknown but the offence of breaking and entering or of entering the premises with intent to commit a specific offence, the accused may be found guilty of the offence so proved."

350 In the light of the repeal of the provincial legislation setting out such offences, section 263 no longer has reason to exist, and can be repealed.[538]

351 *Question/recommendation for consideration in redrafting*: This provision should be repealed, since it no longer finds application in respect of the erstwhile statutory housebreaking and intrusion offences.

(x) Theft

352 Section 264 of the Act provides as follows:

> "(1) If the evidence on a charge of theft does not prove the offence of theft, but-
>
> *(a)* the offence of receiving stolen property knowing it to have been stolen;

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538 For discussion of these offences, see SV Hoctor "Statutory regulation of housebreaking and intrusion in South Africa – An historical perspective" (2017) 23(1) *Fundamina* 39.

> *(b)* an offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955); or
> *(c)* an offence under section 1 of the General Law Amendment Act, 1956 (Act 50 of 1956),
> *(d)* .....
> the accused may be found guilty of the offence so proved.
> (2) If a charge of theft alleges that the property referred to therein was stolen on one occasion and the evidence proves that the property was stolen on different occasions, the accused may be convicted of the theft of such property as if it had been stolen on that one occasion."

353 Theft may be defined as an unlawful appropriation with intent to steal of a thing capable of being stolen.[539] Section 264 sets out competent verdicts on a charge of theft but is not a basis for criminal liability in itself.[540]

354 The context for the competent verdict finding in terms of s 264(1)(*a*) is that theft is a continuing offence, which entails that the person assisting the original thief is also guilty of theft, if such accessory had knowledge of the theft.[541] Only where theft cannot be established on this basis does the competent verdict arise for consideration. The verdict of receiving stolen property knowing it to have been stolen requires that it be proved that the person concerned did not participate in the actual commission of the theft charged, but received the stolen goods knowing them to have been stolen.[542]

355 In terms of s 264(1)(b), it may be noted that s 36 of the General Law Amendment Act 62 of 1955, which makes the inability to give an account of the possession of goods suspected of being stolen an offence, has been held to be constitutional in *Osman v Attorney-General, Transvaal*.[543] In *S v Doma*,[544] the court commented, in circumstances where the appellant, who had been charged with theft, and convicted of contravening s 36, regarding the purpose of s 36:

> "Section 36 is a quintessential example of what might be called a 'policeman's crime'. The purpose of the section is to afford an alert police officer the right to lawfully stop and interrogate a person who is honestly and reasonably suspected

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539 Burchell, Schwikkard and Mosaka 647.

540 Du Toit 26-21.

541 Du Toit 26-21.

542 *S v Naran* 1963 (1) SA 652 (A).

543 *Osman v Attorney-General, Transvaal* 1998 (2) SACR 493 (CC).

544 *S v Doma* [2013] ZAGPJHC 116 at par 36.

> by the police officer of wrongdoing. It is not a device to circumvent evidential problems on a charge of theft…The offence created in terms of Section 36 is not a logical progression from theft. It is an artifice conceived by the legislature to address a different set of circumstances, and simply for policy reasons is it, in terms of Section 264 of the CPA, declared to be a competent verdict on a charge of theft."

356 In respect of s 37 of the General Law Amendment Act 62 of 1955, the reverse onus provision in the original formulation of this section has been declared unconstitutional.[545] In terms of the reformulated provision,[546] the section now contains an evidential burden, rather than a reverse onus. Thus, in the absence of evidence to the contrary which raises a reasonable doubt, proof of possession of the stolen goods shall be sufficient evidence of the absence of reasonable cause for believing that the goods were honestly acquired.[547] The "possession" required for guilt under s 37 includes mere detention on behalf of another.[548]

357 In terms of (c), s 1 of the General Law Amendment Act 50 of 1956 criminalises theft of use. The related offence contained in s 66(2) of the National Road Traffic Act 93 of 1996, of using a motor vehicle without the owner's consent, is not a competent verdict for theft.[549] Such a charge will therefore have to be brought in the alternative.[550]

358 The question has arisen whether theft by false pretences[551] is competent on a charge of theft. However, this is not provided for in s 264,[552] nor would it be possible in terms of s 270, as theft by false pretences is a wider crime than theft.[553]

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545 This was the verdict of the Constitutional Court in *S v Manamela* 2000 (1) SACR 414 (CC).

546 In terms of the judgment in *Manamela supra*, as confirmed in the Judicial Matters Amendment Act 2 of 2000.

547 S 37(2) of Act 62 of 1955.

548 *S v Doma* [2013] ZAGPJHC 116 at par 36.

549 Kruger/Hiemstra 26-23.

550 *S v Pekani* 1977 (1) SA 72 (Tk).

551 Theft by false pretences is defined as the unlawful and intentional obtaining of movable, corporeal property belonging to another with the consent of the person from whom she obtains it, such consent being given as a result of a misrepresentation by the person committing the crime, who appropriates the property (see Hoctor/Snyman 493).

552 It was held in *S v Kudjiwane* 1975 (3) SA 335 (O) that theft by false pretences is not a competent verdict for theft.

553 *S v Nkosi* 2019 (1) SACR 570 (GJ) par 13; Kruger/Hiemstra 26-23.

359 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(xi) Receiving stolen property knowing it to have been stolen

360 Section 265 of the Act provides as follows:

> "If the evidence on a charge of receiving stolen property knowing it to have been stolen does not prove that offence, but-
> *(a)* the offence of theft; or
> *(b)* an offence under section 37 of the General Law Amendment Act, 1955 (Act 62 of 1955),
> *(c)* .....
> the accused may be found guilty of the offence so proved."

361 The competent verdicts in this section apply where this crime has not been proved.[554] This common-law crime may be defined as 'unlawfully receiving possession of stolen property knowing it to have been stolen'.[555] The accused must therefore know, at the time of taking the property into his possession, that it has been stolen.[556] For an example of where a court may resort to a theft conviction where guilty knowledge on the part of the accused when he received the property could not be proved, see the dissenting judgment of Ogilvie Thompson JA in *S v Bolus*.[557] If all the elements of theft are proved, the competent verdict provided for in (*a*) may apply.

362 In respect of (*b*), it may be noted that the reverse onus provision in the original formulation of s 37 has been declared unconstitutional.[558] In terms of the reformulated provision,[559] the section now contains an evidential burden, rather than a reverse onus. Thus, in the absence of evidence to the contrary which raises a reasonable doubt, proof

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554 See discussion in Kruger/Hiemstra 26-24; Du Toit 26-22.

555 Burchell, Schwikkard and Mosaka 670.

556 Hoctor/Snyman 475.

557 *S v Bolus* 1966 (4) SA 575 (A).

558 This was the verdict of the Constitutional Court in *S v Manamela* 2000 (1) SACR 414 (CC).

559 In terms of the judgment in *Manamela supra*, as confirmed in the Judicial Matters Amendment Act 2 of 2000.

of possession of the stolen goods shall be sufficient evidence of the absence of reasonable cause for believing that the goods were honestly acquired.[560]

363 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment.

(xii) Assault with intent to do grievous bodily harm

364 Section 266 of the Act provides as follows:

> "If the evidence on a charge of assault with intent to do grievous bodily harm does not prove the offence of assault with intent to do grievous bodily harm but the offence of-
>
> *(a)* common assault;
>
> *(b)* sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or
>
> *(c)* pointing a fire-arm, air-gun or air-pistol in contravention of any law,
>
> the accused may be found guilty of the offence so proved."

365 The definition of assault with intent to do grievous bodily harm accords with that of common assault,[561] but in addition it is required that the accused have the intent to do grievous bodily harm.[562] It follows that where the additional special intent cannot be established, but the other elements can be proved, that common assault can serve as a competent verdict (as in (*a*)). Factors which may indicate the presence of the intent to cause grievous bodily harm include the nature of the weapon or instrument used, the way in which it was used, the degree of violence, the part of the body aimed at, the persistence of the attack, and the nature of the injuries inflicted, if any.[563]

366 Regarding (*b*), previously the common-law crime of indecent assault was a competent verdict on a charge of assault with intent to do grievous bodily harm, but since the replacement of the common-law crimes with the statutory sexual offences found in

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560 S 37(2) of Act 62 of 1955.

561 See discussion of s 267 below at (xiii).

562 For discussion, see Burchell, Schwikkard and Mosaka 549-551; Hoctor/Snyman 426-427.

563 *S v Oosthuizen* 2020 (1) SACR 561 (SCA) par 22.

the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the definition of s 267 has changed accordingly.[564]

367 Section 266(*c*) must be read with the offence of pointing a firearm contained in s 120(6) of the Firearms Control Act of 2000.[565]

368 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment. It may be that the statutory offence of intimidation,[566] could be considered as an additional competent verdict for assault with the intent to do grievous bodily harm.

(xiii) Common assault

369 Section 267 of the Act provides as follows:

> "If the evidence on a charge of common assault proves the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, the accused may be found guilty of any such offence, or, if the evidence on such a charge does not prove the offence of common assault but the offence of pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty of that offence."

370 Assault may be defined as "any unlawful and intentional act or omission (a) which results in another person's bodily integrity being directly or indirectly impaired, or (b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place."[567] Hiemstra points out that this section differs in two respects from the pattern in Chapter 26 of the Act. First, it is not a prerequisite here for an alternative finding that the offence charged is not proved, and second, the findings permitted in terms of the section appear to be more serious than the offence charged.[568] Nevertheless, assault with intent to commit grievous bodily harm is not a competent

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564 See discussion of s 261 above at (vi).

565 Act 60 of 2000; for further discussion see Hoctor/Snyman 429.

566 Contained in s1(1) of the Intimidation Act 72 of 1982.

567 Hoctor/Snyman 421.

568 Kruger/Hiemstra 26-25.

verdict on a charge of common assault.[569] Previously, the common-law crime of indecent assault was a competent verdict on a charge of common assault, but since the replacement of the common-law crimes with the statutory sexual offences found in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the definition of s 267 has changed accordingly.[570]

371 Section 267 must be read with the offence of pointing a firearm contained in s 120(6) of the Firearms Control Act of 2000.[571]

372 Hiemstra rightly comments that intimidation could also constitute a competent verdict for common assault,[572] and this should be taken into account in any redrafting of this section.

373 *Question/recommendation for consideration in redrafting*: The possibility of including the statutory offence of intimidation[573] as a competent verdict for common assault could be investigated.

(xiv) Statutory unlawful carnal intercourse

374 Section 268 of the Act provides as follows:

> "If the evidence on a charge of unlawful carnal intercourse or attempted unlawful carnal intercourse with another person in contravention of any statute does not prove that offence but-
> *(a)* the offence of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
> *(b)* the offence of common assault; or
> *(c)* the statutory offence of-
> (i) committing an immoral or indecent act with such other person;
> (ii) soliciting, enticing or importuning such other person to have unlawful carnal intercourse;
> (iii) soliciting, enticing or importuning such other person to commit an immoral or indecent act; or

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569 Du Toit 26-23; *S v Radebe* 2019 (1) SACR 565 (FB) pars 7, 9.

570 See discussion of s 261 above at (vi).

571 Act 60 of 2000; for further discussion see Hoctor/Snyman 429.

572 Kruger/Hiemstra 26-25.

573 Contained in s1(1) of the Intimidation Act 72 of 1982.

(iv) conspiring with such other person to have unlawful carnal intercourse,

the accused may be found guilty of the offence so proved."

375 Apart from the amendments brought about as a result of the new statutory formulation of sexual offences in the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007[574] repealing and replacing the common-law antecedents in s 268(*a*), it is notable that the competent verdicts in the form of the statutory offences referred to in s 268(*c*) date from the initial 1977 version of the Act. As Lansdown and Campbell point out,[575] the offences contained in subsection (*c*) refer to ss 14, 15, 16 of the Sexual Offences Act 23 of 1957. Since all these provisions in the 1957 Act have been repealed, the question arises whether this should also be the case for this subsection?

376 *Question/recommendation for consideration in redrafting*: Subsection (*c*) of this provision should be repealed, since it no longer finds application, given the repeal of the erstwhile sexual offences.

(xv) Competent verdict relating to corruption contained in 269A

377 Section 269A of the Act provides as follows:

"If evidence on a charge of an offence under Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, does not prove the offence so charged but proves the offence of-

(a) theft;

(b) fraud; or

(c) extortion,

the accused may be found guilty of the crime or offence so proved."

378 The English text of section 269A was inserted without a heading by the Prevention and Combating of Corrupt Activities Act of 2004.[576] In the Afrikaans text the heading reads as follows: "Statutêr-wederregtelike korrupte bedrywighede", which Hiemstra translates as "Corrupt activities which are unlawful according to statute." As per

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574 Act 32 of 2007. See discussion of s 261 above at (vi).

575 AV Lansdown & J Campbell *South African Criminal Law and Procedure Vol V: Criminal Procedure and Evidence* (1982) 549n99.

576 Act 12 of 2004.

the court in *S v Scholtz*,[577] corruption is committed on agreement to give or even on merely offering to give the gratification, even if the gratification is only forthcoming after the event.

379 As Du Toit et al point out,[578] Parts 1 to 4 of the Prevention and Combating of Corrupt Activities Act cover the following broad categories of offences: (i) general offence of corruption; (ii) offences in respect of corrupt activities relating to specific persons; (iii) offences in respect of corrupt activities relating to receiving or offering of unauthorised gratification; and (iv) offences in respect of corrupt activities relating to specific matters. Sections 17, 20 and 21 of the Prevention and Combating of Corrupt Activities Act, which are specifically referred to in s 269A, pertain, respectively, to: the offence concerning acquisition of a private interest in a contract, agreement or investment of a public body; accessory to or after an offence; and attempt, conspiracy and inducing another person to commit an offence.

380 Section 269A provides for theft, fraud or extortion to serve as competent verdicts in respect of the abovementioned offences from the Prevention and Combating of Corrupt Activities Act.

381 *Question/recommendation for consideration in redrafting*: This provision serves a useful purpose, but should be furnished with a title in any redrafting.

(xvi) Offences not specified in this Chapter

382 Section 270 of the Act provides as follows:

> "If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved."

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577 *S v Scholtz* 2018 (2) SACR 528 (SCA).

578 Du Toit 26-25.

383 The purpose of this section may be clear, but describing its ambit is not as easy.[579] The section only applies in respect of an offence not previously mentioned in chapter 26 of the Act.[580] Hiemstra summarises the section as follows:[581]

> "[It] is an omnibus provision for (i) all cases which are not covered in the preceding sections (ii) where the offence charged cannot be proved (iii) but all the elements of another offence (iv) which is included in the offence so charged (v) are proved."

384 It is important to note that s 270 is not meant to serve as a cure-all for sloppy or inept drafting of charges.[582] The criterion to be applied in terms of this section is whether the essential elements of the proved offence fit within the scope of the charged offence.[583] In this regard, it does not matter if the wider offence is statutory and whether the narrower crime falls under common law or vice versa.[584] Moreover, the offence charged need not be wider than the offence on which the court wants to convict, as long as the elements are the same.[585]

385 The application of s 270 may be seen in a number of contexts:

- Conspiracy to assault does not include all essential elements of murder, and s 270 can therefore not be used to achieve a verdict of conspiracy to assault on a murder charge.[586] Therefore in order to obtain such a verdict, a further charge of conspiracy must be added.[587]
- Housebreaking with intent to steal and robbery is not a competent verdict on a charge of robbery in terms of s 270.[588]

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579 Kruger/Hiemstra 26-27.

580 Du Toit 26-25, *S v Van Ieperen* 2017 (1) SACR 226 (WCC) par 48.

581 Kruger/Hiemstra 26-27.

582 MG Cowling "Recent cases: Criminal procedure" (2000) 13(2) *SACJ* 227 237; *S v Van Ieperen* 2017 (1) SACR 226 (WCC) pars 13, 48.

583 *S v Kwezi Risk Solutions CC* 2026 JDR 1614 (ECMk) par 48; *S v Mavundla* 1980 (4) SA 187 (T) 190H-191A; *S v Nkosi* 1990 (1) SACR 653 (T); Kruger/Hiemstra 26-28; Du Toit 26-26. See also *S v Amas* 1995 (2) SACR 735 (N).

584 Kruger/Hiemstra 26-28.

585 Kruger/Hiemstra 26-28 uses the example of s 2 of the Stock Theft Act 57 of 1959, and s 36 of the General Law Amendment Act 62 of 1955 in this regard.

586 *S v Mitchell* 1992 (1) SACR 17 (A). Conspiracy is also not an offence referred to in s 258.

587 As was attempted in *S v Tungata* 2004 (1) SACR 558 (Tk); Kruger/Hiemstra 26-29.

588 *S v Nyamza* 2000 (1) SACR 626 (CkHC).

- Malicious injury to property is not a competent verdict on a theft charge in terms of s 270.[589]
- Theft is not a competent verdict on a charge of fraud in terms of s 270.[590]
- However, it has been held that s 117 of the Correctional Services Act 111 of 1998 (escaping from custody *after* being lodged in a prison or police cell) is a competent verdict on a charge under s 51 of the Act (escaping from lawful custody *before* being lodged in a prison or police cell).[591] Moreover, it has been held that assault with intent to cause grievous bodily harm is a competent verdict on a charge of contravening s 17(a) of the Domestic Violence Act 116 of 1998.[592]

386 It seems that the rule is that the accused should be informed of the possibility of the operation of a competent verdict, particularly where the accused is undefended.[593]

387 However, in the recent case of *S v Kobe*[594] the court explained that although an accused has a right to know the case he had to meet, such right finding expression in s 35(3)*(a*) of the Constitution, it was not necessary that competent, alternative verdicts should formally be mentioned in the charge-sheet. The legality of competent verdicts was subject to the principle that the accused should not be prejudiced in the presentation of their case. Where, as in the present case, the appellant was aware, before he elected not to give evidence, that the court a quo was considering a competent verdict to the charge of murder, and where his counsel had the opportunity to address the court in that regard and had in fact done so, the risk was held to be clear. Where he therefore, with such knowledge, chose not to put up any evidence to counter a competent verdict of assault with intent to do grievous bodily harm, it was held that the appellant could not be said to be prejudiced.

388 As Du Toit et al point out, the answers provided by an accused in response to s 112(1)(b) questioning may be taken into account in determining the presence or absence of prejudice where s 270 is invoked.[595]

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589 *S v Malapane* [2011] ZAGPJHC 113.

590 *S v Kwezi Risk Solutions CC* 2026 JDR 1614 (ECMk) par 53.

591 *S v Mokoena* (unreported, TPD case A402/2007, 14 May 2007), cited in Du Toit 26-27; *S v Mafokane* [2011] ZAGPPHC 241.

592 *S v Masita* 2005 (1) SACR 272 (C).

593 *S v Ambros* 2005 (2) SACR 211 (C) 218b. In *S v Mukwevho* 2010 (1) SACR 349 (GSJ) the accused had counsel, but the competent verdict was nevertheless set aside on account of prejudice. See discussion in 'Introduction' above at (*a*).

594 *S v Kobe* 2026 (1) SACR 88 (WCC).

595 Du Toit 26-27; *S v Busuku* 2006 (1) SACR 96 (E) par 13.

389 *Question/recommendation for consideration in redrafting*: This provision is clearly drafted, serves an important function, and does not appear to require amendment.

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