South African Law Reform Commission

DISCUSSION PAPER 182

REVIEW OF THE LAW ON DETENTION OF WITNESSES AND WITNESS FEE IN CRIMINAL PROCEEDINGS

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

This Discussion Paper is part of a series of discussion papers developed by the South African Law Reform Commission's (SALRC or Commission) under Project 151 (Review of the Criminal Act 51 of 1977 (CPA)).

The Discussion Paper has been prepared to elicit responses from various stakeholders and interested members of the public and to serve as a basis for the Commission's deliberations during its consultative process on the discussion paper. Following an evaluation of the responses and any final deliberations on the matter, the SALRC will issue a report on this subject, which will be submitted to the Minister of Justice and Constitutional Development. The views, conclusions and recommendations in this paper are not the final views of the Commission. The paper is published in full to provide persons and bodies wishing to comment or to make suggestions for the reform of this area of the law with enough background information to enable them to place focused submissions before the SALRC. The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents unless representations are marked "Confidential". Respondents should be aware that the SALRC may, in any event, be required, under the Promotion of Access to Information Act 2 of 2000, to release information contained in representations. Respondents are requested to submit written comments or representations on the Discussion Paper to the SALRC by no later than 30 September 2026. Comments can be sent by email or post. However, comments by email are preferred.

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EXECUTIVE SUMMARY

1 Since 1996, several programmes and initiatives have been developed to ensure the establishment and maintenance of a transformed, efficient, effective, victim-friendly and modernised criminal justice system (CJS) for South Africa. Key among these initiatives are the National Crime Prevention Strategy of 1996, as a vehicle to transform and align the CJS to the new democratic dispensation; the Seven Point Plan of 2008, which listed seven fundamental transformative measures in recognition that the CJS in South Africa was performing sub-optimally and needed to change; the National Development Plan: Vision 2030 of 2012 that outlines a roadmap for the transformation of society; and the adoption of Outcome 3 of the Medium Term Strategic Framework (2014-2019), "All People in South Africa are, and feel safe".

2 In 2017 Cabinet approved a broad framework for the development of an Integrated Criminal Justice Strategy to promote a transformed, efficient, effective and modernised integrated CJS, the result of which was the Integrated Criminal Justice Strategy for South Africa of 2019 (the ICJS). This document sets out several strategic goals of which Legislative Reforms is Strategic Goal 1. The Implementation Plan for the ICJS proposes that the overhaul of the CPA be implemented in a phased manner. However, the immediate focus should be on determining the critical weaknesses of the CPA and its Regulations.

3 On 26 August 2020, the then Minister of Justice and Correctional Services, Mr Ronald Lamola (MP), requested the Chairperson of the SALRC to include, on an urgent basis, the review of the CJS in the SALRC's research programme. Under cover of a letter dated 31 March 2021, the Minister submitted the terms of reference for the review to the Commission. The review was included in the SALRC's research programme under Project 151. In view of the urgency to reform the CPA, the SALRC is following a two-pronged approach in executing the review. First, the reform of the CPA is being dealt with in terms of an accelerated process under the Criminal Procedure Reform (CPR) Project, a sub-project of the broader Criminal Justice System Reform (CJSR) Project. Both processes are part of Project 151. Second, the normal SALRC processes (issue paper, discussion paper and report) will be followed for the initiation and conclusion of the broader CJSR Project.

4 As part of the accelerated process, the Department of Justice and Constitutional Development (DOJ&CD) and the SALRC hosted consultative stakeholder workshops on 23 June

2023 and 21 – 22 September 2023. The purpose of the workshops was to gather insights from stakeholders on the problems experienced in the CJS and the challenges and inadequacies that need to be addressed, as these relate to the CPA. The workshops provided an important platform for conversation and debate among the Departments and institutions in the criminal justice value chain. The outcome of the workshops will assist the SALRC in developing a framework for the scope of the review of the CJS and conceptualising the issues to be addressed. The framework outlines several thematic areas related to the pre-trial, trial and post-trial phases. These thematic areas have been identified as they relate to areas of our criminal law, particularly the CPA, that need reform. This discussion paper stems from the thematic area that deal with the detention of witnesses and witness fee.

CHAPTER 1: ARREST

A Broad Overview

1.1 Arrest, by definition, constitutes a drastic deprivation of an individual's freedom and affect the arrestee's dignity and privacy. Thus, arrest is fully regulated by legislation in South Africa and that includes the Constitution of the Republic of South Africa 1996[1] (the Constitution), the CPA, the National Standards on Arrest and The Treatment of an Arrested Person Until Such Person is Handed Over to a Community Service Centre Commander and other prescripts[2]. The CPA, amongst other things, prescribes the methods for securing court attendance of accused persons in court. The methods listed in section 38 are- arrest,[3] written notice,[4] summons[5] and indictment.[6] Arrest is also used as a method of securing court attendance of a witness under sections 184 and 185 of the CPA.

1.2 Arrest, as one of the methods to bring the accused to court, may occur with or without a warrant. Arresting a person for the purpose of ensuring their attendance in court is a common law principle that has been affirmed in case law[7]. In ***Rakgwale v Minister of Police and Another*** [8] the court pointed out that the purpose of an arrest is to bring the suspect before the court. Further, the court stated that a police official would be seldom criticized for arresting a person who is suspected of committing a serious offence. While arresting a suspect for a trivial offence would be considered irrational.

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1 Act No. 106 of 1996.

2 Standard Manual on the Arrest and The Treatment of an Arrested Person Until Such Person is Handed Over to a Community Service Centre Commander, page 1.

3 Sections 39 – 53.

4 Section 56.

5 Section 54 – 55.

6 Section 144.

7 The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009) at paras 16-28; S v Walters 2002 2 SACR 105 (CC); Ex parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC) at 640 H- 641 A; and Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 820 C-E, SALRC Discussion Paper 167 par.10

8 (41173/2020) [2025] ZAGPJHC 757 (1 August 2025).

1.3 The court held that the mere nature of the offences of which the respondents were suspected in this case, which ordinarily attract sentences of imprisonment or capable of attracting sentences of imprisonment for 15 years, clearly justified their arrest for the purpose of enabling a court to exercise its discretion as to whether they should be detained or released, pending their trial and if so on what conditions. A person should therefore be not arrested for a minor offence. Other ways of securing the attendance in court of the witness should be considered. In ***Minister of Law and Order v Hurley***[9] the court stated as follows:

> *"An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just that the person who arrested or caused the arrest of another person should bear the onus of proving that his action was justified in law.*[10]*"*

1.4 The circumstances in which a person may be arrested without a warrant by a police official are outlined in section 40 of the CPA. In the case of ***Duncan v Minister of Law and Order***[11] which dealt with an arrest without a warrant, the court interpreted section 40 of the CPA to include four requirements that must be fulfilled for an arrest without a warrant to be considered lawful. These requirements are also known as jurisdictional facts; and they are – "(i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1, and (iv) the suspicion must rest on reasonable grounds". Once these jurisdictional requirements are met, section 40 of the CPA gives a police official the discretion to arrest an accused person.

1.5 The arresting official must have a reasonable suspicion that the arrestee has committed a crime. In ***Moipolai v Minister of Police***[12] the Plaintiff was arrested and kept in a police cell for two days after which he was released without appearing in court. In a claim for damages it was argued on behalf of the plaintiff that - (a) the arresting officer did not have a reasonable suspicion that the plaintiff committed the alleged offence, and (b) that he did not conduct any kind of investigation, nor did he exercise his discretion to arrest, at all. The court pointed out that to establish a reasonable suspicion there must be evidence that the arresting officer formed a

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9 1986(3) SA 568 (A).

10 Par. 3.

11 1986 (2) SA 805 (A) par 818G-H).

12 (1853/2020) [2025] ZANWHC 55 (12 March 2025).

suspicion which is objectively sustainable. The court stated that in establishing a reasonable suspicion, the question to pose is –

> *"Would a reasonable man in the defendant's position and possessed of the same information have considered that there were good and sufficient grounds for suspecting that the plaintiff was guilty of conspiracy to commit robbery or possession of stolen property knowing it to have been stolen?"* [13]

1.6 Further, the court pointed out that in evaluating the information, a reasonable man would bear in mind that the section authorizes drastic police action. It authorizes an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and therefore, the reasonable man will have to analyze and assess the quality of the information at his disposal critically, and he will not accept it lightly or without verifying it where it can be verified. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. Briefly, the requirement of reasonable suspicion requires an officer to critically assess and verify the information before forming a suspicion. The Court found that the arresting officer did not verify the information which he used as a basis for arresting the Plaintiff. The Plaintiff's claim for damages based on unlawful arrest succeeded.

B Arrest and Detention of Witnesses

1.7 The issue of arrest and detention of witnesses under the CPA are dealt with in chapter 23, particularly sections 184, 185 and 189 of the CPA. This is apart from the various other sections in chapter 23 which create different offences of which a witness may be convicted and sentenced. These sections are discussed elsewhere in this paper. The focus of this paper at this stage is sections 184, 185 and 189.

1 Arrest of Witnesses

a) S184 Witness about to abscond and witness evading service of summons

1.8 Section 184 of the CPA provides as follows:

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[13] Par. 3.

"(1) *Whenever any person is likely to give material evidence in criminal proceedings with reference to any offence, other than an offence referred to in Part III of Schedule 2 any magistrate, regional magistrate or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is about to abscond, issue a warrant for his arrest*;
(2) If a person referred to in subsection (1) is arrested, the magistrate, regional magistrate or judge, as the case may be, may warn him to appear at the proceedings in question at a stated place and at a stated time and on a stated date and release him on any condition referred to in paragraph (a), (b) or (e) of section 62, in which event the provisions of subsections (1), (3) and (4) of section 66 shall mutatis mutandis apply with reference to any such condition.
(3) (a) A person who fails to comply with a warning under subsection (2) shall be guilty of an offence and liable to the punishment contemplated in paragraph (b) of this subsection.
(b) The provisions of section 170 (2) shall mutatis mutandis apply with reference to any person who is guilty of an offence under paragraph (a) of this subsection.
(4) Whenever any person is likely to give material evidence in criminal proceedings, any magistrate, regional magistrate or judge of the court before which the relevant proceedings are pending may, upon information in writing and on oath that such person is evading service of the relevant subpoena, issue a warrant for his arrest…".

b) Section 184(1)

1.9 This subsection authorizes a judicial officer to issue a warrant for the arrest of a witness on the strength of an affidavit which shows that the witness to be arrested is about to abscond. The subsection does not require a formal application for the arrest of the witness. The subsection also does not state who should depose to the affidavit nor does it state who should submit the affidavit to the judge or magistrate. All that the section requires is that the witness must be 'about to abscond'.

1.10 Further, the person to be arrested under this subsection must be one who is 'likely to give material evidence'. However, because at the time of arrest the person would not have given a statement that sets out what he or she knows about the case in question, it would most likely be not known whether the person will indeed give material evidence. In short, in the absence of such a statement it would not be known whether such a person is a material witness or not. It is usually the witness statement that will show whether a person is a material witness. For purposes of subsection (1) an indication that the person to be arrested is likely to be a material witness would be enough. The likelihood to give material evidence is a form of identifying the person on whom the arrest warrant should apply. The subsection does not require that the person to be arrested

should in fact be a material witness. It suffices that such person is believed to be a likely material witness in the sense that he or she may give material evidence.

1.11 Further, it is unclear how the likelihood to abscond is assessed in the absence of such a standard and by whom i.e. is it the magistrate / judge or the arresting officer who must establish the likelihood to abscond before effecting the arrest. It is recommended that that the subsection be amended to provide that it is a judicial officer that establishes the likelihood to abscond.

1.12 In the ordinary sense of the word, abscond connotes a quick and secret departure from a place or the act of absenting oneself from a place. It is not clear as to which of the two meanings was intended in the section. But as the provision was enacted during the era of apartheid era it is assumed that the section was intended for the arrest people who were unwilling to testify in political trials. Therefore, the word 'abscond' may have been intended to refer to those people who were fleeing or leaving South Africa. It is true that many witnesses who were arrested during that era and under this subsection were alleged to have been planning to flee the country. This often-false accusation was normally made by the notorious special branch of the police which was responsible for investigating the so-called political cases. It is therefore recommended that if the section is retained in the revised CPA such short comings should be removed.

c) Section 184(2)

1.13 Section 184(2) provides that a person arrested under subsection (1) should be brought before the magistrate, regional magistrate or judge, to be warned to appear at the criminal proceedings in question, at a stated place, stated time and stated date. Conditions may be attached to a warning and those conditions should specifically be those that are set out in section 62 of the CPA, for example, to periodically report to an official at a designated place.

1.14 Section 184(2) further states that sections 66(1), (3) and (4) will apply with reference to those conditions. While the applicability of subsections 66(1) and (4) are easy to follow even though they refer to an 'accused' and "bail" it is difficult to appreciate how subsection (3) applies. Subsection (1) regulates an inquiry into the witness's failure to comply with a condition and subsection (4) requires the inquiry to be recorded. While subsection (3) governs the outcome of the inquiry. Subsection (3) provides as follows:

If the accused admits that he failed to comply with the condition in question or if the court that he failed to comply with such condition, the court may, if it finds that the failure by the accused was due to fault on his part, cancel the bail and declare the bail money forfeited to the State.

1.15 In short, if at the conclusion of the inquiry the court finds that there was a deliberate non-compliance with a condition, in case of bail, the court may cancel that bail and declare the bail money to be forfeited to the state. This is clearly not applicable to a breach of a condition attached to a warning.

1.16 This is the penalty for breaching bail conditions. It is not clear how this penalty of cancelling bail and forfeiting bail money to the state would apply to a person that has violated conditions attached to a warning under this subsection. This penalty cannot apply to a violation of conditions of a warning in terms of section 184(2) because this subsection does not involve the granting of bail.

d) Section 184(3)

1.17 Section 184(3)(a) provides that a person who fails to comply with a warning under subsection (2) shall be guilty of an offence and liable to the punishment contemplated in paragraph (b) of this subsection. This subsection makes it an offence for person to fail to comply with the warning issued under subsection (2).

1.18 As discussed above, section 184 (3)(a) provides that a witness who fails to comply with a warning is liable to punishment as contemplated in paragraph (b) of this subsection. However, the said paragraph (b) does not prescribe any punishment, instead it provides that the provisions of 170(2) of the CPA applies. Section 170(2) imposes a penalty of R300 or three months imprisonment for a culpable breach of bail conditions.

1.19 It is not clear why section 184(3) follows difficult route to understand when dealing with the issue of the penalty attached to non-compliance with a warning. Subsection (3) could just directly provide that a witness who breaches a warning issued under subsection (2) shall be liable to a fine of R300 or three months imprisonment. For example:

“(3) (a) A person who fails to comply with a warning under subsection (2) shall be guilty of an offence and liable to the punishment contemplated in paragraph (b) of this subsection.

> ”(b) The court may, if satisfied that a witness referred to in subsection (2) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure to appear or to remain in attendance and, unless the witness satisfies the court that his or her failure was not due to fault on his or her part, convict him of the offence referred to in paragraph (a) and sentence him or her to a fine not exceeding R300 or to imprisonment for a period not exceeding three months**”**

1.20 It is submitted that subsection (3) is drafted in a clumsy manner, prone to confuse the reader and therefore it must be redrafted.

e) Section 184(4)

1.21 Section 184(4) deals with a witness who evades the service of a subpoena. This provision authorizes a judicial officer to issue a warrant for the arrest of a witness who is accused of evading the service of a subpoena. Such person is described in similar terms like those in section 184(1) and a similar process is required for issuing the arrest warrant. Similarly, once the person is arrested, he or she must be brought before a judicial officer for a warning that he or she must attend the pending trial on a stated date, place and time. Importantly, just as in section 184(1) the arrested person is not given a hearing; after the arrest he is not offered an opportunity to challenge the issuance of the warrant nor is he or she allowed to argue against the warning to be issued.

1.22 Once the warning is issued, the person is released. If the person fails to comply with the warning, she or he may be convicted of crime and may be sentenced to a fine of R300 or three months imprisonment. The aim of section 184(4) is therefore to arrest a person who is evading the service of a subpoena to warn such a person and release him or her.

1.23 What is curious here is the fact that a person may be arrested for evading the service of a subpoena just to be warned and released. Arresting such a person serves no legitimate purpose. It is not clear why the person is not served with the relevant subpoena where he is found instead of being arrested.

1.24 It is evident from the above discussion that section 184 of the CPA grants broad discretionary powers to arrest a witness in circumstances where less drastic measures of securing the attendance of the witness can be used. There is no logical reason for arresting a person that has not committed any offence just to warn him or her. More so regarding section 184(1) where

a witness who is considered a flight risk is arrested to be warned and released instead of being detained. Why arrest the witness if the purpose of the subsection is not to detain the witness? The arrest of the witness does not seem necessary. The witness can just be served with a written warning to appear.

1.25 The same question arises regarding section 184(4). Why arrest a witness who is evading the service of a subpoena just to warn and release him? Why not just serve him with the subpoena wherever he or she is located? A written warning would therefore seem to be enough for the purposes contemplated in subsection (1) and (4).

2 Detention of Witnesses

a) Section 185(1)

1.26 Section I85(1) provides as follows*:*

> *(1) (a) Whenever any person is with reference to any offence referred to in Part III of Schedule 2 in the opinion of the attorney-general likely to give evidence on behalf of the State at criminal proceedings in any court, and the attorney general, from information placed before him-*
> *(i) is of the opinion that the personal safety of such person is in danger or that he may abscond or that he may be tampered with or that he may be intimidated; or*
> *(ii) deems it to be in the interests of such person or of the administration of justice that he be detained in custody, the attorney-general may by way of affidavit place such information before a judge in chambers and apply to such judge for an order that the person concerned be detained pending the relevant proceedings.*
> *(b) The Attorney-general may in any case in which he is of the opinion that the object of obtaining an order under paragraph (a) may be defeated if the person concerned is not detained without delay, order that such person be detained forthwith but such order shall not endure for longer than seventy-two hours unless the attorney-general within that time by way of affidavit places before a judge in chambers the information on which he ordered the detention of the person concerned and such further information as might become available to him, and applies to such judge for an order that the person concerned be detained pending the relevant proceedings.*

(c) The attorney-general shall, as soon as he applies to a judge under paragraph (b) for an order of detention, in writing advise the person in charge of the place where the person concerned is being detained, that he has so applied for an order, and shall, where a judge under subsection (2) (a) refuses to issue a warrant for the detention of the person concerned, forthwith advise the person so in charge of such refusal, whereupon the person so in charge shall without delay release the person detained.

1.27 This provision authorizes the DPP to apply for the detention of a witness or to order the detention of such a witness in urgent circumstances. The pre-conditions for this process are as follows:

(1) The DPP must form an opinion that the person to be arrested is likely to give evidence on behalf of the prosecution in criminal proceedings. The subsection does not require that such a person must be a necessary and material witness in the sense that his or her evidence is essential for the proof of the case and that without such evidence, the case will not be proved. For this condition it is enough if the DPP forms an opinion that the person to be arrested is likely to give evidence. The relevance of the evidence is not taken into consideration nor the fact that the relevant fact may be sufficiently proved by other means of evidence.

(2) The criminal proceedings must be in relation to an offence listed in Part III of Schedule 2 of the CPA. The offences listed in that schedule include sedition, public violence, arson, murder, robbery, house breaking, kidnapping, human trafficking and terrorism.

(3) The DPP must form an opinion based on the information before him that the personal safety of the person to be detained is in danger or that such a person may be tampered with or intimidated. Surprisingly, instead of providing for the protection of such a person the subsection permits the arrest and detention of the witness. In addition, the DPP may also seek a detention order of a prospective witness if she or he suspects that such a witness may abscond, or if the DPP deems it to be in the interests of the witness in question to be detained or that his detention will be in the interest of the administration of justice. If any of these scenarios is present, the DPP may apply on an affidavit to a judge in chambers for an order for the detention of the witness pending the relevant proceedings which may be for the duration of the trial. What is important to note here is the fact that the subsection does not require that the detained person should be released upon the completion of his testimony, instead it says he or she must be detained for the duration of

the trial. The question here is whether the witness should not be discharged at the end of his or her testimony?

1.28 Subsection (1)(b) provides that where the DPP is of the opinion that seeking a detention order may defeat the detention, the DPP is authorized to order the detention of the witness for a period not longer than 72 hours. Ordinarily this should only happen in urgent cases where for an example a witness would have been harmed or absconded by the time an order is obtained from a judge. A point to note here is that the DPP is not a judicial officer and therefore it is not within his or her powers to issue such an order.

1.29 Subsection (1)(c) provides that if the request for extension is declined the DPP must forthwith inform the person in charge of the place where the witness is detained, and that witness must be released without delay.

1.30 Detaining a person who has not committed an offence should not be taken lightly, especially in consideration of section 12(1)(a) of the Constitution which provides that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

b) Section 185(2)

1.31 Section 185(2) provides as follows*:*

> *(a) The judge hearing the application under subsection (1) may, if it appears to him from the information placed before him by the attorney-general-*
> *(i) that there is a danger that the personal safety of the person concern ed may be threatened or that he may abscond or that he may be tampered with or that he may be intimidated; or*
> *(ii) that it would be in the interests of the person concerned or of the administration of justice that he be detained in custody, issue a warrant for the detention of such person.*
> *(b) The decision of a judge under paragraph (a) shall be final: Provided that where a judge refuses an application and further information becomes available to the attorney-general concerning the person in respect of whom the application was refused, the attorney - general may again apply under subsection (1) (a) for the detention of that person.*

1.32 Subsection (2)(a) empowers a judge to issue a warrant for the detention of a witness at the instance of the DPP, if the judge is persuaded that there is danger in the personal safety of

the witness. A warrant of detention may also be issued if there is a possibility of the witness being tempered with or intimidated.

1.33 The question here is whether detaining a witness under subsection (2)(a) is not a drastic measure? Should witnesses not be protected under the Witness Protection Act, 1998 (WPA) or the less disruptive police protection programs? The Witness Protection Act and the CPA can be aligned to allow a witness who needs protection under section 185 to be protected under the WPA. Alternatively, a witness under section 185 can be directly protected by the police after a security assessment has been conducted and which indicates that such a witness does require protection. In this instance the witness would not have to leave his or her house to go leave in witness house and in that way, there would be less disruptions in his or her private life.

1.34 A witness who is about to abscond is in terms of section 185(1) detained to ensure that he or she attends the relevant criminal trial. The question that arises here is whether this measure is not arbitrary? Would it not be sufficient to serve the witness with a written warning stipulating that he or she must appear in a criminal trial, in a specific place, date and time?.

1.35 Subsection (2)(b) provides that the decision of the judge which is taken in terms of subsection (2)(a) shall be final. This means it cannot be appealed against or challenged by the witness even though the decision was taken without giving the witness a hearing. This amounts to injustice because a decision is taken about a witness without giving the witness a hearing.

1.36 Further, subsection (2)(b) violates section 35(2)(d) of the Constitution which provides that everyone who is detained, including every sentenced prisoner, has the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released. Also, section 12(1)(b) of the Constitution is violated by this subsection. Section 12(1)(b) provides that everyone has the right to freedom and security of the person, which includes the right not to be detained without trial.

c) Section 185(3) to (9)

1.37 Section 185(3) to (9) provides as follows:

> *"(3) A person in respect of whom a warrant is issued under subsection (2), shall be taken to the place mentioned in the warrant and, in accordance with regulations which the*

Minister is hereby authorized to make, be detained there or at any other place determined by any judge from time to time, or, where the person concerned is detained in terms of an order by the attorney-general under subsection (1) (b), such person shall, pending the decision of the judge under subsection (2) (a), be taken to a place determined by the attorney-general and detained there in accordance with the said regulations.".
(4) Any person detained under a warrant in terms of subsection (2) shall be detained for the period terminating on the day on which the criminal proceedings concerned are concluded, unless-
(a) the attorney-general orders that he be released earlier; or
(b) such proceedings have not commenced within six months from the date on which he is so detained, in which case he shall be released after the expiration of such period.
(5) No person, other than an officer in the service of the State acting in the performance of his official duties, shall have access to a person detained under subsection (2), except with the consent of and subject to the conditions determined by the attorney-general or an officer in the service of the State delegated by him.
(6) Any person detained under subsection (2) shall be visited in private at least once during each week by a magistrate of the district or area in which he is detained.
(7) For the purposes of section 191 any person detained under subsection (2) of this section shall be deemed to have attended the criminal proceedings in question as a witness for the State during the whole of the period of his detention.
(8) .....
[Sub-s. (8) deleted by s. 69 of Act 88 of 1996.]
(9) (a) In this section the expression 'judge in chambers' means a judge sitting behind closed doors when hearing.".

1.38 Subsection (3) provides that the witness must be detained at the place mentioned in the warrant of detention. If the detention warrant was ordered by the DPP under subsection (1)(b), the witness would be detained at a place determined by the DPP. Subsection (4) provides that a person detained under a detention warrant in terms of subsection (2) shall be detained for the period terminating on the date on which the criminal proceedings concerned are concluded, unless where otherwise determined by the DPP. Briefly, the witness may be released from detention if the DPP orders an early release of the witness from detention or where the trial does not commence within six months from the date of the detention.

1.39 Subsection 1(b) which authorizes the DPP to order the detention of a witness in the circumstances mentioned in that subsection read with subsection 4(a) which authorizes the DPP to order the early release of a witness from detention without naming the circumstances under which the DPP can make such an order is reminiscent of the administrative detentions of witnesses in political cases during the apartheid era.

1.40 Subsection (5) provides that no person will have access to a person detained under subsection (2), except an official in the performance of his or her duties except where otherwise determined by the DPP and subject to the conditions determined by the DPP. This kind of detention is equivalent to solitary confinement. Effectively, the subsection forbids access to the witness by anyone except policemen and prosecutors. The witness's family, lawyer, doctors and others may only visit the witness when permitted by the DPP and under stipulated conditions.

1.41 Evidently this is inconsistent with section 35(2)(f) of the Constitution which provides that a detained person has a right to communicate with and be visited by- (i)spouse or partner; (ii) next of kin; (iii) chosen religious counsellor; and (iv) chosen medical practitioner. Subsection 5 is also in violation of section 35(2)(b) of the Constitution which provides that a detained person has a right to consult with his or her chosen legal practitioner. In terms of this subsection the witness can only consult with his or her lawyer only when permitted by the DPP under stipulated conditions. Therefore, section 185(5) effectively denies the witness the right to be visited by the persons contemplated in section 35(2)(f) and section 35(2)(b) of the Constitution.

1.42 Subsection (6) provides that the witness shall be visited at least once a week by the magistrate. It is likely that this section was intended for the routine checking of political prisoners to see if they are not tempered with. But this weekly visit by a magistrate could not prevent the abuse of political prisoners who were often detained. This was mainly because the magistrates were also part of the civil service and most of them identified and embraced the discriminatory policies of the then apartheid government.

1.43 From what has been stated above it is clear that subsections (5) and (6) are a severe infringement on the witnesses' rights. The subsections seem to serve the purpose of victimization of the witness more than protecting him or her. In the unreported case of ***S v Mhlongo*** [14] a case related to political violence; the state detained four boys under section 185 in order to protect them. During the trial two of the boys said they knew nothing about the matter for which they had been detained, while two were not even brought before the court. The others who were not detained were discharged at the close of the state's case and the rest were acquitted at the end of the trial. *Didcott J* in considering this matter stated as follows:

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[14] S V Mhlongo (CC176/88).

"But I wish to say that, when one looks at the section under which the juveniles were taken into custody, section 185 of the CPA, I am disturbed by what I see.... Now the whole point about the custody of a witness ... is that he is put and kept in custody in his own interests, for his own protection. One is therefore taken somewhat aback to read in sub-section (5) that, even in the case of such a person, nobody but an officer of the State, acting in the performance of his official duties, may have access to the person kept in custody, except with the consent of and subject to the conditions fixed by the Attorney-General or someone deputed by him… What on earth, one asks oneself, can be the conceivable point of the provisions of sub-sections (5) and (8) in relation to somebody who is being kept in custody for his own protection and in his own interests? Is the idea behind it, one wonders, to ensure that threats are not communicated to a person in custody by someone visiting him, or that tampering with him is not attempted by any such person? If that is the fear, surely the way to deal with it is not to place an embargo on visits, but simply to have a policeman present throughout them.". Subsection (8) has since been repealed.

1.44 Section 185 (5) and (6) infringe on the witness's right of visitation and communication with the persons mentioned in section 35(2)(f) and section 35(2)(b) of the constitution. As discussed under subsection (2) there does not seem to be any need to detain witnesses for protection but rather they should be protected under the WPA.

d) Section 189

1.45 Section 189 provides as follows:

"(1) If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.".

[Sub-s. (1) substituted by s. 20 of Act 59 of 1983 and by s. 4 of Act 126 of 1992.]

(2) After the expiration of any sentence imposed under subsection (1), the person concerned may from time to time again be dealt with under that subsection with regard to any further refusal or failure.

(3) A court may at any time on good cause shown remit any punishment or part thereof imposed by it under subsection (1)

(4) Any sentence imposed by any court under subsection (1) shall be executed and be subject to appeal in the same manner as a sentence imposed in any criminal case by such court and shall be served before any other sentence of imprisonment imposed on the person concerned.

(5) The court may, notwithstanding any action taken under this section, at any time conclude the criminal proceedings referred to in subsection (1).
(6) No person shall be bound to produce any book, paper or document not specified in any subpoena served upon him, unless he has such book, paper or document in court.
*(7) Any lower court shall have jurisdiction to sentence any person to the maximum period of imprisonment prescribed by this section***.'**

1.46 This provision empowers a court to punish a witness who refuses to testify or participate in criminal proceedings without a just excuse for her refusal. However, what constitutes a just cause is not defined. If a witness refuses to be sworn in or make an affirmation or answer questions he may be sentenced to two years imprisonment, but if the trial relates to an offence contained in Part III of Schedule 2, the penalty may be up to five years imprisonment. If after serving jail time the witness still refuses to testify or cooperate, he may be repeatedly punished.

1.47 However, the court which has imposed the punishment may remit the sentence on good cause shown. For example, if the witness changes his or her mind and decide to testify, the remaining period of his or her sentence may be remitted by the court. Even magistrate courts whose penal jurisdiction is below the sentence proposed in the section are competent to impose it. Subsection (7) provides that the lower court has the authority to impose the sentence contained in subsection (1).

C Constitutionality of Sections 184, 185 and 189

1.48 A two-stage approach is used when determining whether a law that impinges rights in the Bill of Rights is valid. At the very first leg of the enquiry, the focus is on the relevant law limits these rights. If, it does not that is the end of the enquiry and as a result it must be accepted that the law is not constitutionally objectionable, unless it is also inconsistent with the other provisions of the Constitution. If it turns out to be inconsistent with a provision in the Bill of rights, then that law is invalid to the extent of the inconsistency. This is what the supremacy of the Constitution principle entrenches in section 2 of the Constitution.

1.49 If the defect noticed in the relevant law is about an inconsistency with rights in the Bill of Rights, that law does not automatically becomes invalid once the inconsistency comes into existence. This is because the Constitution itself provides in section 36 that the rights in the Bill of Rights are not absolute. They may be limited by a law of general application provided the

requirements of section 36 are met. This then leads us to the second leg of the constitutional enquiry.

1.50 During the second leg the focus is on whether the limitation imposed by the impugned law is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In determining the reasonableness and justifiability of a limitation, section 36 requires that regard be had to the factors listed in the impugned section. Those factors include whether there are less restrictive means for achieving the purpose served by the section.

1.51 If there are less restrictive means in terms of which that purpose may be attained the limitation cannot be regarded as justifiable. This is because where the purpose can be achieved through alternative means, the less restrictive means should be followed instead of limiting a right. In other words, for a limitation to be acceptable, it must also be necessary. It is now convenient to apply the two-stage standard to sections 184, 185 and 189 of the CPA.

e) Section 184

1.52 It will be recalled that section 184 authorizes an arrest of a witness suspected of absconding and that after the arrest the witness is brought before a judicial officer who warns him or her to attend the trial on a stated time, date and place. After that the witness is released. The purpose of the arrest is to warn the witness. It can be accepted that the purpose of warning a witness to attend a trial is a legitimate one as it preserves the proper running of the trial. However, that purpose may still be achieved by less intrusive means than arrest. For example, a written warning setting out the date, time and place of the trial may be issued against the witness instead of arresting him.

f) Section 185

1.53 For its part section 185 permits the detention of a witness for personal safety and to protect the witness from being tampered with or intimidated. While protecting a witness from these risks is unquestionably a legitimate government purpose, there are other means less drastic to achieve it. A witness who is likely to be harmed needs protection and not detention. It is the responsibility of government to ensure that such a witness is protected in order to safeguard the administration of justice. But in 1970's the apartheid government had no regard for fundamental human rights hence it authorized the detaining of witnesses if the DPP determined it to be in the interest of such witness.

1.54 For a public official to deem it to be in the interest of a witness to be detained and to be denied enjoyment of basic rights and personal freedom constitute not only state arrogance but also an insult to the witness's dignity. It must also be dehumanizing to be told you are detained because a public official considers it to be in your best interest. This to happen in circumstances where the person concerned has done no wrong instead seen someone commit a crime.

1.55 It is indisputable that witnesses who are at risk of harm, one way or another require state protection and support because their lives are usually disrupted. They need to be treated humanely to cushion the disruption. Detention makes their situation untenable. The purpose for their detention may be realized by the employment of less intrusive means like putting them into a witness protection program under the WPA at state expense. By authorizing solitary detention and insulating the decision allowing such detention from being challenged, is also is also inconsistent with the various rights in section 35(2) of the Constitution. This includes the right to be visited by relatives, religious counsellors, next of kin and medical practitioner of choice.

1.56 The other rights that are violated here are the right to consult with a legal representative and the right to challenge the lawfulness of the detention in a court of law. Both the solitary confinement and the insulation from legal scrutiny of the detention itself appears to be not rationally connected to the purpose of protecting the witness. These limitations are clearly vindictive and unjustifiable.

g) Section 189

1.57 Lastly, section 189 mandates a criminal sanction to be imposed where there is no crime committed and without any trial. This is a limitation on one's freedom and the right not to be detained without a trial. The purpose of the section is to force an unwilling witness to testify and this is a legitimate purpose. Witnesses are an essential part of administrative justice and without them many crimes would go unpunished. Therefore, while it is necessary that a witness would be obliged to testify or produce documents, the question that arises is whether the coercive means in the section is reasonable and justifiable.

1.58 Those means can be justified only if they are the only means that can be used to force cooperation from the witness. If criminal penalty is the only means, the issue becomes whether straight imprisonment is the only penalty that can be imposed. It does not appear to be the case.

A fine or a wholly suspended prison sentence may have a similar effect. It may well be that the refusal envisaged in section 189 ought to be made an offence for it to attract a sentence.

D Other Sections Reviewed

1 Section 179 Process for securing attendance of witness

1.59 Section 179 provides as follows:

> *(1) (a) The prosecutor or an accused may compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings by taking out of the office prescribed by the rules of court the process of court for that purpose.*
> *(b) If any police official has reasonable grounds for believing that the attendance of any person is or will be necessary to give evidence or to produce any book, paper or document in criminal proceedings in a lower court, and hands to such person a written notice calling upon him to attend such criminal proceedings on the date and at the time and place specified in the notice, to give evidence or to produce any book, paper or document, likewise specified, such person shall, for the purposes of this Act, be deemed to have been duly subpoenaed so to attend such criminal proceedings.*
> *(2) Where an accused desire to have any witness subpoenaed, a sum of money sufficient to cover the costs of serving the subpoena shall be deposited with the prescribed officer of the court.*
> *(3) (a) Where an accused desire to have any witness subpoenaed and he satisfies the prescribed officer of the court-*
> *(i) that he is unable to pay the necessary costs and fees; and*
> *(ii) that such witness is necessary and material for his defense, such officer shall subpoena such witness.*
> *(b) In any case where the prescribed officer of the court is not so satisfied, he shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court, who may grant or refuse the application or defer his decision until he has heard other evidence in the case.*
> *(4) For the purposes of this section 'prescribed officer of the court' means the registrar, assistant registrar, clerk of the court or any officer prescribed by the rules of court.*

a) Section 179(1)(a)

1.60 Section 179(1)(a) of the CPA governs the procedure for compelling the attendance of witnesses in criminal proceedings. The subsection specifically states that both the prosecutor and the accused may compel the attendance of any person to give evidence or to produce any book, document, paper or document by utilizing the legal process, using a special subpoena known as

subpoena duces tecum. The subpoena is served in the same manner as an ordinary subpoena. In the subpoena a witness is commanded to appear in a specific court on a stated date and time to give testimony under oath.

1.61 Section 35(3)(i) of the Constitution provides that everyone has a right to a fair trial which includes the right to adduce and challenge evidence. The right of an accused person to call witnesses is one of the core principles of a fair trial. The right has a horizontal application in that information in the possession of a third party could be necessary for the adequate preparation of the defense's case. The right to a fair trial guarantees an accused person an opportunity to adduce and challenge the evidence of the state by *inter alia,* cross examining witnesses.

1.62 The accused does not need to prove to the court that there are reasonable grounds to believe that a specified document is in the possession of a witness and that the document is likely to be relevant for the preparation of the defense case. Section 179(1)(a) simply permits the accused person to compel the attendance of any person to give evidence or to produce any book, paper or document in criminal proceedings by following the administrative rules of court. No consideration is given to the relevance of the information in the hands of the witness in respect of the pending case.

b) Section 179(1)(b)

1.63 Section 179(1)(b) provides that a police official will subpoena a person of whom he has reasonable grounds for believing that the attendance of such a person is or will be will be necessary to give evidence by handing that person a written notice calling upon him to attend such criminal proceedings on the date and at the time and place specified in the notice. Unlike in subsection (1)(a) where there is no requirement for subpoenaing a witness in this subsection the police official must have reasonable grounds for believing that the attendance of the person to be subpoenaed is necessary for giving evidence. Just as in subsection (1)(a) the police official does not need a court order to subpoena a witness.

c) Section 179(2)

1.64 Section 179(2) provides that an accused person wishing to subpoena a witness must deposit the money to serve the subpoena with the relevant court official. Subsection (3)(a) provides for a deviation from that requirement by providing that an accused who desires to subpoena a witness and cannot meet the costs of the service of the subpoena must satisfy the

prescribed officer of court that- (i) he is unable to pay the necessary costs and fees for serving the subpoena and (ii) that the witness to be subpoenaed is necessary and material for his defense, before the witness is subpoenaed on his behalf by the state.

1.65 This subsection provides for a higher threshold for subpoenaing of a witness on behalf the accused. While in section 179(1)(a) the accused and the prosecutor are permitted to subpoena a witness simply by following administrative court process, in this subsection the accused must prove that the witness he or she wants to subpoena is 'necessary and material' to his defense case before the subpoena is served on his behalf. The CPA does not define the words "necessary and material' so it is not clear how the court official determines if the witness to be subpoenaed on behalf of the accused is indeed "necessary and material" to the defense of the accused.

1.66 Subsection (3)(b) provides that where the officer of the court is not satisfied that the accused is unable to pay for the costs of the subpoena and that the witness to be subpoenaed is 'necessary and material' to the defense case, the officer shall, upon the request of the accused, refer the relevant application to the judge or judicial officer presiding over the court for consideration and the judge or presiding officer may grant or refuse the application or defer his decision until he has heard other evidence in the case. The decision of the court officer to decline a request in terms of subsection 2(b) is an administrative decision; as the prescribed court officer is not a judge or judicial officer. It would therefore be important that like in any case where an adverse administrative decision has been taken against a person that the accused whose request has been declined should be given reasons for the decision.

1.67 Further, subsection (3)(b) provides that the relevant judge or presiding officer may defer his decision until he has heard other evidence in the case. This effectively denies the accused enough time to prepare for his defense. Further, subsection 3(b) conflicts with section 35(3)(b) of the Constitution which provides that every accused person has the right to a fair trial which includes the right to have adequate time to prepare a defense. It would be recommendable to trim the tedious long process of subpoenaing a witness on behalf of the accused by removing the requirement to prove that the witness is necessary and material; and that the only thing to be proved by the witness be that he does not have money to subpoena the witness. This can be proved by submitting the relevant bank statement by the accused.

1.68 Lastly, the CPA does not provide that an undefended accused must be informed of the right to compulsory process like to subpoena a witness. In ***S v Hlongwane***[15] the Court held that the accused should be informed of the compulsory process and the court must, where necessary, assist the accused in securing the attendance of the relevant witness. Informing an undefended accused of compulsory process goes a long way in satisfying the right to a fair trial.

d) Section 182 Witness from prison

1.69 Section 182 provides as follows:

> *"A prisoner who is in a prison shall be subpoenaed as a witness on behalf of the defense or a private prosecutor only if the court before which the prisoner is to appear as a witness authorizes that the prisoner be subpoenaed as a witness, and the court shall give such authority only if it is satisfied that the evidence in question is necessary and material for the defense or the private prosecutor, as the case may be, and that the public safety or order will not be endangered by the calling of the witness".*

1.70 In terms of section 182 of the CPA where an accused subpoena a prisoner as a defense witness, prior authority of the trial court is required. The court will authorize a subpoena of such a witness only if it is satisfied that- (i) the evidence in question is necessary and material for the defense; and (ii) the appearance of the witness shall not disturb public order. Again, as discussed under section 179 above, the CPA does not define the words "necessary and material" neither is there a set of factors set out to assist the court in determining whether a witness is "necessary and material" for the defense case.

1.71 Secondly, it is not clear what the legislature envisaged by - 'if public order will not be endangered by the calling of the witness'. It can only be presumed that that the intention of the Legislature was to prevent public uprising on the court appearance of a political prisoner prior 1994. This requirement has lost its relevance in the new democratic dispensation.

1.72 The right to a fair trial as envisaged in section 35(3)(i) of the Constitution is seemingly violated by section 182 in the light of the obstacles that are contained in this section such as the requirement that the witness be- (a) necessary and material; and (b) public order be not endangered by the calling of the witness. It is recommendable that these limitations be removed

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15 S v Hlongwane (569/92) [1994] ZASCA 8 (15 March 1994).

to allow an accused person to subpoena a prisoner as a witness in the same manner that a witness is subpoenaed under section 179(1)(a).

e) Section 186 Court may subpoena witness

1.73 Section 186 provides as follows:

> *"The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the* ***just decision in the case*** *[own emphasis]".*

1.74 "Just decision in the case" seems to mean evidence that will help the court come to a just and fair decision in the case. The CPA does not define 'just decision in the case'

E Issues for Comment

1.75 The SALRC invites commentators and interested parties to furnish it with comments and suggestions on the following issues:

1. to provide suggestions on how sections 184, 185 and 189 and any other section pertaining to the detention of witnesses may be reformed to be consistent with the Constitution?
2. How sections 184, 185 and 189 may be changed to meet the requirements of section 36 of the Constitution;
3. Suggest any formulation that may advance the principle of equality of arms in criminal proceedings; and
4. Provide any other suggestion that may provide adequate protection to witnesses in criminal proceedings.

PART 2

CHAPTER 2: WITNESS FEE

2.1 The witness fee regime in South Africa is governed by the CPA and the applicable Regulations. The CPA provides for a tariff of allowances to be paid to witnesses attending criminal proceedings. These allowances are intended to limit the witness's expenses due to court attendance and, in certain instances, loss of income. As discussed under Part 1 witnesses play a crucial role in criminal proceedings by providing firsthand accounts and technical expertise that can substantiate or challenge the evidence presented. The significance of witnesses lies in their ability to influence the outcome of criminal trials through accurate and credible testimony. Well-placed witness statements can corroborate facts, establish timelines, or provide insight into the suspect's behavior, thereby aiding in reaching just verdicts[16].

2.2 Furthermore, witnesses contribute to the integrity of the legal process by helping courts determine guilt or innocence based on real, observable events. Their role is pivotal in upholding transparency and ensuring that justice is served, reinforcing the foundational principles of criminal law. In criminal cases, witnesses typically fall into several distinct categories, each serving a unique purpose within the legal process[17]. Understanding these types of witnesses is essential to appreciating their roles in establishing facts and ensuring justice. Eyewitnesses are among the most prominent, as they provide direct observations of the crime. Their testimonies often hinge on their personal experiences, helping courts visualize the incident and identify suspects. Expert witnesses, on the other hand, contribute specialized knowledge. They analyze technical evidence such as forensic data, ballistics, or medical reports to clarify complex aspects of the case.

A Payment of witness fee

2.3 A witness fee is paid to a person who is summoned to appear in court to give testify regarding a matter before court. The witness fee covers travelling expenses including transport,

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16 Mihaela RUS "The role of the witness in criminal proceedings: importance, vulnerabilities, and psychological implications" Faculty of Law and Administrative Sciences, Ovidius University, p1.

17 Mihaela p2.

accommodation, parking and toll gate s etc. The Regulations Prescribing the Tariff of Allowances Payable to Witnesses in Criminal Proceedings, 2008 (the Regulations) provides for pre-payment of a witness fee to a witness who cannot attend the relevant criminal proceedings without prior financial assistance by the State[18]. Such a witness may make a request for such assistance as may be necessary at any magistrate's office or High Court.

2.4 Section 181 of the CPA also makes provision for pre-payment of a witness fee in instances where a subpoena is served on a witness outside the magisterial district from which the subpoena is issued, or, in the case of a superior court, outside the magisterial district in which the relevant proceedings will take place. and the witness is required to travel from such place to the court in question. The expenses to travel to and from such court and of sojourn at the court in question, is paid at the time of service of the subpoena.

2.5 At the foundation of the provisions that enable payment of a witness fee to a witness is the need for a fair trial that produces a just and lawful decision at the end of the trial. Further, section 35(3)(i) provides that every accused person has a right to a fair trial, which includes the right to adduce and challenge evidence. This provision allows the accused to test the reliability, credibility and truthfulness of the state's case through, inter alia, the cross examination of the witness.

Section 191 Payment of expenses of witness

Section 191 provides as follows:

2.6 *(1) Any person who attends criminal proceedings as a witness for the State shall be entitled to such allowance as may be prescribed under subsection (3): Provided that the judicial officer or the judge presiding at such proceedings may, if he thinks fit, direct that no such allowance or that only a part of such allowance shall be paid to any such witness.*

(2) Subject to any regulation made under subsection (3), the judicial officer or the judge presiding at criminal proceedings may, if he thinks fit, direct that any person who has attended such proceedings as a witness for the accused, shall be paid such allowance as may be prescribed by such regulation, or such lesser allowance as such judicial officer or such judge may determine.

(3) The Minister may, in consultation with the Minister of Finance, by regulation prescribe a tariff of allowances which may be paid out of public moneys to witnesses in criminal proceedings, and

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[18] Regulation 6(1).

may by regulation prescribe different tariffs for witnesses according to their several callings, occupations or stations in life, and according also to the distances to be travelled by such witnesses to reach the place where the proceedings in question are to take place, and may by regulation further prescribe the circumstances in which such allowances may be paid to any witness for an accused.
(4) The Minister may under subsection (3) empower any officer in the service of the State to authorize, in any case in which the payment of an allowance in accordance with the tariff prescribed may cause undue hardship or in the case of any person resident outside the Republic, the payment of an allowance in accordance with a higher tariff than the tariff prescribed.

2.7 Section 191(1) provides for the payment of a travelling allowance to a witness attending criminal proceedings. The subsection further gives a discretion to a judicial officer or judge presiding over criminal proceedings to not pay or pay only a portion of such an allowance to a witness, if he or she thinks it fit. What should be noted here is that the only requirement to be met in the exercise of this discretion is that the judge or judicial officer must 'think it fit' to pay a portion or not pay a witness fee to a witness.

2.8 It is not clear how a judge or judicial officer would conclude that it is not fit to pay a witness or to pay a portion of the witness fee to a witness. Witnesses are not offenders, so they must be treated with fairness throughout the criminal trial process. Witnesses who co-operate with the state by testifying in court should at least receive fair treatment in the very same process that accords an accused a right to a fair trial, by ensuring that the necessary financial assistance is provided to a witness to enable him or her to attend the relevant criminal proceedings.

2.9 Subsection 2 makes a similar provision to that in subsection 1 by giving the relevant presiding officer or judge a discretion to decide, as he or her "thinks fit", whether a witness for the accused is paid a witness fee as stipulated in the Regulation or a lesser amount as he may determine. This subsection allows a judge or presiding officer to deny payment of a witness fee to a witness for an accused person where he thinks fit or to pay a lesser amount than the prescribed amount. The only requirement for the exercise of this discretion is that the presiding officer or judge must "think fit' to not pay or to pay a lesser witness fee to the witness. The lesser amount that the judge can authorize is not mentioned or how it is to be calculated.

2.10 The CPA does not define the words “think it fit” neither does it set out the process to follow that will assist the judge or presiding officer in deciding whether it is “fit’ to pay a lesser amount than the prescribed amount. Section 35(3)(i) of the Constitution provides that every accused person has a right to a fair trial, which includes the right to adduce and challenge evidence. This right is violated by this provision in the sense that the subsection put unnecessary limitations to the process of calling of a witness by the accused.

2.11 Subsection (3) provides that the Minister may by regulation prescribe a tariff of allowances which may be paid to witnesses in criminal proceedings, and may also prescribe different tariffs for witnesses according to their several callings, occupations or stations in life, and according also to the distances to be travelled by such witnesses to reach the place where the proceedings in question are to take place, and prescribe the circumstances in which such allowances may be paid to any witness for an accused. This provision seeks to reimburse witnesses who belong to certain professions (expert witnesses) and businesses, for income forfeited while attending criminal proceedings as witnesses.

2.12 Some professions have set tariffs that guide the payment of such amounts to their members, but many professions do not set tariffs. Without listing the different types of professions or businesses regulation 4 of the Regulations provides that the court manager or a registrar may, on satisfactory proof having been produced that a witness has forfeited income as a result of his or her attendance of a criminal case, in addition to the allowance that may be payable to such a witness order the payment of an allowance equal to the actual amount of income so forfeited, subject to a maximum of R2 008 ,OO per day.

2.13 It is presumed that professionals and business-persons or other relevant persons who forfeited income by attending court proceedings will submit a claim under this regulation. However, the failure by the Regulations to list the relevant professions and types of businesses and the specific amounts claimable in each category means witnesses who are in the same profession or doing same type of business would be able to claim different amounts.

2.14 Subsection (4) provides that the Minister may under subsection (3) empower any officer in the service of the state to authorize, in any case in which the payment of an allowance in accordance with the tariff prescribed may cause undue hardship or in the case of any person resident outside the Republic, the payment of an allowance in accordance with a higher tariff than

the tariff prescribed. The subsection does not specify the nature of hardship envisaged. Regulation 5(ii) of the Regulations provides for a deviation from the prescribed tariff in any the case where the Director-General Or delegated official is satisfied that the application of the provisions of the Regulations or the prescribed tariff may cause financial hardship if applied. In this case a higher amount that the prescribed tariff may be paid to the specific witness.

2.15 It is presumed that a disabled witness who incurs higher costs than the prescribed tariff may by virtue of his disability submit a claim under this regulation. There is no need for listing the different kinds of disabilities that witnesses may have and the prescribed tariff for each category of disablement. This general provision is enough to cover disabled witnesses and the fee they can claim depending on their different needs. Therefore, by the look of things there is nothing wrong with the section

Section 191A Witness services

2.16 Section 191A provides as follows:

> *(1) 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.*
> *(2) The Minister may make regulations relating to-*
> *(a) the assistance of, and support to, witnesses at courts;*
> *(b) the establishment of reception centers for witnesses at courts;*
> *(c) the counselling of witnesses; and*
> *(d) any other matter which the Minister deems expedient to prescribe in order to provide services to witnesses at courts.*
> *(3) Any regulation made under this section which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.*
> *(4) 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.*
> *(5) Any regulation made under this section must, before publication thereof in the Gazette, be submitted to Parliament*.

2.17 Section 191A (1) provides that 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. These services include- (a) assistance of, and support to, witnesses at courts; (b) establishment of reception centers for witnesses at courts; (c) counselling of witnesses; and (d) any other matter which the Minister deems expedient to prescribe in order to provide services to witnesses at courts.

2.18 The current section 191A, in its current form, does not provide for any form of assistance to witnesses who are complainants or victims of crime for purposes of attendance of criminal proceedings in which they have direct interest up to the stage of verdict and sentence. Upon giving evidence in court, they are excused from further attendance of the proceedings, although they are complainants or victims in the cases concerned. If they decide to continue attending the proceedings beyond their testimony, they must provide means for their attendance. They become prejudiced thereby as the cases in which they have a direct interest proceed in their absence.

2.19 It has become necessary, as part of creating a victim-centric criminal justice system, to extend the services that are provided to witnesses, to the complainants and victims of crime. To provide for this extension, it is necessary to include a new paragraph (d) under section 191A(2) that state the following:

(2) The Minister may make regulations relating to-

(d) any assistance, including financial assistance, that may be given to a witness who is a complainant or victim for purposes of his or her continued attendance beyond their testimony until the verdict or sentence stage.

2.20 The current paragraph (d) of section 191A(2) to become paragraph (e).

2.21 A report by the Child Witness Institute gives a detailed analysis of the different kinds of services that are necessary for disabled persons[19].There are various categories of disability, and each of these will give rise to specific needs. Individuals with disabilities vary in their capacities, even those with the same disabilities, and, therefore, their needs will differ depending on the nature and severity of their disabilities. It is not possible to have a one-size-fits-all approach and the type of reasonable accommodations required will depend on the unique circumstances of everyone with a disability.

2.22 For example, a person who uses a wheelchair needs a ramp and wider door space to gain access to buildings; a quadriplegic would have additional and different needs to a paraplegic even

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19 Court Accommodations for People with Disabilities, December 2022.

though they both use wheelchairs; a person who is deaf may require a sign language interpreter while another who has a hearing impairment may require a hearing device; a child with autism has different communication needs to a child with Down's Syndrome[20]. Therefore, reasonable accommodations have to be customized to individual needs.

2.23 Another important point to note is that disabilities also vary according to co-occurring conditions. This means that there are clusters of disabilities that may occur together. For instance, a person with Down's Syndrome may also have a visual impairment; a person with a hearing disability may also have a cognitive disability. Many individuals with disabilities are diagnosed as having multiple disabilities. Being aware of the complexity and severity of a disability enables one to better respond to the accommodations required and to focus on what the abilities and strengths of the individual are[21].

2.24 The presiding officer is required to evaluate the evidence of a case based on the credibility of a witness. This is done through an observation of the witness's behavior and speech, through verbal and non-verbal cues, facial expressions, eye contact and other gestures. However, persons with disabilities do not fulfil these expectations.[22] Verbal and behavioral indicators of reliability such as accuracy, fluency, rational and logic behavior, consistency (in substance, time and place descriptions), poised body language, lax stature and confident appearance are often lacking or different in the accounts of persons with disabilities[23].

2.25 In order to ameliorate these differences, various types of accommodations need to be introduced to assist disabled witnesses. Disabled persons fall under different categories depending on the nature of their disablement. Some of those disablements are the following:

B Blindness and visual impairments

2.26 First thing is that it should not be assumed that the blind person has no usable vision. Many people who have a visual impairment can see shapes, colors and light. This is important

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20 Court Accommodations for People with Disabilities, December 2022 page 2.

21 Court Accommodations for People with Disabilities, December 2022, page 2.

22 Ibid.

23 Ibid.

information to find out from the individual because it may be relevant to the substance of their testimony as well. There are certain accommodations that are necessary on a practical level for persons with visual impairments to access justice. These may for example, include the admission of guides or service dogs into court buildings and courtrooms and making court documents to be available in Braille or large print or electronic and/or in audio format.[24]

2.27 Further, the process of identifying an accused will have to be adapted for witnesses with visual impairments and other evidence of identification, such as voice recognition, will have to be considered. For presiding officers to evaluate the evidence of persons who are blind or visually impaired, it is necessary for them to understand evidence as it is experienced by persons with this disability. This would require training of court personnel to understand the way persons who are blind or visually impaired experience the world to ensure their access to justice[25]. Braille and voice recognition, amongst other things, will go a long way in assisting blind or visual impaired witnesses in delivering credible testimonies.

C Deafness or hearing impairments

2.28 There are several accommodations that can be introduced to assist persons with hearing impairments, and, depending on the extent of the particular impairment, these could include (a) qualified sign language interpreters, (b) listening devices (c) television captioning and decoders (d) computer assisted note-taking (e) speech transliteration. Courts may provide these services on request of the disabled person. Also, information about obtaining these auxiliary aids and services could be posted clearly throughout the court system, including notices in the court building as well as on court websites.

2.29 Further, courts could introduce a system for calling cases suitable to persons who are deaf or have hearing impairments as these persons cannot access the normal way of calling cases. Persons who are deaf and require an interpreter must be consulted before the court date with regards to the dialect or type of sign language to be used so that an appropriate interpreter can be appointed.

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24 Court Accommodations for People with Disabilities, December 2022, page 1.

25 Court Accommodations for People with Disabilities, December 2022, page 1.

D Intermediaries

2.30 The court has the discretion in terms of s170A of the CPA to appoint an intermediary to assist a certain category of witnesses. Section 170A provides that *'whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.".*

2.31 Subsection (4)(a) further provides that the Minister may by notice in the Gazette determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

This is of importance for persons with disabilities, since they are entitled to reasonable accommodation within the parameters of the section. The Section specifically refers to:

(a) any witness under the mental age of eighteen;

(b) any witness who suffers from a physical, mental or emotional condition.

2.32 The test for the appointment of an intermediary is whether the person will experience undue psychological, mental or emotional stress, trauma or suffering if they were to testify at such proceedings. Intermediaries can thus be used to assist with certain categories of disabilities. Intermediaries can also be used as support persons to assist persons with disabilities who testify in terms of s158 of the Criminal Procedure Act 51 of 1977 as well as those who testify in court i.e. persons who are blind or deaf.

2.33 Persons with disabilities may, as a result of their disability, behave in ways that differ from the norm and this can have a profound impact on the evaluation of their credibility. Disability can alter the way a person perceives and understands an event. A person with a cognitive impairment may not, for example identify danger or realize that a act is unlawful. This perception can have an impact on memory, because a person who does not realize that something unlawful or "bad" has happened will not take note of incriminating details that could be very relevant to identification or corroboration.

2.34 The greatest challenge to their credibility relates to the difference in the ways that they convey information to people. The presiding officer is required to evaluate the evidence of a case based on the credibility of witness. This is done through an observation of the witness's behavior and speech through verbal and non-verbal cues, facial expressions, eye contact and other gestures. However, persons with disabilities do not fulfil these expectations. Verbal and behavioral indicator of reliability "such as accuracy, fluency, rational and logic behavior, consistency (in substance, time and place descriptions), poised body language, lax stature and confident appearance" are often lacking or different in the accounts of persons with disabilities.

2.35 Persons with cognitive or intellectual disabilities often have difficulties with memory, with providing an accurate and coherent, consistent and complete account and may be more susceptible to confabulation and suggestion. In order to ameliorate these differences, various types of accommodations may need to be introduced. The following are some of the accommodations needed to support a disabled witness- (i) friendlier environment in the courtroom not having to confront the accused; (ii) framing the questions in a way that assists memory; and (ii) using expert evidence to explain the meaning of their words and conduct.

2.36 Effective resources for witness support are imperative in ensuring that individuals who testify in criminal proceedings feel secure and informed throughout the legal process. Witnesses often face significant emotional and psychological stress, which can impede their ability to provide accurate testimony.

2.37 Additionally, emotional assistance programs are important for helping witnesses cope with the stress associated with their involvement in a criminal case. Many jurisdictions offer counseling services specifically designed for witnesses, where trained professionals can provide emotional support, coping strategies, and a safe space to discuss concerns. These services can significantly enhance a witness's emotional well-being, thereby improving their overall performance in court.

2.38 Furthermore, community organizations and victim advocacy groups often provide resources tailored to support witnesses. These organizations can assist with practical needs, such as transportation to court, and provide information about the judicial process, which can further alleviate anxiety and foster a sense of empowerment.

2.39 Section 191A This section does not deal with witness fee but services that may be provided to a witness who is required to give evidence in a court of law.

E Issues for Comment

2.40 The SALRC invites commentators and interested parties to furnish it with comments and suggestions on the following issues:

1. to provide suggestions on provisions relating to payment of witness fee, particularly to victims of crime;
2. to provide suggestions on services that may be given to witnesses in criminal proceedings.