

SOUTH AFRICAN LAW REFORM COMMISSION

PROJECT 82

SENTENCING

(A COMPENSATION FUND FOR VICTIMS OF CRIME)

REPORT

APRIL 2004

ISBN

**TO MRS BS MABANDLA, MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's second and final report in the investigation into the review of the law relating to sentencing which deals with a compensation fund for victims of crime.

A handwritten signature in black ink, appearing to read 'Y Mokgoro', written in a cursive style.

JUSTICE Y MOKGORO

CHAIRPERSON: SA LAW REFORM COMMISSION

APRIL 2004

INTRODUCTION

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

The members of the Commission are -

The Honourable Madam Justice Y Mokgoro (Chairperson)
The Honourable Madam Justice L Mailula (Vice - Chairperson)
Professor IP Maithufi (Full time member)
The Honourable Mr Justice CT Howie
Adv J J Gauntlett SC
Ms Z Seedat
Professor C Hoexter
Judge W Seriti

The Secretary is Mr W Henegan. The Commission's offices are on the 12th floor, Sanlam Centre C/o Andries and Pretorius Street, Pretoria. Correspondence should be addressed to:

The Secretary
South African Law Reform Commission
Private Bag X 668
PRETORIA
0001

Telephone : (012) 322-6440
Telefax : (012) 320-0936
E-mail : wvuuren@salawcom.org.za
Internet site : <http://www.law.wits.ac.za/salc/salc.html>

The project leader responsible for this project is Mr J Kollapen and the researcher is Mr AWF van Vuuren.

The members of the project committee are:

Judge L Mailula (Commission's representative)
Mr V Petersen
Mr K Govender
Ms L Camerer
Ms M Ramagoshi
Ms B Pithey
Dr HF Snyman

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CHAPTER 1

A COMPENSATION FUND FOR VICTIMS OF CRIME, RESTORATIVE JUSTICE AND VICTIM EMPOWERMENT: THE INVESTIGATION BY THE SA LAW COMMISSION

A. BACKGROUND

1.1 During 1991 the Minister of Justice approved the appointment of a number of project committees which were mandated to review the law relating to specific areas on a continuous basis. As part of this initiative the law of sentencing was designated to be subjected to investigation. Following this a new investigation into the review of the law of sentencing, with the object to review all aspects relating to sentencing on a continuous basis, was included in the Commission's programme.

1.2 The first project committee on sentencing was appointed during 1992. The project committee was requested to identify areas of the law which were to be the subject of investigation and to develop its own terms of reference. The project committee subsequently resolved to include in its programme of work an investigation into compensation for victims of crime. Professor Cilliers, a member of the first project committee, was requested to prepare a draft report in this regard for consideration by the committee after his attendance of the World Conference on Victimology during 1994. He completed his report and it was submitted to the Minister of Justice during 1995. Although his report recommended the establishment of a compensation fund it did not contain draft legislation or detailed provisions on the operation of the fund and the investigation was therefore not finalised.

1.3 During September 1996 the Minister appointed a new project committee chaired by Judge L van den Heever. Since its appointment the project committee met on several occasions to plan the investigation and identified a number of subjects for further investigation which included :

- * victim empowerment and a restorative justice approach to criminal law; and
- * the establishment of a compensation fund for victims of crime and victim empowerment.

1.4 Following this decision two draft issue papers, each dealing with one of the above topics, were prepared and approved by the committee for publication. The two issue papers were submitted to the Commission's Working Committee for approval and publication and, following a decision taken by the Working Committee, combined into one issue paper which dealt with both issues. The Commission published this issue paper titled Restorative justice (A compensation fund for victims of crime) during 1997. This issue paper considered the need for the establishment of a compensation fund for victims of crime as well as the broader issues of victim empowerment and a restorative justice approach to crime.

1.5 It is necessary to give some background information on the events that preceded the publication of this first issue paper. At the end of August 1996 the Institute for Security Studies in co-operation with the SA Police Services organised a national workshop on victim support and empowerment which was held at the World Trade Centre. Focussing on victims of crime and their needs, rather than offender-based strategies to combat crime, the meeting for the first time, brought together relevant stake holders ranging from service providers around rape and trauma counselling, researchers, police, government and the media, to consider issues around victims of crime. At the workshop consensus was reached that it was premature to establish a national co-ordinating body around victim support, but an interim steering committee was elected to carry the process forward.

1.6 During this time the South African Police Services embarked on their own Victim Support Programme, the scope of which included the training of police officials to provide support to victims of crime, liaison with other Government Departments and NGO's to co-ordinate counselling and support services to victims of crime and violence, the development of strategies on crime prevention, the establishment of comfort rooms at police stations and victim support centres and the setting up of a referral system and resource directory.

1.7 Following these developments a victim empowerment programme was included as a national programme in the National Crime Prevention Strategy which was released during 1996. Recognition of the role and rights of victims of crime was thought to be vital in addressing the effects of crime and at the same time creating crime resistant communities. This programme, therefore, aimed at making the criminal justice process more victim friendly and minimising the negative effects of crime on its victims. The objective was to create a greater role for victims in the criminal justice process as well as to provide protection against repeat victimisation. An Interim Steering Committee was officially appointed as the first programme team of the Victim

Empowerment project under the NCPS programme and the lead agency of the project was the Department of Social Development supported by the Departments of Health, Safety and Security, Justice, Correctional Services, Local Health Authorities and non government and community based service groups. The Law Commission was also a stake holder in this programme because the project committee on sentencing already embarked on an investigation into a review of legislation pertaining to victims of crime as part of its investigation into sentencing. The Commission's researcher was co-opted in the first Programme Team for the Victim Empowerment project under the NCPS.

1.8 As stated above, the project committee approved the publication of an issue paper dealing with restorative justice, victim empowerment and the establishment of a compensation fund for victims of crime at a meeting on 10 January 1997. The issue paper addressed the issue of compensation for victims of crime and victim empowerment as part of the broader concept of restorative justice. During the beginning of 1997 the Minister of Justice formally requested the Commission's to undertake an investigation into the plight of victims of crime in the criminal justice system upon which he was informed that the Commission's project committee on sentencing has already included such an investigation in its programme of work. During April 1997 the Commission's Working Committee approved publication of the issue paper. The closing date for comment was 30 June 1997 but was extended until the end of September 1997.

1.9 In the issue paper the Commission *inter alia* considered restorative justice as a process which seeks to redefine crime, interpreting it not only as breaking the law, or offending against the State, but also as an injury or wrong done to another person. It encourages the victim and the offender to be directly involved in resolving conflict and thereby becoming central to the criminal justice process with the State and legal professionals playing the role of facilitators, supporting a criminal justice system which aims at offender accountability and full participation of the victim, the offender and the community in making good or putting right the wrong. As part of this process, restorative justice demands consideration of approaches such as that of offering compensation, where appropriate, to the victims and empowering victims in their search for recognition through direct participation in the criminal justice system.

1.10 The issue paper also noted that present support services for victims of crime and violence in South Africa seem to be limited, fragmented, uncoordinated, reactive in nature, and therefore ineffective. The planning and establishment of these services are often not

community-driven and happen on an *ad hoc* basis which results in difficulties. Services do not cater sufficiently for the diversity of the population and certain services such as those focussing on women and children, are over-utilized while others tend to be inaccessible in terms of their location and service fees or are poorly marketed and therefore not used. Many victims go unsupported, remain traumatised, become victims again or even turn to crime and violence themselves.

1.11 A new project committee chaired by Professor D van Zyl Smit was appointed in the course of 1998. This committee revisited its terms of reference and identified the development of a new sentencing framework for South Africa as its main focus while it also resolved to proceed separately with its investigation into the plight of victims of crime. In accordance with this decision taken on 30 November 1998 a task team consisting of Lala Camerer, Verni Peterson, Willie van Vuuren and Rainer Pfaff, met on 25 January 1999 to consider how the issues of victims should be dealt with and to propose an action plan for consideration by the project committee. The task team proposed that the investigation into restorative justice, which included the establishment of a compensation fund for victims of crime, should receive urgent attention. It was, however, recommended that the investigation should focus on the establishment of a compensation fund and, in the event it was found not to be a financially viable option, that alternative options which would address the plight of victims of crime in South Africa effectively, should be considered. Following these recommendations a focus group, consisting of members of the project committee on sentencing, was appointed to direct the investigation into a compensation fund for victims of crime.

1.12 At a subsequent meeting of the focus group on 29 March 1999 it was decided that additional research was necessary, in particular with regard to the financial viability of a compensation fund. With the financial assistance of GTZ, the project committee was able to farm out the research into the viability of a compensation fund for victims of crime to the Centre for the Study of violence and Reconciliation (CSVR). A discussion paper was subsequently prepared by CSVR and published for general information and comment during March 2001. The closing date for comment was 31 July 2001 after which the committee embarked on a consultation phase which entailed 5 regional workshops in Pretoria, Durban, East London, Kimberley and Cape Town during the period 20 November 2001 up to 27 November 2001.

1.13 The discussion paper considered the feasibility of establishing a Victim Compensation Scheme (VCS) in South Africa against the Commission's broader mandate to revisit the plight

of victims of crime within the criminal justice system in general.

1.14 As far as establishing a compensations scheme for victims is concerned the discussion paper provided an overview of the nature and extent of violent crime in the country. This was considered critical to understanding the foundation for such a compensation scheme and for realistically costing such an endeavour. It also briefly documented the economic, physical and psychological impacts of violent crime on its victims and discussed the services currently available to them. It included the debates concerning compensation and an analysis of the motivations for and against the establishment of a Victim Compensation Scheme (hereafter referred to as VCS) were provided. Strong arguments from a victim-centred and moral perspective were made for establishing a VCS. Some potential benefits for the criminal justice system as a whole were also described. Arguments against establishing a VCS were also outlined. These mainly focused on whether providing compensation, in a context of limited resources, should be prioritised over and above other aspects of victim support.

1.14 The discussion paper provided an overview of the South African law of damages and existing schemes that offer compensation (i.e. compensation to victims of road accidents, occupational injuries and diseases, and political traumas) were provided. The international experience in compensating victims of crime specifically was also considered and the recovery of compensation from the offender was discussed. The eligibility criteria for compensation from the State, based on comparative international data, were then elucidated. Specific parameters applied to foreign compensation schemes, which may be appropriate for inclusion in a South African scheme, were highlighted, including the mandate of these schemes, the type of crimes eligible for compensation, as well as who may qualify to apply to the scheme for compensation. This analysis of the parameters of different compensation schemes was considered the skeleton upon which any legislative framework for a South African compensation scheme would be based.

1.15 Flowing from the research done in the investigation, the discussion paper also included the results of an empirical study on problems which are pertinent for establishing a compensation fund. The findings of an analysis of selected police dockets were reported. This was done in order to verify information about certain types of violent crimes and their impact on victims. This information was used to make assumptions when costing a VCS, and for shaping possible policy scenarios. In addition, the docket analysis focused on the usefulness of police information in adjudicating possible claims for victim compensation. It revealed, amongst other

findings, that current police recording practices provide inadequate data on which to base an assessment of compensability, such as may be required in a VCS. Of particular concern was the fact that a medical report was not completed in over 80% of the cases studied.

1.16 The envisaged costs associated with establishing a compensation scheme in South Africa were discussed on the basis of certain assumptions. The variables that would determine the overall cost of the scheme were pointed out, with the estimated financial impact of various policy permutations and eligibility parameters were considered. The discussion paper also considered the estimated administrative costs that would be incurred in running a compensation scheme. These, and the cost of different models, varied a great deal (i.e. from incredibly costly to potentially viable in the South African context) depending on the policy parameters used.

1.17 The discussion paper also highlighted possible sources of funding to finance the establishment of a VCS. Attention was given to the potential of state funding, voluntary sources and the imposition of dedicated taxes. Obstacles that may be encountered in attempting to secure such funding were considered, as were alternative expenditure choices, including the provision of limited and targeted assistance to crime victims *in lieu* of extensive compensatory support.

1.18 The mechanics of administering a victim compensation scheme were briefly delineated and some of the administrative processes that would need to be in place if such a scheme was established in South Africa were examined. In particular, steps were detailed which aim to minimise the risks, while maximising the benefits to victims.

1.19 The discussion paper recommended that a fully-fledged compensation scheme was not possible in the short-term and it detailed the pre-conditions (e.g. reliable police record keeping, sufficient funds, *etc.*) that would need to exist for such a scheme to be established in South Africa. The debate concluded that compensation, either partial or full, should be seen as a complementary component of victim support, which is vital to ensuring the efficacy of the whole criminal justice system.

IDENTIFYING THE ISSUES

1.20 From the issues dealt with in the issue paper and the discussion paper and the comments received, it became clear that a number of closely related subjects should be considered in the course of the investigation. Although the discussion paper mainly focussed on the establishment of a compensation fund and its financial feasibility, the broader issue of victims and their treatment in the criminal justice system was implicit in the terms of reference in that alternative approaches to improve the treatment of victims of crime, should a compensation fund not be a viable option, were considered.

1.21 The investigation therefore includes a review of the legal position relating to both compensation and restitution with the aim of making recommendations on law reform in this regard. The purpose of the investigation is to determine the feasibility and nature of a compensation scheme and to make recommendations with regard to the establishment of a compensation scheme that would ensure fair compensation and restitution for victims of crime, if one were to be set up in South Africa. Secondly, the principles of restorative justice is considered to be an integral part of the investigation. In particular the report considers how a restorative justice approach to victims should be accommodated if a compensation scheme based on monetary compensation appears not to be viable or sufficient to stand on its own. As such alternative strategies and approaches to complement the compensation models form part of this report.

1.22 The Commission's final report therefore deals with both issues and is divided into three parts. Part I deals with the establishment of a compensation fund for victims of crime and all its related aspects. Part II deals with the Commission's broader terms of reference, ie the plight of victims of crime in the criminal justice system. Part III deals with the Commission's evaluation and final recommendations. The report therefore discusses the relevant issues in the following order:

Part I :

The establishment of a compensation fund for victims of crime

The key issues

The violent crime situation in South Africa

The impact of violent crime

Services available to victims of crime in South Africa

The victim empowerment programme
Compensation in South African Law
Compensation Schemes - a comparative overview
Particular problems relevant to establishing a compensation scheme in South Africa

Part II deals with:

Victims and their treatment in South African law
A comparative overview of the treatment of victims by the criminal justice system
A restorative justice approach to the criminal justice system
Victim support models and co-ordinated victim support services
Victim's rights
The need for law reform.

Part III deals with:

The Commission's evaluation and recommendations.

1.23 The Commission has already completed its investigation into sentencing which, *inter alia*, dealt with victim and community participation in sentencing; victim impact statements and victim-offender mediation. In that report recommendations relating to these subjects have already been made and they are not dealt with again in this report. Although the Commission will refer to victim rights in the course of the report it should be noted that, following a decision taken by the Minister, the development of a charter of victim rights is the responsibility of the Department of Justice in collaboration with the Commission's project committee on sentencing and the discussion in this report will therefore not include the development of a charter.

PART I**CHAPTER 2****A COMPENSATION SCHEME FOR VICTIMS OF CRIME IN SOUTH AFRICA****THE KEY ISSUES****INTRODUCTION TO KEY ISSUES**

2.1 It is generally recognised that crime in South Africa (SA), and especially violent crime, is at exceedingly high levels and that the risk of victimisation of citizens, residents and visitors is inordinately high. This fact, which is confirmed by all available crime statistics and victim surveys, explains the extent to which crime, as well as the nature and efficacy of the state's response to it, has become one of the main foci for policy and political debate in SA. It could be argued that, with the possible exception of job creation and the economy, no single issue of governance comes close to the levels of attention and concern associated with the problems of crime, criminality and victimisation.

2.2 The extent of public concern about crime has led to numerous proposals, of varying practicability, for improving the safety and security of members of the public. These proposals have ranged from endorsements of violent vigilantism to carefully costed proposals for the implementation of technological solutions to problems of inefficiency in the criminal justice system. They have covered the spectrum of possibilities from calls to reinstate the death penalty to campaigns calling on people not to 'do' crime. They have also included such imperatives as increasing the accessibility of the criminal justice system to previously under-served communities, to the fencing-off of neighbourhoods.

2.3 On the basis of the sheer variety of proposals made for addressing the problems of crime, criminality and victimisation in SA, one could conclude that almost all areas which can or do impact on the nature and level of crime could be improved. Three basic formulae for improving levels of safety and security in SA have been developed. These are:

'Devote more resources to alleviating socio-economic problems and unemployment, and crime will take care of itself';

‘Improve the functioning of the criminal justice system, employ more police officers and prosecutors and get the prisons in shape, and crime will be dealt with directly’; and

‘People are victimised because of the failure of the state to properly police society and to create appropriate conditions for improving safety and security. It is these people to whom the state owes its greatest duty of care, and, if their needs are prioritised, the state can reduce revictimisation and can break the cycle of violence. Moreover, dealing with the needs of victims reduces the likelihood of vigilantism emerging.’

2.4 In general terms, one might term these approaches to be ‘social crime prevention’, ‘law enforcement’ and ‘victim-centred’. The underlying premises and goals of each approach differ from those of the others, yet there need not be too great a degree of contradiction between the various approaches and they should be complementary. That said, it is apparent that in recent years the victim-centred approach to dealing with the impact of crime on the lives of victims has gained currency and is now part of the cutting edge of policy debates in the field of safety and security.

2.5 Victim-centred approaches to the issue of crime comprise a number of components and concerns about which there is a great deal of political, policy and academic debate. These issues include concerns relating to victims in general, such as:

- * the accessibility of the police and courts;
- * the nature and quality of services provided at and by those institutions;
- * an under-emphasis on concerns relating to the plight of specific classes of victims, such as the specific needs of rape and child abuse survivors as well as those of victims of domestic violence.

2.6 Particular emphasis is beginning to be placed on the need to restore victims to a position comparable to that which they occupied prior to their victimisation. This is part of a more general need to empower and support victims and to recognise and address their particular needs. Proposals to restore victims to their prior positions often include reference to the payment of compensation as a way to compensate them for the wrong done to them both materially and symbolically. Such proposals, which are based on similar programmes in other parts of the world, include references to the need to establish a Victim Compensation Scheme¹ in SA, through which the state would offer financial compensation to victims or their dependants for the harm done by offenders.

2.7 Proposals for the establishment of a VCS are based on the undeniable premise that

¹ Hereinafter referred to as VCS.

victims of violent crime and their dependants suffer material and psychological costs as a result of their victimisation. The circumstances under which these costs are incurred are deemed intolerable and it is felt, therefore, that the victim should be compensated in some way for such costs.

2.8 Generally, legal systems recognise this and create an unfettered right to receive compensation from the perpetrator of the wrong for the damages associated with the commission of those wrongs. These rights are deeply rooted in the law of SA, and have evolved through legislation and judicial interpretation over time. More recently, however, governments in many countries around the world have adopted policies that extend the right to access compensation for victims of violent crime beyond the civil liability of the wrong-doer. These policies include the creation of mechanisms through which some or all victims of violent crimes can access funds made available through the state, irrespective of whether the wrong-doers are, themselves, ever identified or if they are unable to compensate the victims of the original crime.

2.9 These schemes amount, therefore, to a transfer of funds from taxpayers to the victims of crime and are motivated by a philosophy that construes society as having a responsibility to the victim of crime. By providing compensation, it is hoped that further victimisation and hardship experienced by the victim is prevented or limited. These schemes do not create a legal right to compensation from the state, rather they provide mechanisms through which the victim can access funds on the basis of an accepted social responsibility by the state towards the victim.

2.10 The fact that there is no legally recognised right to compensation except from the offender means that compensation schemes operate in the context of the political and fiscal vicissitudes of government. Compensation schemes, therefore, frequently differ in their interpretations as to who qualifies for compensation, what exemptions and exclusions apply, and the extent of the compensation provided. These differences make it impossible to speak in more than the most general terms of the practical and legal requirements for the establishment of a VCS in SA. Nonetheless, given the broad political and public support for the idea of establishing a VCS, it has become necessary to develop a framework for thinking through the implications and prerequisites for such a scheme in SA and it is this task that this report seeks to address.

SUMMARY OF THE VIOLENT CRIME SITUATION IN SOUTH AFRICA

Introduction

2.11 Whilst violent crime in South Africa is widespread, a fact borne out by the anecdotal and the statistical evidence that exists, data on rates of crime and victimisation in SA are inadequate. In particular:

- * Police crime statistics² are generally regarded as unreliable because they reflect only those crimes which are (a) reported to the police and (b) recorded by them. This means that a large number of crimes go either unreported or unrecorded;
- * In SA the problem of the size of the 'dark number' of unreported and of the 'grey number' of unrecorded crimes is accentuated by the fact that much of SA is under-policed and that, until recently, many policing jurisdictions lacked any significant infrastructure for the gathering and compilation of crime statistics. For that reason, reliable police crime statistics do not exist for any time prior to 1994;
- * The under-policing of SA and the related problem of historical police illegitimacy imply that, apart from very serious violent crime and property crimes against people who are insured, reporting rates are thought to be quite low. Moreover, skewed results are likely to produce a relatively larger under-count of crimes committed against the poor, especially those who live in rural areas;
- * Assessments of the South African Police Services (SAPS) systems continue to reflect concerns that the systems used by the SAPS for the gathering of crime statistics are either not properly understood or not properly utilised by police officers; and

² Whilst writing the discussion paper National Police Commissioner, Jackie Selebi, ordered his communications officials countrywide not to publish police crime statistics until further notice. The moratorium on the statistics was said to be about giving the SAPS 'breathing space' while taking stock and redesigning its entire approach to the way it counts and assesses crime in South Africa. Only the national quarterly statistics will be made public during the period the moratorium is in force, and only by SAPS headquarters in Pretoria (Business Day, 14 July 2000). The moratorium was, however, lifted subsequently.

- * Victimization surveys, which seek to assess levels of crime and to capture the extent of under-reporting, are relatively recent initiatives. As such, they cannot be used to measure trends over time. In addition, some disturbing anomalies in their findings cast some doubt on the validity of some of the data collected.

2.12 Given these problems, assessing the levels and distribution of victimisation is exceedingly difficult. This fact complicates the calculation of the appropriate size and coverage of a Victim Compensation Scheme (VCS) if such a scheme is to meet the needs of victims of crime and violence. At the same time, it is important to base any assessment of the desirability and feasibility of a VCS on an as accurate as possible appreciation of the scale of the problems with which it will have to deal. It is, therefore, important to reflect on what we do know about levels of crime and victimisation in SA.

Nature and Extent of Violent Crime

2.13 Police crime statistics for the years 1994 to 1998, which should capture all crimes reported to the police, are reflected in the table below.³

³ Source: 'The incidence of serious crime in SA between January and December 1998' 1/99
SAPS Semester Report Pretoria: SAPS

Crime in the RSA for the period January to December 1994-1998

Crime category	1994	1995	1996	1997	1998	Ave. annual growth
Murder	26,832	26,637	25,782	24,588	24,875	-2%
Attempted murder	27,300	26,512	28,516	28,148	29,418	2%
Robbery with aggravated circumstances	84,900	80,071	67,249	69,691	88,319	1%
Common robbery	32,423	40,881	51,506	52,678	62,111	18%
Public violence	1,223	992	907	1,043	1,093	-3%
Illegal strikes	347	394	113	51	64	-34%
Rape and attempted rape	42,429	47,506	50,481	52,159	49,280	4%
Intercourse with a girl under the prescribed age and/or female mbeile	787	666	580	537	474	-12%
Indecent assault	3,874	4,873	5,220	5,053	4,851	6%
Cruelty and ill-treatment of children (excluding sexual offences, assault and murder)	2,723	2,905	2,315	2,368	2,083	-6%
Kidnapping	3,984	4,167	4,156	4,035	4,196	1%
Abduction	2,808	2,299	2,019	2,705	3,090	2%
Assault with the intend to inflict grievous bodily harm	210,250	220,990	230,425	234,554	234,056	3%
Common assault	193,764	205,101	205,333	201,863	199,313	1%
Burglary - business premises (including attempts)	89,058	86,379	87,863	88,610	94,102	1%
Burglary - residential premises (including attempts)	228,021	244,063	246,438	249,375	266,817	4%
Stock-theft	45,137	44,629	41,818	42,908	40,490	-3%
Shoplifting	67,059	63,037	62,198	63,795	63,001	-2%
Theft of motor vehicles and motorcycles	104,302	101,056	96,715	100,637	107,513	1%
Theft out of or from motor vehicles and motorcycles	182,624	189,811	180,229	176,254	188,438	1%
Theft not mentioned elsewhere	382,407	388,252	380,197	387,836	427,132	3%
Arson	11,357	9,761	10,064	9,830	10,130	-3%
Malicious damage to property	122,598	128,393	130,313	127,004	127,590	1%
All fraud, forgeries, malappropriations, embezzlements, etc.	62,581	61,016	62,186	63,632	62,086	0%
Drug related crime	47,323	40,782	39,241	42,805	39,830	-4%
Driving under the influence of alcohol or drugs	26,771	23,174	23,979	27,806	25,606	-1%
Illegal possession of firearms and ammunition	11,136	11,886	12,886	12,877	14,463	7%
Explosives act	571	336	371	204	132	-31%
Total	2,014,589	2,056,569	2,049,100	2,073,046	2,170,553	2%
Carjacking*	-	-	12,860	13,011	15,111	8%
Hijacking of trucks*	-	-	3,694	4,296	5,773	25%
Robbery of cash in transit*	-	-	410	230	214	-28%
Bank robbery*	-	-	642	497	476	-14%

* These crimes have already been accounted for under robbery with aggravating circumstances

2.14 In the above table, and in much of the rest of the report, attention is focused on violent crime (*shaded blocks*) because that category of crimes is most likely to become the source of eligible claims from any VCS that may be established in SA, for reasons that will be explained later in the report.

2.15 As is readily apparent, levels of recorded crime have changed at very different rates over the past five years. Thus, while recorded murders have diminished by approximately 2% per year, attempted murders and assaults with intent to do grievous bodily harm have increased at a similar rate. In addition, the trends are not stable: recorded aggravated robbery incidents declined by 21% between 1994 and 1996 but increased by 31% between 1996 and 1998.

2.16 The fact that approximately 24,000 murders are recorded each year in SA is, in itself, no real indication of the extent of victimisation. This can only be reflected if crime statistics are reflected on a per capita basis. The next table reflects crime levels in SA per 100,000 of the population. These statistics for 1996 are then compared to similar statistics for other countries.⁴

Crime per 100,000 people in the RSA for the period January to December 1994-1998

Crime category	1994	1995	1996	1997	1998	Ave. annual growth
Murder	69.28	67.19	63.53	59.18	58.47	-4%
Attempted murder	70.49	66.88	70.26	67.75	69.15	0%
Robbery with aggravated circumstances	219.22	201.98	165.70	167.73	207.61	-1%
Common robbery	83.72	103.12	126.91	126.79	146.01	15%
Public violence	3.16	2.50	2.23	2.51	2.57	-5%
Illegal strikes	0.90	0.99	0.28	0.12	0.15	-36%
Rape and attempted rape	109.55	119.83	124.39	125.54	115.84	1%
Intercourse with a girl under the prescribed age and/or female imbecile	2.03	1.68	1.43	1.29	1.11	-14%
Indecent assault	10.00	12.29	12.86	12.16	11.40	3%
Cruelty and ill-treatment of children (excluding sexual offences, assault and murder)	7.03	7.33	5.70	5.70	4.90	-9%
Kidnapping	10.29	10.51	10.24	9.71	9.86	-1%
Abduction	7.25	5.80	4.97	6.51	7.26	0%
Assault with the intent to inflict grievous bodily harm	542.87	557.44	567.78	564.53	550.20	0%
Common assault	500.31	517.36	505.95	485.85	468.53	-2%
Burglary - business premises (including attempts)	229.95	217.89	216.50	213.27	221.21	-1%
Burglary - residential premises (including attempts)	588.76	615.64	607.24	600.20	627.21	2%
Stock-theft	116.55	112.57	103.04	103.27	95.18	-5%
Shoplifting	173.15	159.01	153.26	153.54	148.10	-4%
Theft of motor vehicles and motorcycles	269.31	254.91	238.31	242.21	252.73	-2%
Theft out of or from motor vehicles and motorcycles	471.54	478.79	444.09	424.21	442.97	-2%
Theft not mentioned elsewhere	987.39	979.35	936.82	933.45	1004.07	0%
Arson	29.32	24.62	24.80	23.66	23.81	-5%
Malicious damage to property (malappropriations, embezzlements, etc.)	161.59	153.91	153.23	153.15	145.95	-3%
Drug related crime	122.19	102.87	96.69	103.02	93.63	-6%
Driving under the influence of alcohol or drugs	69.12	58.46	59.09	66.92	60.19	-3%
Illegal possession of firearms and ammunition	28.75	29.98	31.75	30.99	34.00	4%
Explosives act	1.47	0.85	0.91	0.49	0.31	-32%
Total	5201.75	5187.60	5049.09	4989.43	5102.37	0%
Carjacking*			31.69	31.32	35.52	6%
Hijacking of trucks*			9.10	10.34	13.57	22%
Robbery of cash in transit*			1.01	0.55	0.50	-29%
Bank robbery*			1.58	1.20	1.12	-16%
POPULATION	38,729,085	39,643,934	40,583,573	41,548,719	42,540,106	2%

* These crimes have already been accounted for under robbery with aggravating circumstances

2.17 As can be seen, overall recorded crime levels per capita have been largely stable over the past 5 years, ignoring for the moment the inexplicable fluctuations in the aggravated robbery and common robbery statistics. There has been a fairly stable distribution of crimes between the various categories of crime to which South Africans are exposed. However, the level of crime is exceedingly high. Indeed, the total risk of being a victim of crime per person per year is in the order of about 5 per cent even before unrecorded crimes are considered.⁵

International victimisation rates							
Country	Murder	Rape	Serious assault	Robbery and violent theft	Breaking and entering	Theft of motor vehicles	All crimes in national crime statistics
South Africa	61.05	119.54	545.64	281.21	791.61	244.97	6388.35
Argentina	43.48	21.67	58.18	32.09	0	641	4709.76
Australia	3.5	0	618.76	33.88	2178.55	669.97	6476.63
Botswana	12.87	68.46	369.3	72.88	7.65	111.87	7815.04
Brazil	9.7	0	0	0	0	12.51	120.14
Bulgaria	8.83	9.12	13.94	69.95	834.23	143.25	2334.49
Cameroon	0.36	0.18	0.15	0.87	2.32	0.2	23.13
Canada	4.94	0	157.14	104.27	1321.89	595.99	9079.74
Chile	3.86	10.84	117.54	57.07	0	15.97	1309.38
France	4.11	12.39	129.99	136.95	752.16	595.68	6134.97
Gabon	0	105.07	134.95	123.56	148.38	113.56	1451.31
Germany	4.32	7.61	123.85	82.6	1768.83	208.93	8124.91
Ghana	2.23	4.04	404.51	1.12	4.42	0	929.16
Japan	0.97	1.18	14.2	1.96	177.65	26.79	1504.34
Jordan	6.86	1.42	34.06	0.25	45.12	33.32	263.76
Mauritius	3.45	3.54	48.17	91.11	100.32	0	3220.75
Namibia, (Republic of)	52.1	50.46	498.97	67.05	502.43	68.21	4090.94
Netherlands	23.02	11.23	236.04	119.16	3491.97	289.46	9315.28
New Zealand	3.23	34.96	512.07	53.7	2296.32	871.89	14025.87
Swaziland	15.44	59.38	444.28	194.73	682.84	62.8	3619.63
Sweden	10.31	18.18	38.44	75.07	1665.05	750.38	13520.87
Tanzania	7.61	1.63	1.62	2.44	85.6	0.98	1691.69
Thailand	7.36	5.87	25.18	1.67	2.71	4.84	694.54
Tunisia	0.88	4.84	154.16	12.84	137.26	9.94	1413.46
Uganda	9.13	1.24	12.09	13.37	14.8	4.11	153.33
UK (England and Wales)	2.6	8.83	17.43	142.23	2239.23	933.67	7205.5
USA	7.41	36.1	388.19	202.44	942.96	525.92	5078.94
Zimbabwe	10.65	23.27	170.37	71.43	411.57	9.84	4959.62

2.18 Figures in the table above, which reflect recorded crime levels in a variety of countries for 1996, show that, with the exception of property crimes in the first world, which are well policed and (importantly) enjoy wide insurance coverage, SA has the highest rates of violent crime in the world (*shaded blocks indicate higher levels than South Africa*).

2.19 There are, of course, exceptions to the finding that SA has the highest levels of crime in the world. For instance, in 1997, the homicide rate for South Africa was estimated at about 59 per 100 000 inhabitants. This is compared to approximately 9 per 100 000 in the United States and 2.5 per 100 000 in the United Kingdom. In Colombia, however, when the Medellin drug cartel was operating in 1993, the homicide rate was an alarming 450 per 100 000.⁶

⁶ Z Roelfse-Campbell and K Campbell 'States In The Labyrinth: Insecurity, Crime And Cartels In Columbia And Peru' (1996a) Vol 9 No 2 *Acta Criminologica* 16-25.

2.20 In general, however, South African crime rates are exceptionally high by international standards. Countries such as Brazil, which have more comparable histories to South Africa's, show similar yet less dramatic trends in violent crime.⁷ Brazil witnesses on average 39,000 murders a year,⁸ compared to the approximate 24,000 in South Africa, which has about one third of Brazil's population.

2.21 As the table above shows, these levels of overall crime are high in comparison to crime rates around the world. More importantly, the weight of violent crime in the basket of crimes to which South Africans are exposed is much greater than is the case in those countries – notably in the first world – whose overall levels of crime exceed those of SA. This obviously has important implications for the desirability and feasibility of a VCS in SA since the overall levels of victimisation, as well as the high rates of violent crimes, will generate much greater volumes of eligible claims.

Under-reporting of Crime in SA

2.22 There is a great deal of evidence that the rate of reporting crime in SA is a good deal lower than 100%. Statistics South Africa⁹ reports that for some serious crimes, reporting levels are below 50%. In this category fall such crimes as theft (28%), assault (38%), robbery with force (41%) and sexual offences (47%). Indeed, crimes which are generally very well reported in other jurisdictions were surprisingly under-reported in South Africa, with murder having a recorded reporting level of only 83%. These findings are broadly in line with a number of similar victimisation surveys in South Africa.

2.23 The fact that crime is under-reported in South Africa is no surprise. The history of the relationship between the police and the community under apartheid was hardly conducive to the creation of trust and legitimacy, which are the prerequisites for high levels of reporting. Moreover, although there is some evidence that the black South Africans' impression of the

⁷ Z Roelfse-Campbell & K Campbell 'State And Society In The Fight Against Crime In Brazil' (1996b) Vol 9 No 1 *Acta Criminologica* 20-25.

⁸ Roelfse-Campbell & Campbell, 1996a.

⁹ 1998, p.53-61.

criminal justice system has improved¹⁰, the perception that the police have, through their actions and lack of action, failed to curb the growth in crime has continued to fuel low levels of reporting. In this regard, it is also worth bearing in mind that the relative inaccessibility of policing services exacerbates under-reporting by making it logistically more difficult to report crimes.

Interpreting the Statistics

2.24 Although the statistics used in this chapter can be useful in making broad comparisons, the figures need to be understood in context. Broad statistics can convey the mistaken impression that crime rates are uniform. South African crime, like much else in this society, does not impact equally on all individuals. In general terms, black South Africans are far more exposed to the risk of violent victimisation than are White South Africans, while police crime statistics suggest that White South Africans are more likely to be victimised in property crimes than are black South Africans.¹¹

¹⁰ M Schönteich *Justice Versus Retribution: Attitudes To Punishment In The Eastern Cape* Pretoria: Institute for Security Studies 2000, p.32

¹¹ Source: Altbeker *Crime in Pretoria: A Quantitative Analysis* Pretoria: Idasa 1998.

Distribution of crime in Pretoria (1997)								
STATIONS	All violence	Murder	Rape	Robbery (agg)	Burglary (homes)	Burglary (business)	Theft: MV	Theft out MV
Lyttleton	2.1%	1.8%	1.6%	4.2%	8.2%	5.2%	8.3%	5.2%
Atteridgeville	11.4%	10.5%	11.3%	5.7%	3.1%	1.4%	1.1%	1.7%
Brooklyn	2.3%	1.8%	1.2%	3.9%	8.8%	8.6%	12.9%	13.5%
Eesterust	4.8%	5.5%	2.3%	1.1%	2.2%	1.3%	0.5%	0.9%
Erasmia	2.3%	3.8%	3.7%	3.0%	2.0%	1.1%	0.6%	0.6%
Garsfontein	1.4%	1.8%	0.8%	1.5%	11.6%	2.2%	6.0%	6.8%
Hercules	3.3%	2.3%	2.6%	2.2%	2.8%	3.1%	3.4%	1.3%
Laudium	1.9%	2.0%	1.0%	2.1%	1.0%	1.9%	1.2%	1.9%
Mamelodi	19.8%	19.9%	26.2%	17.5%	5.6%	1.0%	1.6%	2.1%
PTA Moot	1.4%	0.9%	0.6%	0.9%	1.8%	1.9%	3.6%	2.3%
PTA North	2.2%	1.6%	2.5%	2.0%	2.0%	2.8%	2.4%	2.7%
PTA West	4.4%	3.4%	5.3%	3.9%	3.5%	6.8%	4.9%	5.5%
PTA Central	10.8%	6.3%	5.1%	11.2%	2.3%	22.7%	15.3%	14.6%
Rietgat	9.3%	14.5%	13.5%	11.2%	4.0%	1.6%	0.8%	0.8%
Rosslyn	3.4%	4.0%	4.5%	5.4%	5.4%	3.9%	3.3%	1.7%
Silverton	2.0%	1.6%	1.5%	3.2%	4.2%	6.5%	4.2%	5.1%
Sinoville	1.6%	1.1%	1.4%	1.4%	5.0%	1.5%	2.3%	1.8%
Soshanguve	5.9%	8.8%	8.5%	7.1%	2.5%	2.6%	1.0%	1.1%
Sunnyside	4.4%	2.6%	2.2%	4.4%	5.3%	9.9%	16.4%	22.3%
Villiera	1.6%	1.1%	1.2%	1.9%	3.9%	4.8%	2.9%	2.5%
Wierdabrug	2.5%	3.8%	2.2%	5.6%	12.7%	6.8%	5.3%	4.3%
Wonderboompoort	1.3%	0.8%	0.7%	0.6%	2.0%	2.5%	2.1%	1.4%
Townships	51.1%	59.2%	61.9%	42.6%	17.4%	7.8%	5.0%	6.6%

2.25 The table above makes this point explicitly: whereas property crime in Pretoria was concentrated in the suburban police precincts, recorded violent crime was overwhelmingly concentrated in township areas and the inner city – precisely the places where black South Africans are most likely to make their homes. This is evidenced by the fact that the stations reporting the largest proportion of violent crimes are invariably Mamelodi, Atteridgeville, Rietgat, Shoshanguve and Pretoria Central, while the stations reporting the largest proportions of property crime are Lyttleton, Brooklyn, Garsfontein, Pretoria West, Pretoria Central, Sunnyside and Wierdabrug. Moreover, while about 60% of all violent crimes are recorded in township police stations, often less than 10% of property crimes are recorded in the same stations. If crime were evenly distributed, the bulk of all crimes would occur in the most populous station areas. As this is not the case, we can conclude that crime affects different people differently.

2.26 The perception (largely held by White South Africans) that the wealthy are more affected by crime than the poor is, therefore, at best, only partly true. The rich are twice as likely to be

victims of property crime than the poor,¹² but the poor are nearly 80 times more likely to die or get physically hurt by crime than the well-off.¹³ Furthermore, the annual incidence of violence experienced by African women is more than ten times that of their White counterparts¹⁴ These figures are in line with the increasing international evidence that poor people bear most of the brunt of violence in society.¹⁵

THE IMPACT F CRIME ON SOUTH AFRICA'S POOR¹⁶

2.27 In addition to these differences in the level of risk borne by different people in different socio-economic circumstances, there are also fairly large differences in the regional spread of crime, as the table below demonstrates.¹⁷

¹² This figure could be distorted because the rich are also more insured than the poor and consequently may report crime more.

¹³ J Steinberg 'Crime: Beyond 2000' (1999) Issue 4 (Autumn) *Siyaya* 47-49.

¹⁴ Trauma Review, 1996.

¹⁵ Cf. J A Mercy, M L Rosenberg, K E Powell, C V Broome and W L Roper 'Public Health Policy For Preventing Violence: New Vision For Prevention' (1993) 12 *Health Affairs (Millwood)*; A Louw and M Shaw.

¹⁶ Monograph No 14 Pretoria: Institute for Security Studies 1997; HSRC survey cited in Louw & Shaw, 1997.

¹⁷ Source: SAPS Semester Report 1/99.

Recorded 1998 crime per 100,000 (Above/below the national average)						
Province	Murder	Attempted murder	Rape	Assault GBH	Indecent assault	Aggravated robbery
Eastern Cape	1%	-18%	-12%	12%	-29%	-51%
Free State	-28%	-30%	10%	15%	-11%	-59%
Gauteng	31%	37%	32%	10%	1%	156%
KwaZulu-Natal	24%	21%	-17%	-44%	-20%	8%
Mpumalanga	-33%	-18%	-12%	0%	-46%	-36%
North West Province	-34%	-20%	8%	11%	-38%	-43%
Northern Cape	22%	-22%	46%	185%	72%	-78%
Northern Province	-70%	-58%	-38%	-30%	-76%	-76%
Western Cape	46%	43%	29%	36%	239%	-13%
RSA	0%	0%	0%	0%	0%	0%

2.28 In the table, provinces where the average per capita level of crime varies by more than 20% from the national average have been highlighted. It appears from this that Gauteng has a far higher level of violent crime, especially murders, attempted murders, rapes and aggravated robberies, than would be predicted purely on the basis of its population alone. Similarly, the Northern Cape and Western Cape have much higher per capita levels of rape, assault and indecent assault. By contrast the Northern Province has crime levels well below those of the national average.

2.29 That said, there should be some caution exercised in reading these figures as it is widely acknowledged that the distribution of policing resources is also heavily skewed in SA, and it is likely that some of the apparently lower levels of crime in places like the Eastern Cape may simply reflect the difficulties associated with reporting crime and recording it accurately in those areas.

THE IMPACT OF VIOLENT CRIME

Economic and medical cost of violent crime

2.30 There is very little written in South Africa specifically about the physical impact of violent crime. Most studies that look at the impact of violence tend to focus more broadly on what can be termed medical-related trauma. Trauma in this sense of the word, which can include violent crime, motor vehicle accidents and accidental injury, is considered the single largest cause of productivity loss in South Africa and is unparalleled by any other disease as a cause of potential years of life lost.¹⁸ More than 16 per cent of all deaths are due to trauma and this is significantly higher than the World Health Organisation's global figure of 5,2 per cent.¹⁹ Trauma is the second largest cause of overall deaths (after circulatory diseases) in South Africa, whereas in the United States trauma is ranked in fourth place.²⁰

2.31 As was noted, not all trauma-related injury and death can be attributed to violence or violent crime. However, it does seem that much of the trauma seen in South Africa is related to violence. In 1990, of the trauma cases recorded in the Cape Metropolitan area, 34 per cent of injuries and 53,2 per cent of deaths were caused by violence.²¹

2.32 Violence-related deaths and injuries place a significant burden on the health care systems and, for individuals, result in disability, pain and suffering.²² Trauma has a major impact on the financial situation of families, as well as on the national fiscus and economy.²³ A study done at the Trauma Unit at Groote Schuur Hospital on a sample of 969 patients who

¹⁸ MRC Trauma Research Programme at <http://www.mrc.ac.za>

¹⁹ J W van der Spuy and B de Wet 'Trauma - Today and Tomorrow' (1991) 79 *South African Medical Journal* 61-62.

²⁰ Trauma Review, 1993, cited in Louw & Shaw, 1997.

²¹ Trauma Review, 1993 cited in Louw & Shaw, 1997.

²² Marais, 1998.

²³ J W van der Spuy 'The economic impact of trauma' (1996) 6(2) *S.A. Bone and Joint Surgery* 5-11.

had sustained gun shot injuries in 1993 showed a cost of R3 858 331 to the hospital.²⁴ However, medical costs account for only 13% of the total cost of firearm injuries to society according to economists in the USA. The intangible 87% is due to lost productivity as a result of temporary and/or permanent disability or premature death.²⁵

2.33 Clearly, therefore, the sheer volume of crime, as well as the proportion of violent crime, ensures that crime in South Africa is inordinately expensive to the society and individuals. Violent crime affects all people who are victimised by it, but some argue that it takes its toll on the health and lives of the poor in particular.²⁶ In the most extreme cases, the death of income-generating family members appears to be one of the most severe shocks, and causes vulnerable households rapidly to become poverty-stricken.²⁷ A list of the headings under which the economic costs of crime might be summed up might include a range of items. It is important to note that while all of these represent costs to individual victims, some are not losses to the economy, reflecting, instead, a transfer of income from one person to another. Examples of this include expenditure on private security: Although this represents an expense to the potential victim who pays for the service, it represents income for security companies' shareholders and staff. That said, victims might consider the following set of costs as reflecting the sorts of losses they incur both in trying to prevent their own victimisation, and in recovering from their victimisation:

- * productive years lost by victims who are killed or seriously injured, as well as those who emigrate to reduce their exposure to the risk of violence;
- * working days lost during convalescence (which can take many years, especially in the case of violent crimes, rape and, especially, child abuse);
- * reduced productivity following violent victimisation, resulting from post-traumatic stress and damaged morale (especially in the case of violent robberies committed in the workplace);
- * working days lost assisting the investigating officer and attending court;
- * working days lost replacing lost and damaged property;
- * taxes used to pay for the provision of the services of the criminal justice system which go elsewhere;

²⁴ J W van der Spuy and M Peden 'The Cost of Treating Firearm Victims' (1998) August *Trauma Review* at <http://www.mrc.ac.za>.

²⁵ Peden & van der Spuy, 1996.

²⁶ Louw & Shaw, 1997.

²⁷ Cited in Louw & Shaw, 1997.

- * **insurance premiums and payments for private security;**
- * **lost and damaged property;**
- * **medical costs;**
- * **lost investments and economic opportunities flowing from the increased costs of doing business in a high crime environment and from the reduced levels of business confidence, as well as the lost opportunities attendant on the closure of otherwise solvent businesses in the face of criminal victimisation; and**
- * **reductions in the pleasure derived when activities are avoided as a result of a fear of crime.**

2.34 These costs cannot be and have not all been calculated in South Africa, but it is clear that they constitute a drain on the economy of significant proportions. Moreover, while all South Africans incur these losses, victims of crime incur a disproportionate share of many of them. Lost productivity, for instance, while being a loss to the economy as a whole, is a particularly severe loss to the individuals who would otherwise have earned income from their work.

The psychological effects of violence

2.35 Empirical and clinical research shows that suffering of victims is not only in the area of physical and economical loss, but that psychological trauma is a major factor as well. According to current literature, beliefs, expectations and assumptions about the world play a pivotal role in determining the effects of victimisation.²⁸ Janoff-Bulman²⁹ asserts that the experience of trauma shatters three basic healthy assumptions about the self and the world. These are: the belief in personal invulnerability (it won't happen to me); the view of the self as positive; and the belief that the world is a meaningful and orderly place and that events happen for a reason. Violence, or trauma that is inflicted by a fellow human being, shatters a fourth belief: the belief that other human beings are fundamentally benign. These four assumptions allow people to function effectively in the world and to relate to others. After an experience of violence, the individual is left feeling vulnerable, helpless, and out of control in a world that is no longer predictable.

2.36 There is always a significant subjective component in an individual's response to a traumatic event. This can be seen most clearly in disasters, where although a broad cross-section of the population is exposed to the same traumatic experience, individual psychological reactions are markedly different. Some of these individual differences in susceptibility may stem

²⁸ McCann & Pearlman, 1990.

²⁹ 1985.

from pre-existing social, cultural and psychological factors. Individuals' reactions are as much about the actual traumatic incident as they are about their pre-traumatic personality structure and their available personal resources, coping strategies and extended support structure.

2.37 Post-Traumatic Stress Disorder (PTSD) is the most commonly documented impact of violence and is a diagnostic category used to describe symptoms arising from emotionally traumatic experience(s).³⁰ However, PTSD is not the sole response to traumatic experiences. Other psychological issues may confront the individual after exposure to a trauma.³¹ For example, bereavement-related issues are often paramount if, for example, a person close to the victim was killed. Or, in the aftermath of a disfiguring trauma such as a burn, an individual would have to deal with psychological issues around body-image. In addition, it has also been shown that the exposure to traumatic events can be associated with the onset of psychiatric disorders.³²

2.38 Dire social circumstances have made it difficult for individuals to deal with or prioritise past psychological traumas. At times, so-called present difficulties (i.e. occupational problems, substance abuse, relationship breakdowns, *etc.*) are symptoms of long-term traumatisation, which may have been compounded by impoverished living conditions. However, at other times, impoverished living conditions (e.g. over-crowding, hunger, being forced to work away from home, *etc.*) have heightened the primary trauma and have also in themselves caused a range of new psychological difficulties and problems.

SERVICES AVAILABLE TO VICTIMS OF CRIME IN SOUTH AFRICA

2.39 The impact of crime on its victims in terms of trauma and secondary victimisation - ie

³⁰ cf. Hajiannis and M Robertson 'Counsellors' Appraisals of the Wits Trauma unselling Model: Strengths and limitations' (Paper presented at the Traumatic Stress in South frica Conference, Johannesburg, South Africa) 27-29 January 1999.

³¹ B Hamber and S Lewis 'An Overview of the Consequences of Violence and Trauma in South Africa' (Occasional paper) Johannesburg: Centre for the Study of Violence and Reconciliation 1997.

³² Z Solomon, M Mukilincer and H Flum (1988). 'Negative Life Events, Coping Responses And Combat-Related Psychopathology: A Prospective Study' Vol 97 No 3 *Journal of Abnormal Psychology* 302-307.

unsympathetic or inappropriate responses which actually worsen its effects - is highly significant. It is furthermore exacerbated by several factors that are inherently South African. These relate particularly to the police and other agents of the criminal justice system, which were previously regarded as victimising institutions by the majority of South African citizens.³³

2.40 Victims of crime have certain emotional and practical needs, including trauma counselling, advice and referral, information on court procedure, and compensation. If these needs are not urgently addressed, and the victim's position in the criminal justice system is not drastically reformed, it will further contribute to legitimacy crisis of the criminal justice system in South Africa.³⁴

2.41 In countries abroad victims of crime find themselves in a much better position than in South Africa. In those countries victim support systems offer services necessary for support in the form of programmes aimed at giving emotional support, practical aid and promotion of the rights of victims of crime. In South Africa there are limited support services for particular categories of victims only and at present there is no single organisation representing the victim or promoting their rights. This situation is, however, changing dramatically in South Africa.

2.42 On the whole, services available to victims of crime in South Africa are generally inadequate and limited in their accessibility. Historically, victim support services in South Africa have been provided by community-based organisations (CBOs) and non-governmental organisations (NGOs), but these are limited in their scope and reach. The mainstay of the government's attempts at victim support was the establishment of the Victim Empowerment Programme³⁵ in 1996.

³³ L Camerer "A victim movement for South Africa" 31.

³⁴ L Camerer "A victim movement for South Africa" 31.

³⁵ VEP Status Report 'Status Report With Regard To The Victim Empowerment Programme Covering The Period 1 January 2000 To 31 March 2000' Department of Welfare 2000.

The Victim Empowerment Programme³⁶

2.43 The VEP is one of the key components of the National Crime Prevention Strategy (NCPS National Crime Prevention Strategy).³⁷ The NCPS advocates a victim-centred approach to combating and preventing crime and violence. Within this broadly restorative justice strategy it is argued that victim empowerment and support can make an important contribution to crime prevention. VEP emphasises crime as a social issue rather than a security issue. The ultimate purpose of the programme, as captured in the VEP mission statement, is ***to provide a caring and supportive service to victims of crime that is accessible, timeous and thorough, thus contributing to a sense of empowerment and an environment conducive to peaceful communities.***

2.44 Effective victim empowerment would mean that services for victims of crime would be:

- * available, accessible, thorough and professional;
- * rendered in an empowering, respectful and supportive manner;
- * co-ordinated and integrated effectively;
- * efficient in providing all the necessary information on available services to victims; and
- * efficient in providing information on the progress of relevant criminal investigation and information on procedures and processes to victims;

2.45 Currently, the programme is co-ordinated and implemented by the Department of Social Development together with an inter-departmental and inter-sectoral Victim Empowerment Management Team, which consists of the Departments of Social Development, Health, Correctional Services, Justice, Education and the South African Police Service, relevant NGOs and provincial coordinators.

2.46 Since the inception of the VEP, the number of available services for victims has increased. The Department of Social Development has developed national projects aimed at achieving the objectives of the VEP. These include the following:

³⁶ Thanks to Suzette Kotze from the Department of Social Development, Victim Empowerment Programme, for her comments on this section.

³⁷ Document produced by an Inter-Departmental Strategy Team consisting of the Departments of Correctional Services, Defence, Intelligence, Safety and Security Justice and Welfare May 1996).

- * guidelines for voluntarism in victim empowerment;
- * expansion and/or duplication of a one-stop services project including domestic violence projects;
- * research and co-ordination;
- * undertaking victim of crime surveys;
- * programmes which prevent and respond to violence against women;
- * programmes for perpetrators of violence;
- * programmes for establishing shelters for abused women and children;
- * training social workers and lay-counsellors in the implementation of the Domestic Violence Act;
- * developing a resource directory on domestic violence for referral purposes;
- * programmes which prevent and respond to rape and sexual offences;
- * integration of victim-empowerment, economic and HIV/Aids programme; and
- * establishing trauma response units

2.47 At provincial level, the Department of Social Development is partially funding various NGOs and CBOs that are implementing the VEP. In some provinces they have appointed Project Managers to oversee the functioning of these funded projects. Furthermore, the Department of Safety and Security has been involved in training its police in trauma management and victim-empowerment. A number of police stations have opened Trauma Centres to assist victims of various crimes. The Department of Health has also taken an initiative in training the primary health care practitioners in victim empowerment and trauma management in different provinces. In addition, the Department of Justice has made legal provisions to counteract domestic violence in rural communities.

2.48 Besides these government-driven initiatives, there are various NGOs and CBOs which are providing services to victims of various crimes and some of these have been involved in training and providing expertise to the projects initiated by the government. A number of trauma clinics exist across the country and various primary level health care professionals have been trained by NGOs to provide frontline assistance. Research has shown that partnerships, between NGOs, community stakeholders, community police forums, government departments and others, are considered crucial to improved support for victims.³⁸

³⁸ Independent Projects Trust 'No Excuses: Implementing the Victim Empowerment Programme' (2000) No 20 (Winter) *Crime and Conflict* 12-15.

The Charter of Victim Rights³⁹

2.49 There have also been some developments regarding the establishment of a Victims' Charter in South Africa. In 1998, the Department of Justice developed the first draft of the Victim Charter. This was based on international standards of victims' rights. This draft has been developed into a more comprehensive charter after the comment of a variety of stakeholders has been gathered. The types of rights focused on in the draft charter include:

- * the right to be treated with respect and dignity;
- * the right to offer information and to be heard;
- * the right to receive information;
- * the right to legal advice and timely processing of criminal proceedings following the arrest of an accused, within reasonable bounds;
- * the right to protection;
- * the right to restitution; and
- * the right to assistance.

2.50 It is hoped that the Victims' Charter will educate victims about their rights and improve the accountability of service providers who interface with victims (e.g. hospital staff, police, **etc**). The Victims' Charter is considered to be part of a holistic policy on victim empowerment, which will play a role in reducing incidents of secondary victimisation, experienced by victims within the criminal justice system. The draft charter also aims to ensure that the justice system strikes a balance between the rights and dignity of victims and the rights of accused persons.

2.51 Specifically, in terms of the right to compensation and restitution, it is important to note that the draft charter does not include a broad right to compensation, i.e., a unilateral right to compensation from the state if one is a victim of crime. At this stage the right to compensation (restitution) only exists in so far as the victim has a right to receive restitution from the offender, with the court having discretion about whether or not to grant a compensation order to this effect. The right to redress for damages through normal civil law channels is also stipulated.

Evaluating the Victim Empowerment Programme

2.52 A number of successes have been achieved thus far, including the building of partnerships that have resulted in the participation of various role players in co-ordinated

³⁹ Information on the Victims' Charter was extracted from a progress report issued by the Department of Justice and Constitutional Development, Subject: South African Victim Charter of Rights, August, 2000. Thanks to Marie Swart for supplying this information.

projects based on a shared concern for victims. An integrated business plan has been developed and approved, which consists of inter-sectoral and departmental objectives with detailed action steps and performance indicators for each step. A victim survey was conducted by Statistics South Africa,⁴⁰ which has provided information on the nature and prevalence of victimisation in the country.

2.53 A total of 66 VEP projects have been established at a provincial level. The majority of these aim to operate on the basis of '24 hour one-stop service centres'. Victims receive a range of services rendered by trained professional and/or volunteer staff. Each project reaches at least 20 victims per month, which means that 1 320 victims per month have access to services that did not exist in the past. A resource directory on domestic violence has been compiled. A number of VEP training programmes for primary health care practitioners, police and social workers have been conducted.⁴¹

2.54 However, there are a number of gaps in the implementation of the VEP. Service delivery for certain groups and in certain areas remains limited. The majority of the projects funded by the government are concentrated in the urban, peri-urban and semi-rural areas; the rural areas still remain under-resourced.

2.55 In terms of broad successes, there has been a general increase in victim support services at a level of basic psychological first aid. This may be sufficient for many victims. However, research suggests that a percentage of people exposed to violence may develop post-traumatic stress disorder, which requires more specialised intervention.⁴² There is a serious gap in the provision of professional services and those that do exist are based in major cities. Rural and outlying areas do not have access to such services.

2.56 Another shortcoming of existing victim support services is the failure to evaluate levels of service delivery and an absence of defined standards. This makes it difficult to determine whether existing services are adequate. In certain provinces, provincial VEP managers and a national VEP manager have not yet been appointed. This has resulted in ineffective co-

⁴⁰ Statistics South Africa, 1998.

⁴¹ VEP Status Report, 2000.

⁴² M J Scott and S G Stradling *Counselling for Post-Traumatic Stress Disorder*. London: Sage 1992.

ordination of VEP strategies in certain areas. A further obstacle is that state service providers such as police, social workers and primary health care practitioners are expected to include victim empowerment as part of their day-to-day job function, in addition to their other responsibilities. Most frontline workers are already overstretched and under-resourced without this additional responsibility. This impacts on their ability to dedicate the necessary time and energy to the delivery of effective victim empowerment services.

2.57 A further gap in the delivery of effective victim empowerment relates to a shortage of resources within the various sectors, which leads to increased levels of secondary victimisation. Examples of this include shortages of cars to investigate crimes, a lack of private interviewing rooms for police and social workers in certain areas and unavailability of district surgeons, to name but a few.

2.58 In conclusion, it is evident that victim empowerment as a philosophy and approach has, to some degree, been entrenched in several government departments. A number of new programmes have also been set up to service victims of crime and improvement is evident in some areas, but few of these have been evaluated in detail. However, a significant gap persists between policy-making and implementation. Inter-sectoral co-operation remains an ongoing problem and an imbalance exists between various departments in their engagement with providing victim support and services. The provision of services to victims is undermined across the board by a general lack of resources, resulting in on-going inconsistencies in the number of services available to victims of crime in the urban areas relative to those in the rural areas. Overall, psycho-social services for victims of crime remain underdeveloped.

PART I**CHAPTER 3****COMPENSATION IN SOUTH AFRICAN LAW****INTRODUCTION**

3.1 This chapter will focus on the complex debates surrounding the establishment of a compensation scheme for victims of crime in South Africa. It will begin by providing an overview of the South African law and allied schemes of reference relevant to compensation and the making of civil claims. A discussion on recovering compensation from the offender in the South African context follows and a summary is given of the main parameters applied by most international compensation schemes, i.e., the mandate of the scheme, the type of crimes eligible for compensation, as well as who would qualify to apply to the scheme for compensation. Each of these is discussed using international comparative data. The information provided in this chapter and chapter 4 is considered the skeleton upon which any legislative framework for a South African compensation scheme would have to be based.

3.2 Victims of violent crime in South Africa, and, in fact, across the world, generally feel alienated and frustrated with the criminal justice system¹. This is demonstrated by a finding by a Statistics South Africa report² which found that over half of the victims who reported serious crimes to the police were dissatisfied with their interactions with them, with those who experienced more serious and violent crimes being the most likely to be dissatisfied.

3.3 Consequently, the status and treatment of victims of crime has received increasing attention in recent years. The South African government is attempting to transform and improve the criminal justice system across the board. It has also developed a Victim

¹ South African Law Commission, Project 82 - Sentencing, Issue paper 7, *Restorative justice* p.8.

² 1998, p.65-67.

Empowerment Programme (VEP) to assist the victimised. Victim empowerment, potentially including systems of compensation, aims to address the negative effects of crime on victims through providing a meaningful role for victims in the criminal justice system. The philosophy of victim empowerment endorses the need for victim-orientated services that are easily accessible within the criminal justice system. Apart from reducing the negative effects of crime, compensation could provide an important symbolic recognition of a victim's suffering and loss and is consistent with the VEP principle of viewing the victims' needs as central. However, no compensation exists for victims of crime in South Africa outside the courts' prerogative to enforce a restitution order on the offender if convicted and the proposed right to restitution as outlined in the draft Victim's Charter.

OVERVIEW OF SOUTH AFRICAN LAW AND ALLIED SCHEMES OF RELEVANCE

3.4 Before the arguments for and against the setting up of a compensation scheme in South Africa are explored, it is important to first review what related systems exist for providing compensation, including a brief outline of the law of damages and the current legal remedies for providing compensation to victims.

DAMAGES IN SOUTH AFRICAN LAW

3.5 The law of damages deals with the content of the right to compensation. Damages can only be awarded when there is a recognised cause of action on which the recovery of monetary compensation is based.

*** Delictual actions**

3.6 A delict in South African law is the act of a person which, in a wrongful and culpable way, causes harm to another.³ The notion of the wrongfulness of the causing of harm to another is an obvious and essential component of all legal systems, and is a basic premise of South Africa's common law. This premise has also been recognised by the Bill of Rights in the South African Constitution⁴ which provides that everyone has the right to human

³ J Neethling, J M Potgieter and P J Visser *Law of Delict*. Durban: Butterworths, 1990, p.4.

⁴ Act 108 of 1996.

dignity (section 10), the right to life (section 11) and the right to security of her/his person (section 12).

3.7 There are five elements of a delict: namely an act, wrongfulness, fault, harm and causation.⁵ If one of these elements is missing, no delict exists and, accordingly, no liability. In South African law, a distinction is made between delicts that cause patrimonial financial damage and those of an intentional nature, which cause injury to personality.⁶ The South African law of delict allows a third action for pain and suffering in terms of which compensation for injury of personality is allowed as a result of the wrongful and negligent (or intentional) impairment of the bodily or physical-mental integrity.⁷

3.8 Delictual actions are private law actions. The principal difference between private law and public law is that private law is directed at the protection of the individual or private interest, whilst public law aims to preserve the public interest. Delictual remedies are compensatory in nature, compensating the prejudiced person for the harm the wrongdoer has caused. Criminal sanctions are distinguishable from this in that they aim to punish the offender for the transgression committed against the public interest.⁸ It is important to note, however, that one act may have both delictual and criminal consequences.

3.9 The law of delict allows compensation for damage. This compensation takes the form of a monetary award for the impairment or loss suffered by a person. The object of an award of damages is to place a party whose rights have been violated in the same position, as far as money can do so, as if his/her rights had been observed.⁹ In certain circumstances, damage or loss cannot be compensated, in which case damages aim at

⁵ Causation is the causing of damage through an act.

⁶ The *actio legis Aquiliae* allows for damages to be claimed for wrongful and culpable (intentional or negligent) causing of patrimonial damage. The *actio iniuriarum* is directed at granting satisfaction for a wrongful and intentional injury to personality (see Neethling *et al.*, 1990, p. 5).

⁷ Neethling *et al.*, 1990, p. 5

⁸ Neethling *et al.*, 1990, p. 7.

⁹ H J Erasmus and J J Gauntlett 7 *LAWSA 10*. Durban: Butterworths 1995.

compensating injury by effecting retribution for the wrong and by satisfying the victim and the community's sense of justice.¹⁰

3.10 There is an obligation on victims to take all reasonable steps to mitigate the loss they have suffered. Damages are awarded for pain and suffering, shock, disfigurement, loss of amenities of life and shortened expectation of life where physical and mental injury has occurred. This is additional to damages arising, for example, from pecuniary or financial losses, such as loss of income, and to damages awarded for intentional injury to personality, such as defamation. The amount of damages awarded in cases of physical or mental injury must bear a relation to the loss suffered. This involves a consideration of the intensity of the injury, its nature and duration determined in conjunction with considerations of fairness.

3.11 A delictual debt usually prescribes three years after it originated. The dependants of a breadwinner killed or injured in a wrongful and culpable manner may claim damages for loss of maintenance arising out of their personal right to maintenance from the breadwinner. For such a claim to be successful, a legal duty of support must be proved.

* **Liability without fault and by virtue of legislation**

¹⁰ Neethling *et al.*, 1990, p. 178.

3.12 Liability without fault is created in certain instances by legislation. In addition, the courts have also developed the concept of liability without fault over time.¹¹ In the case of legislation, the extent of liability is often limited by the law fixing maximum amounts of compensation payable. Legislation will also usually detail the period within which a claim must be lodged, after which they will prescribe.

3.13 Compensation schemes are examples of statutory payment schemes that accept liability without the scheme (or the State) itself being at fault. These schemes apply the principles of damages law outlined above to varying extents in their work and in the finalisation of claims. Specific examples of compensation schemes in South Africa created by legislation include compensation for occupational injuries or diseases and for injuries or deaths arising out of road accidents. In the case of occupational injuries or diseases, maximum compensation awards are provided by legislation, with specific amounts attached to specified injuries. This scheme is similar in this regard to Great Britain's tariff system on which compensation awards for victims of crime are based. In South Africa, legislation also provides for maximum compensation awards in cases of road accidents, and in certain circumstances, according to whether the claimant was travelling in the negligent vehicle or not. However, there exists no statutory cap on the maximum compensation payable by the scheme in cases in which the claimant was not travelling in the negligent vehicle.

3.14 Claims made against compensation schemes in practice are usually settled administratively before any court action is taken by a claimant. Where a statutory cap or limit on compensation does not exist, common law principles and legal precedent by way of previous court decisions are used to determine the amount of compensation offered to the claimant. Where a dispute arises between the claimant and the scheme, the claimant is entitled to approach the court for assistance.

¹¹ For example, in claims against the owner of an animal for damages caused by such animal.

3.15 Various examples of South African compensation schemes exist. These provide important insights into the structure, functioning, successes and potential pitfalls that could be experienced in the event that a compensation fund for victims of crime were to be established. Such funds have often been plagued by administrative inefficiencies and have been exposed to fraudulent claims. The Road Accident Fund has experienced difficulties with the involvement of lawyers in the application process, and has been required to pay extensive legal costs.¹²

3.16 The Compensation Commission has experienced its own administrative inefficiencies and delays in the settlement of claims. The experience of such statutory compensation schemes, it is recommended, should be carefully considered in the event of the establishment of a compensation scheme for victims of crime.

*** Compensation for Occupational Injuries and Diseases**

¹² Recently, lawyers have been accused of professional misconduct regarding over-charging of accident victims on whose behalf they have claimed from the fund.

3.17 The 1993 Compensation for Occupational Injuries and Diseases Act (*see Appendix Two for full parameters*) requires that certain categories of employers contribute to a fund that covers claims lodged by employees for occupational injuries and diseases. Claims can be made to this fund by an employee injured during the course and scope of duty, or if an occupational disease is contracted. A deceased employee's dependants may also, under specified circumstances, lodge claims.¹³ Employers pay into the fund on a monthly basis, with certain exclusions. Employees do not contribute to the fund. A Compensation Commissioner is appointed in terms of the Act to administer the fund and employees are compensated by the fund.

3.18 For compensation to be paid, a claim must be made within 12 months of the accident, death or disease, and an employee must have been off work for 3 days or more. No compensation is payable if an employee's own misconduct caused the accident, unless death or serious disability resulted, or if medical treatment is unreasonably refused by an employee.

3.19 Compensation is payable at a percentage of an employee's wage at the time of injury, death or disease for permanent or temporary disability, death, medical expenses (for a maximum of two years from date of accident, including medicine) and additional compensation. The fund does not provide compensation for pain and suffering. In cases of permanent disability, degrees of disability are set out in the Act and compensation for permanent disability is paid either as a lump sum or as a pension. A widow/er, common law spouse or dependants may submit a claim for death benefits. Death benefits are paid as a lump sum and a monthly pension.

3.20 An objection to the decision of the Commissioner may be lodged within 90 days from the date on which the employee became aware of the decision. The Commissioner is required to convene a formal hearing to review the decision. At this hearing the applicant is entitled to representation by a legal representative or trade union official or family member. The applicant is entitled to call expert evidence. After representations, the Commissioner

¹³ Employees excluded from the ambit of the Act are domestic workers, members of the South African National Defense Force (SANDF) and South African Police Service (SAPS), independent contractors or employees who work outside of South Africa for more than 12 months at a time. Farm workers and casual workers are included.

will make a final decision. This decision is reviewable in the High Court.

3.21 It was reported recently that difficulties seem to be plaguing the compensation scheme for occupational injuries and diseases. According to the Senior Deputy Compensation Commissioner, Kefilwe Tselane, R637,4m in compensation and R716,9m in medical bills will be paid out for the year 1999/2000.¹⁴ Approximately 290,000 new claims are reported each year. There are also about 100 000 files from previous years, which are still open, largely owing to outstanding or incomplete documentation from employers and doctors. In the claims environment, the backlog is 15 000 and 10 000 respectively to be handled by the compensation and medical sections.

3.22 A review of the records at the Workers Occupational Health Clinic in Woodstock, Cape Town, from 1991 to 1997 shows that 17% of successful claimants, most of them suffering from cancer, died before their compensation was paid out. Of the 22% of claims that were rejected at first submission, 15% were successful on appeal.¹⁵ Other major flaws in the system are said to include the facts that pay outs are calculated according to income, and as a result, the system is biased in favour of those in higher income brackets. Lack of compliance with the system by employees has also been highlighted as problematic. Employers do not complete injury-on-duty forms because they want to keep injuries out of the records to keep up their accident-free hours.¹⁶

* **The Road Accident Fund Act_**

3.23 The Road Accident Fund Act¹⁷ established the Road Accident Fund, which pays compensation for physical injury or death (as opposed to proprietary loss or damage) wrongfully caused by the driving of motor vehicles, whether the identity of the owner or the driver thereof, or both, has been established or not.

¹⁴ Business Day, 15 March, 2000.

¹⁵ Business Day, 15 March, 2000

¹⁶ Business Day, 15 March, 2000.

¹⁷ Act No. 56 of 1996.

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

3.25 The Act prescribes a limit of R25 000 in respect of the payment of compensation in specified circumstances, including where the injured person was a passenger in or on the negligent vehicle.¹⁸ An injured party has three years within which to claim compensation, after which the claim will prescribe. Prescription of a claim for compensation does not, however, run against a minor, a person detained as a patient in terms of any mental health legislation, or a person under curatorship. The Act prescribes that any compensation award shall be reduced by the amount of compensation paid in terms of the Occupational Injuries and Diseases Act, Defence Act or any other legislation, should this apply.

3.26 Currently, the Road Accident fund seems to be beset by administrative difficulties. A commission of inquiry has been proposed to try and set the system on a sound financial footing. The Road Accident Fund currently has a deficit of about R10bn and had a reported operating loss of R771m in the 1998-99 financial year.¹⁹

* **Other state compensation funds**

3.27 The Fund Raising Act²⁰ provides for the establishment of the Disaster Relief Fund, the South African Defence Force Fund, the Refugee Relief Fund, the State President's Fund and the Social Relief Fund. Each fund is, in terms of the Act, to be managed by a board of not more than fifteen members appointed by the Minister. According to the mandate of the fund, the board of each fund is tasked with providing assistance to those in need, which is 'fair and reasonable'. The board may collect contributions, in addition to government funding received, and is tasked with distributing monies in accordance with its mandate. A

¹⁸ It also denies the payment of compensation to certain other persons under specified circumstances.

¹⁹ Business Day, August 29, 2000.

²⁰ Act No 107 of 1978.

fund may therefore receive donations from third parties in addition to government funding.

* **Reparations through the Truth and Reconciliation Commission**²¹

3.28 Based on the findings of the Truth and Reconciliation Commission's²² (TRC) Amnesty Committee and the Human Rights Violations Committee, the Reparations and Rehabilitations Committee (R&R Committee) was mandated to design a policy of how best to assist those found to be victims. In this sense, the term 'victims' includes the direct survivors, family members and/or dependants of someone who has suffered a politically motivated gross violation of human rights associated with a killing, abduction, torture or severe ill-treatment between 1960 and May 1994 in South Africa. The R&R Committee was obligated to make recommendations to 'reparate' these victims for the damages they had undergone in the conflicts of the past. To this end, and according to the Promotion of National Unity and Reconciliation Act²³, the TRC had to make recommendations to the President with regard to:²⁴

Policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims.

3.29 The R&R Committee made such recommendations in the final report of the TRC that

²¹ See Hamber (2000) for a detailed discussion on the TRC's reparation process, as well as selected articles at ReconciliationNet (<http://www.reconciliation.org.za>).

²² Although not directly relevant to victims of crime (without a political motive) the work of the Truth and Reconciliation Commission is worth briefly mentioning, as it is South Africa's newest process focusing on compensation and some important questions of relevance are raised by the scheme.

²³ Hereafter the TRC Act.

²⁴ *Promotion of National Unity and Reconciliation Act*, (Section 40-f).

was handed over to President Mandela on 29 October 1998.²⁵ According to the TRC Act the policy could recommend any reparation measures in the form of compensation, **ex gratia** payment, restitution, rehabilitation or recognition. The TRC final report makes a number of suggestions that utilised most of these measures. The President and Parliament have to decide whether or how the policy will be implemented.

3.30 The TRC opted for an approach that did not utilise a means test for each victim. Seemingly, this was dismissed because of cost, and the resources necessary for grading the psychological and physical injuries of the approximately 18 000 to 20 000 victims. The policy states that relatively equitable urgent and individual financial grants for each person 'found to be a victim' should be made available through the government. A range of other strategies (e.g. symbolic measures and offering more services) to assist victims was also recommended.

²⁵

See the TRC Final Report, Volume 5, Chapter 5 for the full Reparation and Rehabilitation Policy.

3.31 In line with the demands of the TRC Act, the TRC also had to consider the granting of urgent interim reparations. To this end, the R&R Committee has proposed that the financial component of reparation be distributed in two phases. First, those found to be victims will be given an urgent one-off payment ranging from a baseline of approximately R2 000 up to R6 000 in exceptional circumstances.²⁶ Urgent payments began in June 1998 some 18 months after the TRC began operating. In 1998, R600 million was allocated to a three-year cycle for reparations. To date, R32 million has been spent²⁷ compensating about 12,000 victims approximately R3 500 each, as part of the urgent interim-reparations process.

²⁶ The grants vary as the TRC has factored in variance related to the number of people living in the 'victims' house or whether the survivor or family member of a victim lives in a rural or urban area. This was done because services in rural areas, for example, are more costly than in urban areas. No victim, however, will, if government implements the policy, receive more than R23 023 per annum.

²⁷ Tutu, Sunday Independent, 21 May 2000

3.32 After this initial grant, a longer-term individual financial grant scheme is proposed by the TRC. If the government accepts this proposal, it will mean the government will be paying out approximately R2 864 400 000 over a six-year period to some 22 000 survivors. This would work out to roughly R17 000 to R24 000 per victim²⁸ for each year over a six-year period, i.e., roughly R 480 million per year. However, government has still not debated this policy substantially in Parliament, despite the fact that it is nearly two years since the recommendations were made.²⁹

3.33 The reparation process, although incomplete, raises a number of important issues in the South African context. Firstly, it is important to note that payouts like those proposed by the TRC are not uncommon following political violence and, as a result, governments have had to carry heavy fiscal burdens. The most well known case is that of the Holocaust. Fifty years after the liberation of the Nazi concentration camps, the Federal Republic of Germany has paid out more than \$50 billion in the form of reparations to the State of Israel and indemnification to Holocaust survivors.³⁰ The German Finance Ministry estimates that it will pay out almost \$20 billion more by the year 2030.³¹

3.34 In Chile - a country with a GDP per capita not very much higher than ours - about R120 million per year is still spent by the state on compensation for victims whose rights were violated during the military dictatorship of General Pinochet. Children of those killed during the Pinochet regime have a right to a monthly pension until they reach 25 years of

²⁸ In 1997 the average annual household income was R21 700. This was used as a benchmark by the TRC in the design of the monetary package. The Final Reparations Policy notes that, 'The poverty line of R15 600 per annum was rejected as a benchmark, as this would be condemning victims to a life of near poverty, rather than one of minimum dignity' (TRC final Report, Volume 5, Chapter 5, 69). These amounts are not comparable to what a survivor might have received in a civil claim, which would be substantially greater. A civil claim, however, would not be guaranteed in most cases.

²⁹ See ReconciliationNet at <http://www.reconciliation.org.za> or updates on reparations process.

³⁰ M Wise 'Reparations' (1993) October *The Atlantic Monthly*.

³¹ Wise, 1993.

age. For the rest of the beneficiaries, the pension is for life. The monthly pension is between R1 400 and R2 000 for the family of the deceased, depending on the number of dependants. About 800 scholarships a year are also granted to the families of victims. Victims also get free medical and psychological care.

3.35 Second, other schemes aside, the TRC opted for an option that did not utilise a means test as they thought it too expensive. Average incomes were used as benchmarks for calculating potential payments. Furthermore, where there were variations in payments (urgent interim payments), these were slight and based on factors like household size and location (urban versus rural).

3.36 Third, the TRC was forced, as would be any compensation scheme, to define its criteria for eligibility. It used the categorisation of 'victim' as defined by the TRC to do this. Fourth, the TRC adopted a broader notion of compensation (reparation), which included financial and other recommendations aimed at assisting victims. Fifth, like all the schemes outlined in this section, it is clear that the administration of the schemes has hampered the progress of the TRC. As was noted above, the urgent payments of the TRC took nearly two years to be realised. Clearly, the costs of processes of reparation are also incredibly high if the TRC's proposals (for about 18 000 to 20 000 people) is anything to go by.

3.37 Finally, political will clearly has an influence on processes involving matters such as compensation. The lack of government movement on the TRC's proposals is indicative of the fact the TRC process is no longer at the centre of government strategy, and, no doubt, the potential cost of the scheme remains a governmental concern which is currently overriding the principle of a right to claim reparation.

COMPENSATION FROM THE OFFENDER

3.38 The first recourse that victims have following a crime - and assuming that the offender is arrested and is liable for prosecution - is directly from the offender via a civil claim, or in some countries, through a compensation order made in the sentencing of the offender. In most foreign jurisdictions, a victim is usually entitled to lodge a civil claim against the perpetrator or obtain compensation from the perpetrator during the course of criminal proceedings. Both methods usually have limited success and, even when successful, will only assist victims whose cases have actually reached court, and who can

afford to pay.

3.39 The methods used to increase the levels of compensation recovered from offenders differ between jurisdictions, with these often being more complex in common law than in civil law jurisdictions. However, few international efforts in this regard have been overly successful due to the complexity and expense, as well as the existence of some levels of resistance in the criminal justice system. In some jurisdictions it is a prerequisite that the victim has sought, or is willing to seek compensation from the offender before the state scheme will even consider the victim's application. State victim compensation is therefore generally treated as a secondary source of compensation (the principle of subsidiarity).

3.40 In South Africa, sections 297 and 300 of the Criminal Procedure Act 51 of 1977 make provision for the court, after finding an accused person guilty, to order the convicted person to pay compensation to the complainant. Section 300 is expressly limited to compensation for 'damage to or loss of property (including money) belonging to some other person' limited to R300 000 in the regional court and R60 000 in the magistrate's court.³² This provision requires that an application be made by the injured person or the prosecutor acting on the instruction of the injured person. The effect of an award in terms of this section is the same as that of a civil judgement. However, it is not deemed punishment. For such an order to be made, there must have been a conviction. Courts have held that a compensatory order is not a form of correctional supervision and that a failure to comply with such an order does not entitle a court to reconsider or impose any other punishment.³³

3.41 Section 297, which deals with the conditional or unconditional postponement or suspension of sentence, allows the presiding officer to make the payment of compensation to a victim a condition of the suspension or postponement of sentence.³⁴ It has been held by

³² Maximum compensation is determined from time to time by the Minister in the Government Gazette. Current figures are gazetted in Government Notice R1410 of 30 October 1998 (Government Gazette 19435).

³³ In this regard see the case of *S v Medell* 1997 (1) SACR 682 (C).

³⁴ A sentence may be suspended for a period not exceeding five years, apart from cases in which a minimum punishment is prescribed by law. Unlike suspension, in which part of a sentence may be suspended, only the whole of a sentence may be postponed. The postponement of part of a sentence is not permitted.

South African courts that compensation is an important part of the criminal process and that where it is possible to compensate the victim for damages sustained through criminal conduct, this should be done.³⁵

3.42 Orders for compensation are, however, usually not considered 'unless the complainant requests the public prosecutor to apply to the court for an order and complainants seldom make use of the provisions because they are either not present or they don't know about the provisions of the act'.³⁶ Compensation orders are, therefore, usually only granted in circumstances in which an offender is not sentenced to a period of imprisonment.

³⁵ S v Charlie 1976 (2) SA 596 (A).

³⁶ South African Law Commission, 1997, p. 13.

3.43 Sections 297 and 300 have several limitations, particularly in relation to offences involving violence against the person.³⁷ Postponement of sentence on condition of the payment of compensation has generally been held to be suitable only for trivial offences and, therefore, would not be an option for sexual offences and offences of violence other than some assaults. Proper enforcement within the criminal justice system of this legislative provision remains an overriding difficulty.

3.44 According to Van Dokkum³⁸, it would, however, be competent for the presiding officer to suspend (for no longer than five years) a whole or a part of the sentence on condition that the convicted person pays a stipulated amount of compensation to the victim. Thus, if Section 297 were properly enforced, the convicted person would have an interest in raising the money, consequently pursuing that option more vigorously.³⁹

3.45 Where a period of imprisonment is handed down, it is unlikely that the offender would be able to pay compensation to a victim, unless such offender has available assets or is able to raise the money. Similarly, where an offender receives a fine in addition to a compensation order in terms of section 297, this will reduce the likelihood that compensation can be paid.

3.46 In South Africa, it is, therefore, only when the entire sentence is suspended on condition of payment of compensation that it is likely that an offender could be induced to pay compensation to the victim. However, the suspension of a sentence in cases of serious criminal transgressions may well be contrary to considerations of public interest and safety. The Criminal Procedure Act's provisions pertaining to compensation, therefore, appear to have little relevance, particularly in relation to serious offences involving violence against the person, which tend to be the main focus of most of the existing systems of compensation in developed countries.

3.47 Recently, the South African Law Commission has proposed the amendment of

³⁷ N van Dokkum 'Compensation For Victims Of Sexual Crimes' (1997) Vol 10 No 2 *South African Journal of Criminal Justice* 285-6.

³⁸ 1997.

³⁹ Van Dokkum, 1997.

legislation to facilitate greater access to compensation by victims through the process of sentencing following conviction of an accused person. There is value in law reform initiatives to improve the capacity of the criminal justice system to make reparative orders. However, even an improved system is likely to be affected by the problems outlined above. Furthermore, the efficacy of such amendments will strongly depend on the ability of the criminal justice system to arrest and convict offenders.

3.48 There are no available examples of effective systems of compensation in other jurisdictions which rely primarily on payments made by the offender. Furthermore just as there is often little point in a court order for compensation in terms of section 297, in most cases of violent crime there is little that the victim can gain from a civil action as the offender is more often than not unlikely to be able to fulfil any civil judgement against him or her.

CONCLUSION - COMPENSATING VICTIMS OF CRIME

3.49 The above section helped draw attention to some of the legal and practical implications of compensation schemes (in their various forms) in the South African context. Whilst South Africa has experience in the sphere of awarding compensation to victims, none of this experience focuses directly on compensating victims of crime. International experience is, therefore, instructive in understanding different approaches to the basis for, and consequences of, providing compensation to crime victims specifically.

PART I**CHAPTER 4****COMPENSATION SCHEMES FOR VICTIMS OF CRIME - A COMPARATIVE OVERVIEW**

4.1 This chapter will point to some of the key international experiences in relation to granting compensation to victims of crime. This section, therefore, turns attention much more directly towards compensation schemes for victims of crime. It briefly sketches an overview of some compensation schemes for victims of crime and then debates the merits (and demerits) of such schemes for South Africa.

OVERVIEW OF INTERNATIONAL COMPARISON AND EXPERIENCE

4.2 Compensation schemes for victims of crime are now to be found throughout the western world⁸² and in Japan. In 1998/1999 the Office for Victims of Crime within the United States Department of Justice contacted victim assistance programmes throughout the world to see if compensation to victims of crime was offered in their country. They received 115 responses. Of these, 29 countries, including the United States, were identified as providing some form of compensation to victims of crime. These were compiled into the International Crime Victim Compensation Program Directory⁸³, which outlines the parameters of the various schemes (i.e. eligibility requirements, who can claim, procedures, size and type of benefit, 'compensatory' costs and funding sources, etc).

4.3 In reviewing the directory, it is apparent that few compensation schemes are to be found in the developing world. No African countries have compensation schemes. No evidence of compensation schemes for victims of crime in Latin America was found. In Brazil, there is also no financial compensation provided by the state for the victims of common crime. In some Brazilian states, the government has created services to give assistance (i.e. legal, social and/or

⁸² D Greer *Compensating Crime Victims: A European Survey* Freiburg: Max-Planck Institut 1996.

⁸³ US Department of Justice *International Crime Victim Compensation Program Directory* (1998-1999 Resource Directory) Washington D.C: US Department of Justice Office for Victims of Crime 1999.

psychological) to victims of crime, but no financial compensation is offered.⁸⁴

4.4 There are few compensation schemes in Eastern European and poorer East Asian countries (for example Thailand, Indonesia and so on). Exceptions to this include the Philippines where victims of crime and dependants of homicide victims (including foreign citizens) can receive up to 10 000 pesos (about US\$400) in compensation⁸⁵. In both the Czech Republic and in Poland, compensation programmes to provide financial compensation to victims of violent crime are also in operation.

4.5 Where compensation schemes do exist in developing countries, or at least in countries with some structural and economic similarity to South Africa, the purpose is generally geared towards acts of political violence related to ongoing civil and political unrest, not to crime. In Israel, although there is no comprehensive scheme of support for the victims of what may be termed 'ordinary criminal violence', priority is given to victims of hostile acts reflecting the wider geo-political situation.⁸⁶ Similarly, Colombia, offers a programme to provide financial compensation to civilians if they are victimised by acts of 'terrorist' activities, guerilla attacks, combat or massacres.⁸⁷ The United States, Spain and France offer compensation benefits to victims of terrorism as well as victims of other crimes.

4.6 However, merely listing the countries which have compensation schemes and outlining their broad terms of reference provides little insight into the exact provisions available for victims of crime in each country. The purposes, goals and objectives of various national State compensation schemes differ a great deal. After surveying the compensation schemes of the thirteen European countries that ratified the European Convention on the Compensation of Victims of Crime, Greer⁸⁸ concludes that even between European countries, 'it is difficult - and

⁸⁴ Personal communication, Paulo De Mesquita Neto, Senior Researcher, Centre For The Study of Violence, University of São Paulo, Brazil, 9 September 2000.

⁸⁵ US Department of Justice, 1999.

⁸⁶ K Bloomfield, M Gibson and D Greer *A Report Of The Review Of Criminal Injuries Compensation In Northern Ireland: A report to the Secretary of State for Northern Ireland* June 1999.

⁸⁷ US Department of Justice, 1999.

⁸⁸ D Greer 'Concluding Observations' in *The European Convention on the Compensation of Victims of Violent Crime* edited by D Greer, 1996.

even invidious - to compare one with another in any qualitative sense'.⁸⁹

4.7 Greer⁹⁰ adds that most state compensation schemes tend to be governed by pragmatic considerations, of which the most important is a State's willingness to prioritise and allocate public funds to compensation. In other words, it is often the size of the State fiscus that defines the nature and extent of many compensation schemes, rather than any underlying or broadly accepted international principles. As a result, most countries, which have compensation schemes (although not all) run the scheme based on a finite budgetary allocation each year.

4.8 There is a myriad of different international approaches to compensation. Therefore, to unpack in detail the parameters of each compensation scheme that currently exists around the world would be an enormous task. Information available on different compensation schemes has, therefore, been summarised in the table below.

4.9 Nonetheless, there is value in reviewing the differing approaches used in other societies with specific reference to how they have integrated pragmatic considerations with the needs of victims of crime. Throughout the report, therefore, reference will be made to relevant comparative approaches and international experience.

4.10 Despite the diversity of victim compensation schemes (*see summary table below*), it is important to emphasise that international compensation schemes are generally complementary to broader programmes aimed at assisting victims of crime, such as victim support services or State attempts to ensure some form of restorative justice. The essence of this was captured in a recent report on compensation for criminal injuries in Northern Ireland where it was noted:⁹¹

Statutory compensation for criminal injuries does not represent the sole actual or potential source of support for victims...we have to bear in mind the very important part played by individuals and families, by the State and other employers, by the social security system, by private insurance, by voluntary agencies and charitable bodies and by the international funds.

4.11 This highlights the importance of locating any compensation scheme within the broader victim-empowerment and criminal justice process. It also highlights the importance of

⁸⁹ P. 682.

⁹⁰ 1996.

⁹¹ Bloomfield, Gibson & Greer, 1999, p.28.

compensation being defined as part of a process that is wider than simply paying out a sum of money.

COMPENSATION IN THE USA⁹²

4.12 In the US victims may receive financial assistance from the state victims' compensation programs and from restitution orders. In 1986, the President's Task Force on Crime reported that 29 states mandated restitution as a part of sentencing. In jurisdictions where restitution orders are common, courts exercise a considerable amount of discretion in determining the size of the awards.

4.13 American states also have publicly funded compensation programs. California became the first state to adopt a victim compensation program in 1965 and, today, practically every state maintains some form of victim compensation scheme. Many of these programs require a claimant to meet certain eligibility requirements, for example, in most states, to obtain an award claimants must demonstrate financial need. Additionally, most compensation programs do not comprehensively redress the damage that victims sustain because many of them exclude recovery for pain and suffering. However, there are many American victims' service agencies, aided by such non-government organizations as the National Organization for Victims' Assistance (NOVA), which support victims by attempting to ensure that they receive sufficient community support to assist them to cope with their pain and suffering.

4.14 Crime victim compensation is one of the pillars of victim assistance. For thousands of crime victims each year, it serves as the primary means of financial aid in the aftermath of victimization. While restitution laws requiring reparations to crime victims date back to the 1800s, there is one important distinction between these two sources of financial relief for crime victims: crime victim compensation does not require the apprehension and conviction of the offender to provide financial relief to the victim.⁹³ Victim compensation is defined as:

⁹² The information is quoted from a paper presented by Justice F.B. William Kelly "The unfinished triangle: The criminal justice system, the victim, and the offender (A comparative review of victim treatment in some criminal justice systems)" presented at the C.I.A.J. 1995 *Annual Conference: Public Perceptions of the Administration of Justice* October. 11-15, 1995, Alberta.

⁹³ The information under this heading has been excerpted largely from the National Victim Assistance Academy edited by Jane N. Burnley, Christine Edmunds, Mario T. Gaboury, and Anne Seymour who on their part excerpted the information largely from various publications produced by the

"Money paid through a public fund to allow victims to receive out-of-pocket expenses incurred as a result of a violent crime perpetrated against them."

FINANCIAL IMPLICATIONS OF COMPENSATION SCHEMES

Total Benefits Paid by Compensation Programmes Nationwide

4.15 The following statistics are given:

- * In 1995 state crime victim compensation programmes paid \$247,605,531 to 119,113 victims of violent crimes, a decrease of \$9,203,656 in payments and 7,794 victims from the previous year.
- * In 1996, state crime victim compensation programmes received \$83,843,000 in federal matching funds from the VOCA Crime Victims Fund; this represents 35% of the total amount deposited in the Fund in 1995, \$233,907,256.
- * 42,939 victims of assault received 47% (\$118,169,444) of the total amount of crime victim compensation paid to victims and 26,111 victims of child sexual abuse received 12% (\$31,873,317) of the compensation funds paid to victims in 1995.
- * Of the expenses for which crime victims received state compensation in 1995, nearly half (\$119,878,335) were for medical related expenses, including medical treatment, dental, and sexual assault in 1995. In addition, \$49,748,382 was paid to victims for lost wages or loss of support; \$46,349,954 was paid to victims for mental health treatment; and \$22,776,342 was paid to victims for reimbursement of funeral expenses.
- * Compensation programs now operate in all 50 states, the District of Columbia, and the Virgin Islands.
- * Maximum benefits available to victims from the state programmes generally range between \$10,000 and \$25,000, though a few states have higher or lower maximums.
- * Nationally, the average amount paid to each victim applying for compensation is about \$2,000.

NACVCB including: Crime Victim Compensation: A Fact Sheet and Crime Victim Compensation: An Overview. various publications produced by the NACVCB including: Crime Victim Compensation: A Fact Sheet and Crime Victim Compensation: An Overview.

- * The median annual payout per state is just under \$2 million. The range of total payments among states is considerable, with 12 states paying less than \$500,000 annually and about the same number paying more than \$3 million.
- * While there is no federal crime victim compensation program per se, each state treats federal crime victims in the same manner as victims of state and local crimes.⁹⁴

4.16 According to the NACVCB, (National Association of Crime Victim Compensation Boards (NACVCB), a national organization that provides advocacy, training, technical assistance, and communication among state programmes) approximately \$250 million is paid annually to more than 125,000 victims nationwide. California operates the nation's largest program, paying nearly one third of all compensation benefits nationwide (approximately \$75-80 million annually). Only Texas, which pays out approximately \$20-30 million to victims each year, comes close in benefit payout.

4.17 Nationwide, the amount of compensation payments is the following:

- * The median annual payout per state is just under \$2 million (half the states pay a total less than that, and half pay more).
- * The range is considerable, with 12 states paying less than \$500,000 annually and about the same number paying more than \$3 million.

Size of Compensation Programs

4.18 The size of state compensation programs is relatively small for state agencies:

- * 10 states operate with three or fewer people;
- * 34 states employ fewer than 15 people;
- * Seven states operate with more than 20 employees;
- * California is the largest with over 250 employees.

Location of Compensation Programs

⁹⁴ The above information was provided by the National Association of Crime Victim Compensation Boards and reflect information provided by the US Department of Justice, Office for Victims of Crime, 1996.

4.19 Compensation programs, with the exception of Arizona and Colorado, are administered in central state offices. According to the NACVCB, the largest number of state programs are affiliated with criminal-justice related executive branch agencies (one-third), within Offices of Attorneys General (one-fifth), and independent state agencies (one-fifth). Workers' compensation bureaus house five programs, and other programs are affiliated with corrections departments, social services agencies, and finance and management departments. Four states operate their programs within court systems.

4.20 While governed by state law, Colorado and Arizona operate compensation programs at the local level through prosecutors' offices. Each of 22 judicial districts in Colorado has a compensation board, and each of Arizona's 15 counties operates a program.

Compensable Crimes

4.21 While the extent and types of crimes that are eligible for state compensation benefits differ slightly from state to state, most programs include a basic "core" of offences. According to research⁹⁵, about three fourths of the state statutes define compensable crimes in the following language:

Criminally injurious conduct that occurs, or is attempted in a state, and poses a substantial threat of personal injury or death, and is punishable by a fine, imprisonment, or death.

4.22 In general, victims of personal violence, sexual assault or abuse qualify for compensation, while victims of most property crimes do not qualify. A further explanation of these distinctions is presented below.

Collateral Resources

4.23 It is important to emphasize that compensation programs are considered "payers of last resort," meaning that the victim must exhaust all other sources of insurance or public benefits that could pay for medical care, funeral benefits, counselling, etc. Historically, this principle has

⁹⁵ Conducted by an NIJ-sponsored study entitled *Compensating Crime Victims: A Summary of Policies and Practices* (Parent, Auerbach, and Carlson, 1992).

been incorporated into each state's program because compensation was thought to supplement existing resources of the victim, not to serve as an automatic "payment" in response to victimization.

4.24 Compensation programs are "subrogated" to the victim for any expenses the victim recovers from the offender or a third party. NACVCB explains:

If the victim recovers any money from the offender or any other party liable for the victim's expenses, the compensation program must be paid back for that portion of the expenses for which the program has paid. Generally, if the victim's losses are greater than the amount paid for by the compensation program, the program will expect repayment only after those other losses are fully reimbursed. In other words, if the victim's total losses are \$100,000, and the compensation program awards \$10,000, the amounts recovered otherwise by the victim by other recoveries can go to pay for the remaining \$90,000 in losses before the compensation program needs to be repaid.

Coverage of Domestic Violence and Drunk Driving Victims

4.25 For many years, domestic violence and drunk driving victims were excluded from receiving compensation in most states. The domestic violence exclusion emanated because of concerns that compensation awards to battered women would benefit the battering spouse by not holding him financially accountable for his crime. There also was the chance that the offender could benefit from a compensation award if the offender and victim continued to live together. Victims of drunk driving crashes were excluded because drunk driving was not considered a violent crime and because of fears of overtaxing the financial resources of state compensation programs.

4.26 Amendments to the Victims of Crime Act, which provides about 20% of the funding for state programs, required that states cover domestic violence and drunk driving as compensable crimes by 1991.

Compensation Benefits

4.27 According to the NACVCB, all compensation programs cover the same major types of expenses, although their specific limits may vary. The primary compensable costs covered by

all states are as follows:

- * Medical expenses;
- * Mental health counselling;
- * Lost wages for victims unable to work because of crime-related injury;
- * Lost support for dependants of homicide victims;
- * Funeral expenses.

4.28 The majority of compensation payments statewide are paid to victims for the above expenses, for example:

- * Medical fees comprise well over half of the amount of all compensation awards nationwide.
- * Lost wage and support payments comprise the next largest payment category for most states.
- * Awards for counselling are growing rapidly -- in a few states, 20% to 40% of their awards are now paid for counselling.

4.29 In addition, a number of other expenses are paid for by some, but not all, programs, including:

- * Moving or relocation expenses, often limited only to instances where the victim is in imminent physical danger, or if medically necessary (such as severe emotional trauma from sexual assault).
- * Transportation to medical providers, usually limited to occasions when the provider is located in a place distant from the victim's residence, or when other special circumstances exist.
- * Replacement services for work the victim is unable to perform because of crime-related injury (child care, housekeeping), usually limited to payment to non-family members.
- * Essential personal property lost or damaged during the crime (all states will cover medically necessary equipment, such as eyeglasses or hearing aids, but only a few can cover anything else).
- * Crime-scene cleanup, or the cost of securing a home or restoring it to its pre-crime condition.

- * Rehabilitation, which may include physical therapy and/or job therapy; ramps, wheelchairs, and modification of homes or vehicles for paralyzed victims; and driving lessons.

Eligibility Requirements

4.30 In order to qualify for crime victim compensation, certain eligibility requirements must be met by the individual filing the claim. Again, eligibility requirements vary from state-to-state. However, every state requires that victims follow certain critical criminal justice-related provisions or application filing procedures in order to qualify. According to NACVCB, all programs require that the victim must:

- * Report the crime promptly to law enforcement (72 hours is the general standard, although a few programs have shorter or longer periods, and nearly all have "good cause" exceptions applied liberally to children and incapacitated victims, and others with special circumstances).
- * Co-operate with police and prosecutors in the investigation and prosecution of the case. The apprehension and/or conviction of a perpetrator is not a prerequisite to receiving compensation.
- * Submit a timely application to the compensation program (generally one year from the date of the crime, although a few states have shorter or longer time frames, and most can waive these requirements for exceptional circumstances) and provide other information as requested by the program.
- * Be innocent of criminal activity or significant misconduct that caused or contributed to the victim's injury or death.
- * In addition, since collateral sources need to be utilized first (before compensation can be paid), eligibility depends on whether the expenses for which reimbursement is sought have not been or cannot be paid from some other collateral source (medical insurance, other public assistance programs, etc.). If the collateral source is just a potential source of payment, like offender restitution, the compensation program generally will pay anyway and expect to be repaid if the victim ever receives the collateral resource.

4.31 An important aspect of compensation is the eligibility of a victim's dependents or other secondary victims. Generally eligibility for these victims depends on the eligibility of the "direct"

victim - the one who suffered the injury or death. If a homicide victim was engaged in criminal activity, for example, the family generally would not be eligible for any benefits.

Emergency Awards

4.32 Many, but not all compensation programs have established emergency award provisions allowing the program to make an emergency award to a victim within a few days or weeks. However, there is a trend away from granting emergency awards due to the difficulty of verifying the claims under such expedited situations. Most programs now limit emergency awards to cases of extreme hardship, and because of the delays in processing other claims when staff must attend to emergency requests. Emergency awards are also limited to relatively small amounts.

Jurisdiction and Filing Claims

4.33 Victims must apply for compensation in the state where the crime occurs. Until the passage of the Victims of Crime Act (VOCA) in 1984, state programs had set up a complicated nationwide system of reciprocity agreements between states for covering out-of-state victims that became crime victims while visiting their state. In order to qualify for federal VOCA payments, states have been required for the last decade to cover residents and nonresident, including victims of federal crimes. Victims have to meet the eligibility requirements of the state statutes. The NACVCB states:

- * Victims of crime are eligible for compensation in the state where the crime takes place, and should make an application to that state program.
- * All states, with the exception of Nevada, will accept applications from nonresidents who are injured within their borders (a very few states restrict eligibility to US citizens).
- * If the crime occurs in Nevada to a nonresident, the victim should apply in his or her state of residency. All of the states will honor such applications as if the crime had taken place within their own borders.
- * A few states extend coverage to their residents who are injured in other states with compensation programs, as well as other countries, but awards are usually conditioned upon the victim first applying in that other state or country (a number of countries, including Canada, Great Britain, Germany, France, Sweden, and

Australia, have compensation programs).

Maximums and Limits

4.34 Every state program has established a limit on the maximum benefits available to victims. Nationwide the following maximum benefits apply:

- * Currently, maximum awards range between \$10,000 and \$25,000, although a few states have higher or lower maximums.
- * Nationally, the average amount paid to each victim applying for compensation is about \$2,000.
- * In addition, many states have lower limits on specific compensable expenses, like funerals and mental health counselling.
- * Each state can provide information on the specific benefits that are available to victims within its jurisdiction.

The Application Process

4.35 Victims typically learn about crime victim compensation programs from local victim assistance providers, police, prosecutors, and public awareness activities (posters, billboards, and/or public service announcements) conducted by the state program. For many crime victims, missing the application filing deadline is one of the most painful "second injuries" in the aftermath of victimization. State programs generally have very strict policies on application deadlines, and do not accept late applications -- usually one year after the crime. However, exceptions are made in almost all states for crimes involving child sexual abuse cases - extending the filing deadline for "just cause."

4.36 While compensation programs have instituted many policies and programs for "getting information out statewide" about their programs, this is an area that needs greater improvement on the part of compensation programs. However, with many programs facing limited resources to make payouts, it presents a "double edged sword" when public awareness campaigns increase demands on existing programs. According to NACVCB:

- * The victim is responsible for completing the application form and providing all requested documentation. The victim must return the form to the compensation

program or some designated intermediary.

- * Most programs process claims through a staff centralized in one office in the state capital, but a few states have branch or regional offices, and a few (other than Colorado and Arizona) make use of locally-based individuals in other entities or agencies to perform preliminary work on applications (document gathering and verification) prior to final decision making in the central office.

Decision-making authority varies from state to state:

4.37 About half the states use part-time boards or commissions to determine eligibility and awards. About half authorize full-time administrative staff (usually program directors) to make determinations. In court-based programs, judges or court-appointed officials decide claims.

Funding of Compensation Programs

4.38 State compensation programs receive funding from a variety of sources. However, there are two primary sources on the state level that fund programs:

- * Funding from fees or charges that offenders pay.
- * Funding from general-revenue appropriations from legislatures.

According to NACVCB, more than four-fifths of the states are in the first category, gaining most of their income from offenders. In fact, in a large majority of states, no tax dollars are involved at all in either the administration of the program or in the awards given to victims.

4.39 An additional funding issue facing compensation programs today is recovering restitution from convicted offenders in order to help offset the cost of providing compensation benefits to their victims. This is described as "fund recovery" measures -- holding offenders and others liable for injury to victims, and making them pay for the consequences of their crimes. Some state programs are making special efforts to seek restitution from offenders and are working with prosecutors and judges to ensure restitution is ordered and collected, as well as monitoring restitution payments. However, fund recovery remains a small source of total program income thus far, with only a few programs beginning to recover more than 10% of their awards.

Recent Trends in Compensation

4.40 In some states, claims doubled, tripled, and even quadrupled in the period from 1985-1992. The greater visibility of the programs, the growth in other victim services, and new laws mandating that rights, services and information be provided to victims have resulted in more and more victims applying for help. While compensation programs have strived to meet this rising demand, stresses on program resources and administration are inevitable, particularly as many state government budgets have declined, and specific sources of revenue for compensation programs have failed to keep pace. For many programs, there continues to be concern about whether there will be enough money to pay claims, and enough staff to process them, in the near future. Compensation programs everywhere are working hard to process claims promptly and, at the same time, are seeking necessary legislative changes to boost revenue and control costs. The healthy growth in claims is an extremely positive sign; it shows that more victims are receiving the financial help they need. Programs will continue to work to ensure that the resources are there when they are needed by victims, by exploring new funding options and increases, and maintaining controls over costs to the extent reasonable and necessary.

Victims of Crime Act

4.41 With the enactment of the Victims of Crime Act of 1984, (VOCA), state compensation programs can receive federal VOCA funds that equal 40% of the previous year's compensation award amounts paid by the state funds. Federal funds provide about 20% of the monies available to states for making awards to victims. The funding formula for compensation programs works in the following way:

For every 100 state dollars spent, the program will receive 40 federal dollars through a grant process that will make the funds available a little over a year after the end of the fiscal year upon which the calculation is based. This theoretically results in a 72%-28% state-to-federal mix of money (out of every \$140 dollars available, \$100 will be state, and \$40 will be federal), but since most programs are paying more in awards each year, the federal funds will be proportionately less of the total by the time they are available. States also must bear the entire burden of their administrative budgets, since none of the VOCA funds can be used for administration. (NACVCB)

4.42 To qualify for federal funding, states must meet the following VOCA requirements:

- * Programs must cover medical expenses, mental health counselling, and lost wages, as well as funeral expenses and lost support for families of homicide victims.
- * They must also consider drunk driving and domestic violence as compensable crimes.
- * They must not categorically exclude domestic violence victims on the basis of their being related to or living with the offender. (Programs may deny claims when an award to the victim would "unjustly enrich" the offender.)
- * Programs also must comply with statistical reporting requirements.
- * All states currently meet the standards, except Nevada, which does not cover nonresident criminally injured within its borders.

4.43 The VOCA grant program is administered by the Office for Victims of Crime within the US Justice Department, which also provides valuable technical assistance to state compensation programs.

ENGLAND, WALES AND SCOTLAND⁹⁶

4.44 A non-statutory State Compensation Scheme for compensating blameless victims of crimes of violence came into force on 1 August 1964. It was subsequently modified on a number of occasions. It was introduced as a non statutory scheme with compensation being assessed by the Criminal Injuries Compensation Board (CICB) on the basis of common law damages (what an applicant could expect to be awarded in a successful action for damages in the civil courts). The scheme operates in England, Scotland and Wales and there are separate arrangements in Northern Ireland. The scheme was changed fundamentally with effect from 1 April 1996, when it was placed on a statutory footing following passage of the Criminal Injuries Compensation Act, 1995. The new scheme broke the link with the common law damages and it moved away from payment based on an individual assessment by introducing a tariff (scale) in terms of which payment is based on a tariff of awards that grouped together injuries of comparable severity and allocating a financial value to them. This value was based on awards made previously by the Criminal Injuries Compensation Board. The new scheme included approximately 330 injury descriptions in the tariff ranked against 25 levels of award, ranging

⁹⁶ The information reflected in this part was obtained from the *Criminal Injuries Compensation Board* Thirty Fourth Annual Report, (January 1999), Cm 4197.

from £ 1,000 to £ 250, 000. Two main reasons were advanced for the introduction of the tariff scheme, it would help to stop the costs of the scheme rising at a rate that was no longer sustainable for a scheme funded by the taxpayer (it would make the costs more predictable and bring them under tighter control) and secondly, it would provide a better service to victims because the new scheme was easier to administer and simpler for victims to understand. Claimants would have a better idea in advance how much money they were likely to get and they would get the money more quickly than under the old scheme.

4.45 It is important to consider the reasons why the scheme exists and what it is trying to achieve. Ever since the scheme started the Government has made it clear that the State is not liable for injuries caused to people by acts of others. The guilty party is the offender and, in an ideal world, it should be the offender who compensates him. Reality is, however, that offenders are not always caught or even identified, and many lack the means or will to compensate their victims. Government has recognised that the public feel a sense of responsibility for, and sympathy with the innocent victim of a violent crime. They have taken the view that it is right for those feelings to be given practical expression by the provision of monetary award on behalf of the community. Under the common law scheme this meant that the victim had no reason to sue the offender in the civil courts, with all the risks and uncertainties inherent in such an action. They could instead make a risk-free claim under the scheme in the sure knowledge that a successful claim would be paid. The tariff scheme is based on the same principles.

4.46 A compensation scheme such as the one in England is also not free from controversy or difficulties. It has been said that the personal hurt and distress which an injured person suffers is often incalculable in terms of money. While financial loss or expense resulting from injury can be approached in a practical and rational way, the pain and suffering itself is not amenable to that approach and provides very wide scope for argument about how much that element is worth in one individual case against another. The argument extends to different categories of injury in which any order of severity is likely to be criticised. Personal injury litigation in the courts has always had to confront this difficulty: the assessment of compensation for pain and suffering (from whatever cause) recognises that no monetary award can compensate in any real sense. Since money is the only medium available for compensation it is the duty of the courts to assign a cash value to that element and this is done on a case to case basis.

4.47 Many schemes abroad limit the scope of their state schemes to compensate victims to

actual financial loss or expense resulting from injury, paying nothing for pain and suffering. This approach avoids the controversy and cost assigning a monetary value to that component. In the UK scheme the three elements of pain and suffering, loss of earnings and medical or other costs have always been included. Under the scheme more money is paid to victims of violent crime in Great Britain than in the whole of Europe added together.

Administration

4.48 The Tariff Scheme is administered by the Criminal Injuries Compensation Authority. Appeals against decisions of the Authority will be considered by an independent Criminal Injuries Compensation Appeals Panel. The Authority and the Panel consist of such staff and members as may be appointed by the Secretary of State and under such terms and conditions as he considers appropriate. The Authority and the Panel is funded through a Grant-in-Aid from which ex-gratia payments are made in accordance with the rules of the. The Authority is entirely responsible for the administration of the Tariff Scheme and for deciding what awards should be paid in individual cases. Its decisions is subject to appeal to the Panel.

Scope of the Tariff Scheme

Rules or Eligibility

4.49 The Authority may award compensation where:

Personal injury was sustained by:

- (i) the applicant: or
- (ii) the deceased, and
- (iii) the personal injury was directly attributable:
 - * to a crime of violence (including arson or poisoning): or
 - * to an offence of trespass on a railway: or
 - * to the apprehension or attempted apprehension of an offender or a suspected offender, or to the prevention or attempted prevention of an offence, or to the giving of help to any police constable who is engaged in any such activity; and

(iv) the personal injury was sustained:

- * in Great Britain; or
- * on a British aircraft, hovercraft or ship or on, under or above an installation in a designated area within the meaning of Section 1(7) of the Continental Shelf Act 1964 or any waters within 500 metres of such an installation, or in a lighthouse off the coast of Great Britain.

4.50 For the purposes of the above paragraph it is not necessary for the person(s) responsible for causing the criminal injury to have been convicted of a criminal act. The conduct of the person(s) to whose act the injury is found to be directly attributable may be treated as constituting a criminal act if it may not be possible to convict the person(s) of a criminal offence by reason of age, insanity or diplomatic immunity. Where injury is sustained accidentally by a person who is engaged in any of the activities set out in this paragraph compensation will not be payable unless the person injured was, at the time he/she sustained the injury, taking, an exceptional risk which was justified in all the circumstances. The activities are:

- * any of the law enforcement activities described in paragraph 3.64(b) (iii); or
- * any other activity directed to containing limiting or remedying, the immediate consequences of a crime.

4.51 Applications must be received by the Authority within one year of the incident giving rise to the injury. The Authority may in exceptional cases waive this requirement. The Authority or Panel may withhold or reduce an award if it considers that:

- (a) the applicant failed to take, without delay, all reasonable steps to inform the police, or other body or person considered by the Authority to be appropriate for the purpose, of the circumstances of the injury; or
- (b) the applicant failed to co-operate with the police or other authority in attempting to bring the offender to justice: or
- (c) the applicant has failed to give all reasonable assistance to the Authority, Panel or other body or person in connection with the application; or
- (d) the conduct of the applicant before, during or after the events giving, rise to the application makes it inappropriate that a full award or any award at all be granted; or

- (e) the applicant's character as shown by his/her criminal convictions (excluding convictions spent under the Rehabilitation of Offenders Act 1974) or unlawful conduct makes it inappropriate that a full award or any award at all be granted.

4.52 No award will be payable unless the Authority or Panel is satisfied that there is no likelihood that a person responsible for causing the injury would benefit if an award were made. In the case of an application by or on behalf of a minor, an award will only be payable if the Authority or Panel is satisfied that it would not be against the minor's interest. Where the victim and any person responsible for the injuries which are the subject of the offender application (whether or not that person actually inflicted them) were living in the same household living in at the time of the injuries as members of the same family, an award will be paid only where:

- (a) the person responsible has been prosecuted in connection with the offence, except where the Authority or Panel considers that there are practical, technical or other good reasons why a prosecution has not been brought; and
- (b) in the case of violence between adults in the family, the Authority or Panel is satisfied that the person responsible and the applicant stopped living in the same household before the application was made and seem unlikely to share the same household again.

For the purposes of this paragraph a man and a woman living together as husband and wife shall be treated as members of the same family. Applications for awards for personal injury attributable to the use of a vehicle will be excluded from the Tariff Scheme except where such use constitutes a deliberate infliction of injury, or a deliberate attempt to cause injury to any person.

Basis of Awards

4.53 Subject to the other provisions of the Scheme, awards are made to reflect the severity of the injury sustained in accordance with the Tariff of awards appended to the Scheme. The injury must be sufficiently serious to attract the minimum award. Any injury not listed in the Tariff which appears to the Authority sufficiently serious to qualify for at least the minimum award payable shall be referred by the Authority, having first consulted the Panel, to the Secretary of State for direction as to the Tariff Band into which the injury should fall. Such referral and consultation will exclude the circumstances of any individual case and be limited

to a description of the injury alone.

4.54 Minor multiple injuries will be assessed in accordance with Note 2 on the appended tariff. An award for more serious multiple injuries will be the Tariff award for the highest rated injury plus, where the other injuries are separate from the highest rated injury and from one another, 10% of the Tariff value of the second most serious injury and, where appropriate, 5% of the Tariff value of the third most serious injury. Where an award is made to a woman for rape the Authority shall pay the additional sum of £5.000 in respect of each child which was conceived as a result of the rape and which she intends to keep.

Arrangements for Payment

4.55 The Authority may make such directions and arrangements for the conduct of an application, acceptance of an award, settlement, payment, repayment and/or administration of an award as it considers appropriate in all the circumstances. Payments will normally be paid as a single lump sum. However, interim payment(s) may be made where a final award cannot be assessed, for example, where only a provisional medical assessment can be given.

Reopening of Cases

4.56 Although a decision made by the Authority and not contested by the applicant or made by the Panel following an appeal will normally be regarded as final, the Authority will have discretion to reopen a case after such a final decision has been made where there has been such a material change in the applicant's medical condition that the injury now qualifies for an award under the Tariff or from a higher Tariff band than that from which an award was made, or where the victim has since died as a result of his/her injuries. A case will not be reopened more than three years after the date of notification of the final decision unless the Authority is satisfied, on the basis of evidence presented in support of the application for reopening the case, that the renewed application can be considered without a need for extensive enquiries.

Fatal Cases

4.57 Where the victim has died in consequence of the injury, no compensation other than reasonable funeral expenses will be payable for the benefit of his/her estate. The Authority will, however, consider applications for a fatal award. The fatal award is apportioned equally

between those applicants who, at the time of the deceased's death, were either:

- (a) the spouse of the deceased; or
- (b) the parent of a deceased child: or
- (c) the child of the deceased.

4.58 Subject to the application of the rules in relation to the actions, conduct and character of the deceased, funeral expenses to an amount considered reasonable by the Authority will be paid, even where the person bearing the cost of the funeral is otherwise ineligible to claim under this Scheme. Application may be made where the victim has died from the injuries even if an award has been made to the victim whilst alive.

Compensation and Damages from other sources

4.59 An award will be reduced by the full value of any present or future entitlement to:

- (a) any criminal injury compensation awards made under or pursuant to arrangements in force at the relevant time in Northern Ireland which may accrue as a result of the injury or death, to the benefit of the person to whom the award is made; or
- (b) compensation awards or similar payments from the funds of other countries which may accrue, as a result of the injury or death, to the benefit of the person to whom the award is made.

4.60 An award will be reduced by the amount of any payment received in respect of the same injuries, in any of the circumstances listed below. In addition, any person who receives an award from the Authority will be required to reimburse it up to the amount of any payment received in respect of an award from any damages, settlement or compensation he/she has received or may subsequently obtain, in respect of the same injuries, in any of the following circumstances:

- (a) when a civil court has given judgement providing for payment of damages;
- (b) when a claim for damages and/or compensation has been settled on terms providing for payment of money;
- (c) when payment of compensation has been ordered by a criminal court in respect

of personal injuries.

4.61 In making an award the Authority or Panel will not be bound by any findings of contributory negligence by any court but will be entirely bound by the terms of the Scheme.

Procedure for Determining Applications

4.62 Application must be made in writing, on a form, obtainable from the Authority, as soon as possible after the incident and in any event not later than one year after the incident giving rise to the injury. The application will be considered by the Authority and a written decision sent to the applicant or his/her representatives. In any case where the Authority considers that an inspection of the injury is required before a decision can be reached, it will make arrangements for such an inspection by a duly qualified medical practitioner.

Review

4.63 If the applicant considers that there are grounds for contesting the Authority's decision, he/she may apply to the Authority for the case to be reviewed. Such application must be received within 90 days of the date of the notification of the decision. This time limit may be waived where an extension is requested with good reason within the 90 days or where it is otherwise in the interests of justice to do so. Applications for review must be made in writing and must be supported by reasons together with any relevant additional information. The Authority will notify the applicant in writing, of the outcome of the review, giving reasons for its decision.

Appeal

4.64 If the applicant considers that there are grounds for contesting the outcome of the review he/she may appeal to the Panel. Appeals must be made in writing, and they must be supported by reasons together with any relevant additional information. Application must be made within 28 days of notification of the reviewed decision of the Authority. The Panel may waive this time limit where an extension is requested with good reason within 28 days or where it is otherwise in the interests of justice to do so. A decision by the Chairperson of the Panel not to waive the limit will be final.

4.65 An oral hearing, of an appeal will be granted only if:

- (a) no award was made on the grounds that the injury was not serious enough to attract the minimum payment under the Tariff, and it appears to the Panel on the evidence, including the grounds of the appeal, that an award might be made; or
- (b) an award was made and it appears to the Panel that on the evidence, including the grounds of the appeal, an award from a higher Tariff band may be made; or
- (c) no award or a reduced award was made and there is a dispute as to the material facts or conclusions upon which the initial or reviewed decision was based or it appears to the Panel that the decision may have been wrong.

4.66 An appeal which appears likely to fail the criteria in the paragraph above may be reviewed by a Member of the Panel. If the Member considers that any of the criteria in paragraph above have not been met or that had any facts or conclusions under dispute been resolved in the applicant's favour it would have made no difference to the initial or reviewed decision, a hearing will be refused. A decision to refuse an application for a hearing will be final. The Member may reduce any award previously offered when the Member considers the appeal to be frivolous.

Basis of Decisions

4.67 The standard of proof which is to be applied by the Authority and Panel in all matters before them will be the balance of probabilities.

Financial implications of the scheme

4.68 In its first full financial year of operation (1965/66) the Board paid a total of £ 400,000 to 1,164 victims. By 1981/82 CICB were paying out a total of £ 21 million to 20,000 victims and by 1991 £ 109 million to 35,000 victims. In 1997/98 an amount of over £200 million was paid out to more than 45,000 victims. The cost of administering the scheme is approximately £23 million, of which staff costs form less than 50%.

4.69 For personal injuries the scheme entails that:

- * the tariff of injuries to mark the pain and suffering which the victim has experienced, including a small element of financial loss or expense;
- * actual net loss of earnings or earning capacity which, while excluding the first 28 weeks of such loss, can run in cases of severe injury for the remainder of the victim's working life and also cover loss of pension; and
- * the cost of medical or other care, which, subject to incapacity exceeding 28 weeks, can be assessed from the date of injury for the rest of the victim's life.

4.70 In claims from the immediate family of victims of homicide the scheme provides:

- * a fixed fatal award of £5,000 for each qualifying relative or, if there is only one such relative, an award of £ 10,000;
- * payment for dependency on the deceased's income, running to the date on which he or she would have retired from work; and
- * where the claimant is a child under the age of 18, payment for loss of parental services encompassing both a fixed annual amount of £ 2,000 a year up to the age of 18 to mark the special commitment which a parent gives to the nurture of a child, plus a sum calculated on the basis of the actual costs in replacing the services of the deceased parent;
- * funeral expenses are also refundable, whether or not paid by a close relative.

4.71 These payments are not meant to encompass each and every element of damages which might be put forward in a civil action for damages in the courts, but it does provide the core components generally applicable in cases of personal injury or wrongful death and, as such, the proper focus for the delivery of public funds by the taxpayer as distinct from insurance premiums. The scheme deliberately distinguishes between financial and non-financial loss. Calculation of financial loss is done on a mathematical basis, subject to the limits of the scheme. Similarly, costs of medical and other care is carried out on the basis of the financial evidence presented. In fatal cases, dependency on the deceased's income is essentially a financial calculation. All other award components, whether related to pain, grief, trauma, emotional loss and the like, are fixed. In this regard the scheme is criticised as a result of media attention in individual cases. It is said that the level of compensation should be influenced by the degree of dreadfulness in the criminal act which caused the injury. The truth is, however, that no compensation scheme can reasonably meet such expectations. While criminal violence ranges from minor assault to unimaginable savagery, the range of individual circumstances in which

these crimes can be committed is limitless and would clearly defeat any attempt at consensus as to their gradation in terms of impact on individual victims. Thus the focus of the scheme is on the injury itself and the impact of that injury on the victim.

4.72 The tariff of injuries in the scheme is accordingly intended to do no more than provide a tangible measure of support on behalf of society to someone who has been injured by a crime of violence. It does not, and indeed cannot, compensate in the true sense of restoring that which has been lost simply because the hurt cannot be assessed by a process of calculation.

4.73 In terms of the scheme it is possible to claim for sexually transmitted diseases. Such claims are considered under the general provisions for “significantly disabling (medical) disorder”, producing an award of between £ 1,000 and £ 20,000 depending on the duration of the illness. At present the Authority is considering an amendment to the tariff in terms of which an amount of £ 25,000 will be payable in the case of HIV and AIDS and £ 15,000 in the case of other sexually transmitted diseases, and £ 10,000 to be payable in the case of sexually transmitted disease from which there has been full recovery.

4.74 At present provision is made in terms of the scheme for a woman who intends to keep a child born as a result of rape, to receive an additional award at level 10 of the tariff (£5,000). This amount, however, is deemed to be insufficient to cover the various situations that can arise following a pregnancy due to rape and consideration is at present given to a proposal to increase the amount to £ 12,000, (the amount equal to the award for rape) to be payable in any case where non-consensual intercourse results in pregnancy. This is considered necessary to provide victims who, because of religious beliefs, would not terminate the pregnancy but wish to keep the baby or the pregnancy had gone the full term but resulted in stillbirth. The amount of £ 5,000 would still be payable in addition if the woman intended to keep the child born alive.

SUMMARY OF THE PARAMETERS OF CURRENT COMPENSATION SCHEMES⁹⁷

⁹⁷ Colombia, Israel and Italy were excluded from the list as they only have compensation for victims of ‘terrorism’. Information from the US Department of Justice (1999). International Crime Victim Compensation Program Directory, 1998-1999 Resource Directory. Washington D.C US Department of Justice (Office for Victims of Crime Office for Victims of Crime (1996). Report to Congress at <http://www.ojp.usdoj.gov/ovc/welcovc/archives/repcong/chp1.htm> accessed August

4.75 A summary of the parameters of current compensation schemes is given below:

Country	Claimants	Benefits Awards	Compensable Costs (see key below)
	A = Victims of crime B = Dependants of homicide victims C = Relatives of victims of crime D = Foreign Citizens E = Citizens of the relevant country if victimized abroad and there is no compensation scheme in that country F = Victims of terrorist acts		
Australia	A B C D	Max varies per state from \$AUS 15 000 to 60 000 (about R59 000 to R236 000)	1,2,3,5,6,18,19
Austria	A B D E	No maximum limit	1,2,3,4,5,6,7,15 20,21
Belgium	A D	No maximum limit	1,3,15
Bermuda	A B D	Max \$B 200 000 (about R 1.4m)	1,2,3,4,5,6,7,8
Canada	A B D	Max varies per state from \$Can 5 000 to 25 000 (about 24 000 to R120 000)	1,2,3,4,5,7,8
Cyprus	A B D	No maximum limit	1,3,4,5,15
Czech Rep.	A B C D	No maximum limit	1, 4,5
Denmark	A B D E	No maximum limit	1,2,3,4,5,6,7,9
Finland	A B D E	Personal injury max Finnish Mark 270 000 (about R280 000); Loss income FM660 per day (about R685);	1,2,3,4,5,9,10,22

2000). For more detail in each case, and for greater sensitivity not reflected above (e.g. some schemes will vary slightly between states) see the full directory.

		Property loss FM 135 000 (about R140 000)	
France	A B D E F	No maximum limit	1,2,3,4,5,7,8,9, 11,12,13
Germany	A B D G	No max	1,2,4,5,8,11,13
Hong Kong-SAR			
A B	Burial max \$10 700 (about R9 800); death max \$119 000 (about R108 000); disability max \$100 800 (about R91 700); injury max \$41 700 (about R38 000); interim max \$7 000 (about R6 300)	Lump sum (as left)	YES
A D	No maximum limit	1,3,4,5,6,7,8	N
A B D	Incapacity max Y1 273 000 (about R84 250); bereaved family max Y10 790 000 (about R715 000)	Lump sum (as left)	YES
B E H	Lux frs 2.000.000	1,2,3,5 20	YES
A B D	Material damage max-Gds 50 000 (about R200 000); immaterial max Gds 20,000 (about R 80 000)	1,2,3,4,5,6,7,8, 10,17	YES
A B D E	Max K 200 000 (about R153 200)	1,2,3,4,5,6,7,8	YES
A B D	Max Ps 10 000 (about R1 500)	1,2,3,4	NO
A B D	No maximum limit	1,2,3,4	YES
A B D E	Max Escudos 400 000 000 (about R12 260	1,3,4,5,7	YES

	000)		
A B G	No maximum limit	1,2,3,4,5	YES
A B D E	Max SEK 704 000 (about R510 300)	1,2,3,4,5,6,7,8, 14,16, 17	YES
A B D E	No maximum limit	1,2,3,4	YES
A D	No maximum limit	Info N/A	NO
A B D	£500 000 (about R5m)	1,2,3,4,5,6,7,14,20	YES
A B C D F	\$15 000 to \$ 25 000 (about R96 000 to R 160 000)	1,2,3,4,5,6,7,8,9	YES

Key

Compensable Costs

- 1 = Medical Expenses
- 2 = Mental Health and Psychological Care
- 3 = Lost wages of disabled victims
- 4 = Lost support for dependants of deceased victims
- 5 = Funeral costs
- 6 = Travel costs
- 7 = Rehabilitation for disabled victims
- 8 = Services to replace work in the home previously performed by the victim
- 9 = Clothing / articles for daily use (e.g. spectacles, dental plates) damaged in crime
- 10 = Litigation expenses to recover compensation from the offender
- 11 = Physical therapy

Compensable Costs

- 12 = Disfigurement
- 13 = Vocational rehabilitation
- 14 = Pain and Suffering
- 15 = Pensions for disabled victims if victim's least 25% for 6 months or more
- 16 = Violation of personal integrity
- 17 = Inconveniences resulting from injury
- 18 = Loss of enjoyment of life
- 19 = Incidental
- 20 = Assistance to family of victims
- 21 = General social aid to citizens
- 22 = Damage to property

THE PARAMETERS OF A VICTIM COMPENSATION SCHEME

INTRODUCTION

4.76 In contemplating the establishment of a compensation scheme, it is important to consider the broad parameters that would be used to define the functioning of the scheme. If South Africa were to set up a compensation scheme, agreement would have to be reached concerning the specifics of each of the parameters outlined below. These would include who would be disqualified from the scheme, what types of crimes would be eligible for compensation, the basis on which the value of compensation would be decided and so on. The chapter begins with an initial discussion on recovering compensation from the offender, thereafter the key areas deemed relevant to developing a state compensation scheme framework are unpacked and discussed.

4.77 A right to compensation for damages arising from a criminal act generally exists only against the perpetrator or offender. The South African State has, to date, not assumed a legal obligation to compensate, or contribute to the compensation of the victim. State-funded victim compensation schemes are based on welfare or social solidarity notions, and are generally dealt with pragmatically. Such schemes are, therefore, subject to economic and political vicissitudes. Most foreign jurisdictions appear to be shying away from increasing the entitlements of victims of crime to state compensation. This is done through encouraging compensation claims against the offender, as well as fostering the development of broader victim empowerment strategies to service victims of crime.

4.78 Where state compensation schemes exist around the world, they generally do not pay full compensation, or compensation which is on a par with what would be paid by the offender in a civil case. Many schemes aim rather to contribute towards the compensation of a blameless victim, acting as a social safety net and compensating actual loss as opposed to claims in respect of pain and suffering. In practice therefore, state compensation is usually well below comparable awards arising from civil claims. Yet, the benefits of a State victim compensation scheme include the fact that it enables the victim to avoid the risks of failure, cost implications and trauma inherent in civil litigation, particularly litigation against an offender.

4.79 For most countries, compensation should ideally be claimed from the offender and paid directly to the victim before any state compensation or intervention is considered. The next

section, therefore, outlines some of the debates concerning compensation from the offender and links these directly to the current legal position in South Africa. Thereafter, the parameters of a state compensation scheme are discussed.

COMPENSATION FROM THE OFFENDER

4.80 The first recourse that victims have following a crime - and assuming that the offender is arrested and is liable for prosecution - is directly from the offender via a civil claim, or in some countries, through a compensation order made in the sentencing of the offender. In most foreign jurisdictions, a victim is usually entitled to lodge a civil claim against the perpetrator or obtain compensation from the perpetrator during the course of criminal proceedings. Both methods usually have limited success and, even when successful, will only assist victims whose cases have actually reached court, and who can afford to pay.

4.81 The methods used to increase the levels of compensation recovered from offenders differ between jurisdictions, with these often being more complex in common law than in civil law jurisdictions. However, few international efforts in this regard have been overly successful due to the complexity and expense, as well as the existence of some levels of resistance in the criminal justice system. In some jurisdictions it is a prerequisite that the victim has sought, or is willing to seek compensation from the offender before the state scheme will even consider the victim's application. State victim compensation is therefore generally treated as a secondary source of compensation (the principle of subsidiarity).

4.82 In South Africa, sections 297 and 300 of the Criminal Procedure Act 51 of 1977 make provision for the court, after finding an accused person guilty, to order the convicted person to pay compensation to the complainant. Section 300 is expressly limited to compensation for 'damage to or loss of property (including money) belonging to some other person' limited to R300 000 in the regional court and R60 000 in the magistrate's court.⁹⁸ This provision requires that an application be made by the injured person or the prosecutor acting on the instruction of the injured person. The effect of an award in terms of this section is the same as that of a civil judgement. However, it is not deemed punishment. For such an order to be made, there must have been a conviction. Courts have held that a compensatory order is not a form of

⁹⁸ Maximum compensation is determined from time to time by the Minister in the Government Gazette. Current figures are gazetted in Government Notice R1410 of 30 October 1998 (Government Gazette 19435).

correctional supervision and that a failure to comply with such an order does not entitle a court to reconsider or impose any other punishment.⁹⁹

4.83 Section 297, which deals with the conditional or unconditional postponement or suspension of sentence, allows the presiding officer to make the payment of compensation to a victim a condition of the suspension or postponement of sentence.¹⁰⁰ It has been held by South African courts that compensation is an important part of the criminal process and that where it is possible to compensate the victim for damages sustained through criminal conduct, this should be done.¹⁰¹

4.84 Orders for compensation are, however, usually not considered 'unless the complainant requests the public prosecutor to apply to the court for an order and complainants seldom make use of the provisions because they are either not present or they don't know about the provisions of the act'.¹⁰² Compensation orders are, therefore, usually only granted in circumstances in which an offender is not sentenced to a period of imprisonment.

4.85 Sections 297 and 300 have several limitations, particularly in relation to offences involving violence against the person.¹⁰³ Postponement of sentence on condition of the payment of compensation has generally been held to be suitable only for trivial offences and, therefore, would not be an option for sexual offences and offences of violence other than some assaults. Proper enforcement within the criminal justice system of this legislative provision remains an overriding difficulty.

⁹⁹ In this regard see the case of *S v Medell* 1997 (1) SACR 682 (C).

¹⁰⁰ A sentence may be suspended for a period not exceeding five years, apart from cases in which a minimum punishment is prescribed by law. Unlike suspension, in which part of a sentence may be suspended, only the whole of a sentence may be postponed. The postponement of part of a sentence is not permitted.

¹⁰¹ *S v Charlie* 1976 (2) SA 596 (A).

¹⁰² South African Law Commission, 1997, p. 13.

¹⁰³ N van Dokkum 'Compensation For Victims Of Sexual Crimes' (1997) Vol 10 No 2 *South African Journal of Criminal Justice* 285-6.

4.86 According to Van Dokkum¹⁰⁴, it would, however, be competent for the presiding officer to suspend (for no longer than five years) a whole or a part of the sentence on condition that the convicted person pays a stipulated amount of compensation to the victim. Thus, if Section 297 were properly enforced, the convicted person would have an interest in raising the money, consequently pursuing that option more vigorously.¹⁰⁵

4.87 Where a period of imprisonment is handed down, it is unlikely that the offender would be able to pay compensation to a victim, unless such offender has available assets or is able to raise the money. Similarly, where an offender receives a fine in addition to a compensation order in terms of section 297, this will reduce the likelihood that compensation can be paid.

4.88 In South Africa, it is, therefore, only when the entire sentence is suspended on condition of payment of compensation that it is likely that an offender could be induced to pay compensation to the victim. However, the suspension of a sentence in cases of serious criminal transgressions may well be contrary to considerations of public interest and safety. The Criminal Procedure Act's provisions pertaining to compensation, therefore, appear to have little relevance, particularly in relation to serious offences involving violence against the person, which tend to be the main focus of most of the existing systems of compensation in developed countries.

4.89 Recently, the South African Law Commission has proposed the amendment of legislation to facilitate greater access to compensation by victims through the process of sentencing following conviction of an accused person. There is value in law reform initiatives to improve the capacity of the criminal justice system to make reparative orders. However, even an improved system is likely to be affected by the problems outlined above. Furthermore, the efficacy of such amendments will strongly depend on the ability of the criminal justice system to arrest and convict offenders.

4.90 There are no available examples of effective systems of compensation in other jurisdictions which rely primarily on payments made by the offender. Furthermore just as there is often little point in a court order for compensation in terms of section 297, in most cases of violent crime there is little that the victim can gain from a civil action as the offender is more

¹⁰⁴ 1997.

¹⁰⁵ Van Dokkum, 1997.

often than not unlikely to be able to fulfil any civil judgement against him or her.

ELIGIBILITY TO APPLY FOR STATE COMPENSATION

*** Violent crime versus other crime**

4.91 Certain foreign compensation schemes limit the payment of compensation to crimes of violence, though other schemes include the injuries associated with crimes that are not always violent. Generally, however, foreign compensation schemes, rather than base compensation on the nature of the crime, seek to compensate only death or serious injuries – usually defined as being either some form of permanent disability or incapacity to work for a significant period, with a minimum period often set in this regard.

4.92 Denmark provides compensation in circumstances in which personal injury resulted from serious criminal offences stipulated in its criminal code.¹⁰⁶ Finland does not require that the crime be of a deliberate or violent nature before compensation can be awarded and, for example, exemption from criminal liability by reason of insanity is not taken into consideration.¹⁰⁷ In Norway, the state awards compensation for personal injury caused by ‘wilful assault’ or ‘other criminal acts characterised by violence or force’.¹⁰⁸

*** Intentional versus non-intentional violence**

4.93 In most foreign schemes, it is only those persons who are blameless victims of crimes of violence, or those injured while attempting to apprehend offenders or prevent crime, who may apply for compensation. Many state compensation schemes compensate for damages only from intentional violent crimes – though the level of intent required varies. Some schemes, therefore, exclude claims in which injury was caused by negligence (often because the effects of accidental injury and death are well covered by other forms of social insurance).

¹⁰⁶ D Lerche ‘Denmark’ in *Compensating Crime Victims : A European Survey*. Freiburg: Max-Planck Institut 1996.

¹⁰⁷ A Söderholm ‘Finland’ in *Compensating Crime Victims : A European Survey* edited by D Greer Freiburg: Max-Planck Institut 1996 p.170

¹⁰⁸ G Brottwit ‘Norway’ in *Compensating Crime Victims: A European Survey* edited by D Greer Freiburg: Max-Planck Institut 1996.

4.94 Belgium, for example, compensates only intentional acts of violence against persons. In Denmark, if there exists an objective ground for exemption from criminal liability (such as self-defence, necessity or consent), there is no punishable offence and thus no basis for compensation.¹⁰⁹ Similarly, if an accused in Denmark is acquitted of an offence, no compensation is payable. Under the German Victim Compensation Act of 1976, the injury must be serious or have caused lasting damage to the victim's health and have resulted from an intentional and unlawful violent assault.¹¹⁰ The Netherlands adopts a narrow view of 'victim', allowing compensation to be granted by the state to victims of deliberate violent crime who have suffered serious bodily or mental injuries.¹¹¹

4.95 It should be noted that the application of the notion of intentional crime should involve a wide definition of intentionality. It would be unjust if, for instance, a claim were turned down because the injury suffered was the result of being injured by a stray bullet fired negligently by the offender without the offender's having formed the specific intention to kill or injure the actual (or any) victim. The reasonable possibility of injury/death to some person must merely have been foreseeable to qualify the victim for making a claim. It is not, in general, necessary for the victim to have been the intended victim of the act of the offender. In some cases, therefore, even the dependants of a victim of a culpable homicide might well qualify for compensation.

* **Damages for injury or death versus damage to property**

4.96 Most schemes do not permit claims for damage to property, although limited claims for personal effects such as spectacles and hearing aids are usually permitted. Denmark, for example, allows compensation to be claimed where a victim has been injured under the heads of medical expenses, loss of earnings, pain and suffering, permanent injury, loss of capacity to work or compensation awarded for loss of a breadwinner and for funeral expenses. No compensation is normally awarded for loss of or damage to property.¹¹² An exception is

¹⁰⁹ Lerche, 1996, p.135.

¹¹⁰ M Kaiser and M Kilchling 'Germany' in *Compensating Crime Victims: A European Survey* edited by D Greer Freiburg: Max-Planck Institut 1996 p.268.

¹¹¹ J Wemmers and P de Beer 'The Netherlands' in *Compensating Crime Victims: A European Survey* edited by D Greer Freiburg: Max-Planck Institut 1996 412.

¹¹² Lerche, 1996, p.136-137.

Northern Ireland,¹¹³ which allows claims for damage to property under certain circumstances. France allows compensatory payments associated with the loss of sexual function.

* **‘Good Samaritans’**

4.97 Compensation is generally paid to ‘Good Samaritans’ who are injured in the course of trying to prevent a crime or to apprehend a criminal. For example, compensation is awarded in Denmark in circumstances in which personal injury was sustained from giving assistance to the police in relation to an arrest, preventing an offence or with a view to making a citizen’s arrest.¹¹⁴ A similar approach is adopted in most other jurisdictions. In Northern Ireland, compensation may be payable even where no violent offence has occurred, but not where such injury was accidental unless an exceptional risk was taken by the victim when injured.¹¹⁵

* **Location of crime**

4.98 Most schemes require that the injury occurred within the territory of the state, although there are exceptions to this general rule. Austria, for example, allows claims if the offence occurred abroad and the applicant has permanent residence in Austria. The District of Columbia in the United States permits claims by its residents injured outside the United States in a ‘terrorist act or act of mass violence’. In Denmark, the offence must have been committed in the territory of Denmark.¹¹⁶ Finland allows claims to be made by permanent residents or

¹¹³ At the time of going to print, it was announced by the Northern Ireland Secretary of State that a British-style tariff scheme will be introduced in Northern Ireland in 2002. The tariff will be based on Northern Ireland awards and the compensation levels are therefore expected to be somewhat higher than that in Great Britain. It is also likely that Northern Ireland will do away with the right of appeal to the courts and replace it with review by a Compensation Review Authority, as in Great Britain. Other recommendations are also under consideration and draft legislation is to be published early in 2001 (Personal communication, Desmond Greer, 12 September 2000). This report outlines the details of the Northern Ireland scheme as it stands and before any of the proposed changes.

¹¹⁴ Lerche, 1996, p.135

¹¹⁵ Bloomfield *et al.*, 1999, p.41.

¹¹⁶ Lerche, 1996, p.135.

citizens of Finland even where the offence occurred abroad.¹¹⁷

* **Claims limited by citizenship**

4.99 Often schemes limit beneficiaries to nationals, permanent residents, those legally present in the country and people from countries with which the relevant reciprocal agreements exist. Denmark permits claims by its citizens and foreign nationals even where such persons were injured during a temporary stay in Denmark.¹¹⁸ French law provides that compensation is payable to any national of a member state of the European Union injured by a criminal act committed in France.¹¹⁹ Compensation is payable to French nationals injured as a result of an offence committed in a foreign country. Germany grants compensation to all European Union citizens or foreigners permanently resident in Germany injured in Germany or on a German ship or aircraft.¹²⁰ Norway allows compensation to be awarded in circumstances in which the offender and victim are Norwegian even if the injury were sustained abroad.¹²¹

* **Prescription of claim**

4.100 Most foreign compensation schemes require the applicant to report the crime to the police and to lodge a claim within a specified period. Failure to meet these deadlines can result in reduced awards, or in some cases rejection, as can failure to get proper police verification of the incident or medical records.

4.101 Belgium requires that claims be lodged within one year of the conclusion of criminal court proceedings. In Great Britain, a claim must be lodged within two years of date of the commission of the offence. The District of Columbia requires that the crime be reported within seven days and a claim lodged within one year. In Northern Ireland, the injury must be reported to the police within 48 hours, a notice of intention to apply for compensation be lodged within

¹¹⁷ Söderholm, 1996, p.170.

¹¹⁸ Lerche, 1996, p.135.

¹¹⁹ F Lombard 'France' in *Compensating Crime Victims : A European Survey* edited by D Greer Freiburg: Max-Planck Institute 1996.

¹²⁰ Kaiser & Kilchling, 1996, p.274.

¹²¹ Brottveit, 1996, p.453.

48 hours and an application filed within three months. Denmark requires that a crime be reported to the police 'without undue delay' which is commonly interpreted as being within 24 hours, with compensation claims sometimes being refused where reports occur after this period has expired.¹²²

4.102 Finland requires that the application for compensation be made two years from the date on which the victim became aware of the crime and five years from the date on which the crime was committed. In Finland, the offence must be reported to the police unless there exist 'special grounds' which justify not doing so or the police have become aware of the offence in some other way.¹²³ In Finland, prior to 1985, a victim had ten days within which to report a crime to the police but experience showed this to be insufficient time and currently there is no time period specified in the law.¹²⁴ A victim is not required to press charges against the offender and may even withdraw charges. However, victims are required to give all reasonable assistance to the State Treasury with regards to their application for compensation.¹²⁵ In France, a applicant has three years within which to claim compensation from the date of the offence. Compensation schemes in the United States vary in the time limit prescribed for the making of a claim from six months to five years, with only one state having no set limit.¹²⁶

4.103 Legislative provisions in South Africa limit the time period within which civil claims must be made, and the time period within which civil claims against the police must be lodged is even more restrictive. For administrative purposes, it is recommended that a compensation claim be lodged within a specified time period so as to enable an investigation of a claim to occur timeously and without unnecessary difficulties arising due to lengthy delays.

* **Beneficiaries of the scheme**

4.104 In most schemes, it is only the actual victims or their dependants who are entitled to

¹²² Lerche, 1996, p.139.

¹²³ Söderholm, 1996, p.171.

¹²⁴ Söderholm, 1996, p.171.

¹²⁵ Söderholm, 1996, p.171-2.

¹²⁶ Bloomfield *et al.*, 1999, p. 163.

claim compensation. Dependants include spouses and common law spouses,¹²⁷ children and other *bona fide* dependants. Employers and insurance companies are not permitted to claim from most compensation schemes. In Northern Ireland the funds cannot be claimed by debtors or be transferred to an estate if a person dies (for example, of natural causes) sometime after the injury.

4.105 Whilst few schemes legislate as to the manner in which compensation awarded to minor dependants is to be handled, it appears that the majority make provision for lump sum payments which are then managed in accordance with law. Some jurisdictions require that such funds are preserved in a trust, from which payments are made in favour of the children. It is of interest to note that children of deceased victims can receive additional compensation in the Northern Ireland and Great Britain schemes for the loss of parental services.

* **Victim and offender living together**

4.106 Some countries reject claims if the victim and offender are part of the same household or family in order to avoid creating perverse incentives or the abuser benefiting from the compensation. More recent trends in foreign schemes move away from co-habitation to an insistence that the victim be ready to assist in the prosecution of the offender as a fraud protection mechanism. However, if compensation is made dependent on women pursuing court cases or co-operating with the criminal justice system, a substantial number may be excluded from compensation. As was noted above, the reasons for not pressing charges in an abusive relationship can be deep-rooted, and include a fear of the partner's reactions to an investigation and trial, pressure from family members, withdrawal of long-term financial resources if the partner is imprisonment and so on. Conversely, if the willingness to enforce prosecution is not used as a criterion, as is done in most countries, the probability of fraud through falsified domestic violence claims is increased dramatically.

* **Issues Impacting on Eligibility**

4.107 Various issues can impact on whether compensation is granted at all or result in the

¹²⁷ In Great Britain and Northern Ireland common law spouses are deemed to be a man and a woman who have lived together as man and wife for at least two years. In Ireland, the requirement is three years..

reduction of the amount awarded.

* **Retrospective nature of the scheme**

4.108 The establishment of a compensation scheme can take some time. Most countries, however, will only entertain claims after the scheme is fully operational as this allows for proper verification of the claims and injuries. Trying to ascertain reliable information for cases retrospectively can be difficult,¹²⁸ thus most countries do not allow for retrospective claims and the only leeway provided is within the parameters of the prescription of the claim from the time that the scheme is operational, unless the offender will not be able to compensate the victim.

* **Knowledge of the offender**

4.109 Compensation is payable in most jurisdictions, both where the offender is known, as well as where the offender is not identified. In the case of the unidentified offender, this is important in that the compensation scheme assists victims of crime, particularly those who have no recourse to the offender directly. Generally, however, where a victim is able to obtain compensation from the offender, the state compensation scheme will not apply and no state compensation will be granted.

* **Means test and the principle of subsidiarity**

4.110 Some schemes limit payments to persons in financial need and apply a means test to assess this, while others simply set a maximum limit on awards for particular injuries, loss of earnings and medical care. In many schemes it is only actual losses which are compensated and any losses compensated by other sources such as by the offender, though insurance policies will reduce the amount paid to the applicant. In all jurisdictions, private insurance will therefore be deducted from any state compensation award. In Belgium, for example, the applicant must have no effective and sufficient compensation available from another source before being entitled to compensation from the state. In Northern Ireland, a victim who receives compensation from the State and then from the offender is required to reimburse the State that

¹²⁸ Interview with Denis Stanley, Head of Northern Ireland Compensation Agency, 18 April 2000.

portion of compensation received from the offender.¹²⁹

4.111 Spain does not deduct additional compensation such as pension or private insurance payments from the lump sum paid to victims of acts deemed to be terrorism, but does distinguish between such victims and victims of ordinary crime, from whom private insurance payments will be deducted.¹³⁰ In general, therefore, State compensation programmes internationally are ‘payers of last resort’ in the sense that compensation will not be paid in respect of any loss or expense covered by a collateral source such as medical insurance, pension schemes, insurance arrangements, payments made by the offender, employer wage-continuation programmes, social security and so on.¹³¹

* **Character of the applicant**

4.112 Previous involvement in crime and/or criminal organisations and/or organisations involved in political violence is used to exclude or restrict the payment of compensation to applicants in some countries - even where the offence giving rise to the claim was not related to such involvement. Some countries reduce or reject compensation if the award is contrary to public policy or the public’s sense of justice, such as where the applicant is a known criminal. This can also be used to limit an award of compensation to applicants whose injuries were sustained after they initiated the criminal conduct in question, e.g., injuries in a gang fight whilst a member of a criminal gang.

4.113 However, the obvious question is whether people who have committed an offence in the past can ever qualify for compensation. This is important as supposedly, even those who have committed severe offences in the past, should maintain the personal right to rehabilitation, following convictions in respect of which offenders can be said to have done their time and paid their dues. Unlike in Finland, in Great Britain, the applicant’s criminal record cannot be used to refuse compensation. The system in Great Britain is the most creative in this regard. In this system, compensation will normally be refused or reduced where applicants have engaged in misconduct before, during or after the incident in which they suffered injuries. Examples in the Criminal Injuries Compensation Authority (CICA) Guide include taking part in a fight voluntarily,

¹²⁹ Bloomfield *et al.*, 1999, p.64.

¹³⁰ Bloomfield *et al.*, 1999, p.169-171.

¹³¹ Bloomfield *et al.*, 1999, p.57 & p.164.

striking the first blow without reasonable cause, seeking revenge and provocation.

4.114 Great Britain also uses a points system to withhold or reduce an award 'on the basis of a applicant's character, as shown by his or her criminal convictions, even where these are unrelated to the incident for which the claim is made'.¹³² Penalty points are based on the type and/or length of any sentence imposed by the courts together with the time between the date of sentence and the receipt of the application. Sentences imposed after an application has been made are also taken into account. Ten or more points result in a 100% reduction of the claim, whilst 0–2 points results in a 0% reduction. Imprisonment, whether suspended or not, includes the sentence of juvenile offenders to an institution or other custodial sentence. Mitigating factors, such as whether the injury resulted from the applicant's assistance to the police, are also considered after the points system has been used to assess whether an award should be reduced or withheld.

4.115 No other examples could be found of jurisdictions in which the criminal record is used as a basis to reduce or reject compensation.

* **Applicant's actions and conduct**

4.116 The victim's conduct before, during and after the offence can be grounds for reducing or rejecting compensation. The applicants, in most schemes, must take steps to mitigate the injury they have suffered and are required to have reported the crime. In countries such as Finland and Germany, compensation may be reduced or withheld if the victim contributed to the incident which caused the injury.¹³³ The Dutch compensation scheme requires that the victim is completely innocent and is in no way responsible for the offence.¹³⁴

4.117 When considering the reporting of crime, it seems rational that only crimes that are reported need to be considered for compensation. Furthermore, establishing the criterion that crimes have to be reported timeously and that full co-operation with the police is a prerequisite for receiving compensation, suggests that a compensation scheme could actually be used to strengthen the criminal justice system. Reporting rates, through the 'incentive' of compensation,

¹³² Criminal Injuries Compensation Authority, 1996, p.14.

¹³³ Söderholm, 1996, p.171 and Kaiser & Kilchling in Greer (ed), p.275.

¹³⁴ Wemmers & De Beer, 1996, p.412

could therefore increase.

4.118 In some schemes it must be clear that applicants have not contributed to their own misfortune by the use, for example, of alcohol or drugs. This could result in a reduction or the withholding of a claim as it does in Great Britain.

4.119 Applicants in most schemes must not have renounced a claim against the offender if they wish to be eligible for compensation from the state. Applicants must also be prepared to co-operate with the police or prosecutorial services.

Mechanisms for Claiming State Compensation

4.120 The process for applying for State compensation, in most countries, can be summarised as follows:

- * Within a prescribed time limit the crime has to be reported and full co-operation with the police must take place.
- * An application for state compensation, within a prescribed time limit, then needs to be made to the body administering the compensation scheme.
- * The claim is assessed. This usually involves verification by the compensation body that administers the compensation scheme. Verification takes place generally through contacting the police where the crime was reported, as well as with medical facilities and practitioners who treated the victim.
- * A claim is accepted or rejected and a monetary value for purposes of compensation determined.
- * The victim accepts the decision and if not, the victim then has a prescribed period within which to appeal the decision if it is felt that the amount is in appropriate or if the claim was rejected.
- * The appeal is heard either through the compensation body or court and the process is finalised.

4.121 The process itself has a multitude of variations in different countries and is also discussed in more detail later in this report. In Northern Ireland, the entire process is generally dealt with by lawyers on behalf of the victim. The victim's lawyer makes the application and then 'negotiates' with the compensation agency's (a quasi-independent executive government agency) lawyers or case workers until a figure is agreed upon. If agreement cannot be reached, the process can go to court.¹³⁵

¹³⁵ Interview with Denis Stanley, Head of Northern Ireland Compensation Agency, 18 April 2000.

4.122 In Denmark the victim of crime who seeks compensation files a claim with the police. The Victim Compensation Board determines applications. The Board is appointed by the Minister of Justice and consists of three members.¹³⁶ In terms of section 10 of the Danish Victim Compensation Act, if the victim fails to file a claim for damages in the course of criminal proceedings against the offender, compensation may not be awarded.¹³⁷

4.123 In Finland, a person injured as the result of a crime makes a written application to the State Treasury, a procedure for which the assistance of a lawyer is not necessary.¹³⁸ In France, a claim for compensation is made by delivering a petition to the Crime Victims' Compensation Commission. In Germany, a claim is made against the state and usually administered by the Länder.

TYPES OF COMPENSATION

* **Tariff scheme versus common law scheme**

4.124 Schemes vary between those that deal with cases on an individualised basis where awards are based on the specific injuries sustained by a specific applicant, and those that set out a relatively fixed tariff structure with awards set by the nature of the injury. Generally, the former conforms more with the general principles of restitution, while the latter is often swifter, more predictable, transparent and (usually) cheaper.

4.125 Countries such as Great Britain have moved towards a tariff-based compensation scheme, providing for 330 injury descriptions to which specified monetary compensation awards are attached for amounts ranging between £1,000 and £250,000 pounds. Such awards are for pain and suffering and include a small unquantified element for financial loss or expenses. Separate payments are made in addition for loss of earnings and earning capacity, as well as for costs of special care and reasonable funeral expenses. Compensation in the British scheme is also awarded to dependants for the cost of replacing a deceased parent's parental services. No award may, however, exceed £500,000.

¹³⁶ Lerche, 1996, p.149.

¹³⁷ Lerche, 1996, p.140.

¹³⁸ Söderholm, 1996, p.166.

4.126 Northern Ireland, on the other hand, currently uses common law compensation principles such as those used in civil damages proceedings in the assessment of compensation claims. It has not adopted a tariff-based scheme in the awarding of compensation. The objective of the common law approach to the assessment of compensation is to place the victim in the position he or she would have been had there been no injury, insofar as this can be done by the payment of money. Each case is therefore dealt with on an individual basis. The 'once and for all' rule applies, preventing further consideration of the case once compensation has been determined and paid. Where uncertainty arises as to whether a victim can claim, or the amount that should be awarded, this is referred to the court for decision.¹³⁹

4.127 Jurisdictions such as Finland provide minimum and maximum compensation awards for various types of injuries and a maximum award in respect of loss of earnings and maintenance.

* **Compensation for actual financial losses**

4.128 A victim can be compensated following injury for loss of earnings (both past and future), all reasonable expenses (including medical expenses), any other pecuniary or financial loss resulting from the injury (such as the cost of care, loss of free medical and life insurance, loss of private use of a company car), and for pain and suffering, as well as loss of amenities caused by the injury. Many schemes do not allow claims in respect of each of these heads, providing more limited compensation. For example, there is no general award for pain and suffering based on the nature of the injury sustained. Such schemes limit compensation to actual financial losses sustained, including loss of earnings or maintenance, the cost of medical care or treatment and the reimbursement of medical expenses to a maximum amount. Examples of such schemes include Austria, which limits compensation to actual financial losses incurred as a result of injury.

* **Mental health costs**

4.129 Many schemes compensate for losses attributable to psychological effects of the crime, although the criteria for determining the extent of psychological suffering is often based on medical and psychiatric models. In this sense, a specific diagnosis (e.g. post-traumatic stress disorder) is often necessary, or significant mental stress and consequent impacts will need to

¹³⁹ Bloomfield *et al.*, 1999, p.36 & p52.

be shown, i.e., loss of job due to psychological trauma.

4.130 In Israel (for victims of what is deemed terrorist violence), great emphasis is placed on financial support or benefits in kind within the framework of regular contact, counselling and support.¹⁴⁰ Germany provides compensation for medical treatment, recuperation and physical rehabilitation but its compensation scheme makes no express reference to the payment of compensation in respect of psychological injury or for mental health costs.¹⁴¹

4.131 The Netherlands awards compensation for pecuniary losses, which expressly includes the cost of seeing a psychiatrist.¹⁴² Norway, too, provides compensation for the psychological effects of a violent act that caused personal injury, but not where the injury constitutes an insult.¹⁴³ Compensation schemes in the United States vary in their approach to payment for mental health counselling, with some states such as Florida providing greater benefits to children but with most capping the amount that can be claimed.¹⁴⁴

AMOUNTS AWARDED FOR COMPENSATION

* Maximum and minimum awards

4.132 Most schemes set upper and lower limits for compensation. Small claims are often excluded by setting reasonably high lower limits for claims. This is used as a cost-saving technique, although such an approach may disadvantage those who have suffered a relatively small amount of damage but where the cost is a substantial proportion of their low income. Both Northern Ireland and Great Britain provide compensation to claims of a minimum of £1 000 pounds (about R10 000), with Great Britain limiting compensation awards to a maximum of £500 000 pounds. Ireland on the other hand considers compensation claims from as little as £50 pounds (about R500). The majority of state compensation programmes in the United States have a maximum compensation limit equivalent to £25 000 pounds (about R250 000), with

¹⁴⁰ Bloomfield *et al.*, 1999, p.173.

¹⁴¹ Kaiser & Kilchling, 1996, p. 279.

¹⁴² Wemmers & De Beer, 1996, p.412.

¹⁴³ Brottveit, 1996, p.452.

¹⁴⁴ Bloomfield *et al.*, 1999, p. 164-5.

separate caps on different heads of compensation.¹⁴⁵ In Norway, state compensation is limited to Kr 200 000 (£20 000 pounds or about R200 000), while in the Netherlands it is limited to the equivalent of £23 000 (about R23 000) and in Portugal to £17 000 (about R17 000).

* **Emergency and interim awards**

4.133 Most schemes have provision to make some funds available if individuals have urgent needs and cannot wait on the longer process of processing claims. In practice these are usually limited to cases of extreme financial hardship, such as the death of a breadwinner, crisis intervention, temporary shelter and food. In compensation programmes in the United States these awards are often limited to \$500 or \$1,000. Such payments have given rise to debates on the basis that many believe that these are the responsibility of victim assistance programmes rather than compensation schemes.¹⁴⁶

* **Lump sum versus periodic payment regimes**

4.134 Most claims are paid out in a lump sum, rather than using periodic payments (though there are examples of using the claims as a basis for a state pension/welfare payment). Lump sum payments can be problematic as they fail to help the victim over time, but they are easier to administer. Pension payments can create more of a sense of stability and financial security (especially following the death of a breadwinner, which can affect some dependants over their whole lives). However, pension schemes can cause the individual to remain psychologically dependent on the compensation scheme leading to a state of 'compensation neurosis'¹⁴⁷ where victims never move beyond their victim status. In Spain, whilst compensation is normally paid in a lump sum, extraordinary pensions are paid to victims of terrorism in respect of injury and death at twice the normal pension payable.¹⁴⁸ Austria, Italy and Sweden are further examples of countries that make provision for the periodical payment of compensation. Austria normally pays damages for loss of earnings by way of a periodical pension, although payment by way

¹⁴⁵ Bloomfield *et al.*, 1999, p. 164.

¹⁴⁶ Bloomfield *et al.*, 1999, p. 165.

¹⁴⁷ Interview with Desmond Greer, Queens University, Belfast, 18 April 2000.

¹⁴⁸ Bloomfield *et al.*, 1999, p. 169.

of a lump sum is not excluded.¹⁴⁹ Germany and other countries make provision for the payment of pensions for the disabled.

APPEALS AND RECONSIDERATION OF COMPENSATION GRANTS

4.135 All schemes allow the applicant to appeal against a decision of the body granting compensation. Appeals are permitted against the refusal of an award or the amount awarded. Often an internal appeal procedure precedes an appeal by the courts. In some schemes, a review is undertaken by a review panel. It has been proposed in jurisdictions such as Northern Ireland that cases should be allowed to be re-opened if an injustice would otherwise occur, such as if injuries persist. Such provisions are however rare. In Finland, lawyers within the State Treasury make a decision regarding a claim. If applicants are dissatisfied, they may appeal to the Insurance Court within 30 days of being notified of the decision but have no right to an oral hearing, as, for example, in Britain.¹⁵⁰

OTHER KEY ISSUES TO CONSIDER

*** Schemes should not benefit professionals**

4.136 The creation of a compensation scheme can open new markets, particularly for lawyers and doctors whose services are needed either to lodge or prove claims. It is important to find mechanisms that ensure that victims are the major beneficiaries, rather than the professionals, and that the costs of running the scheme do not exceed the benefits payable to victims. This has been raised as a problem in Northern Ireland where the scheme involves many lawyers, as it is based on a 'common law' approach to compensation.¹⁵¹

*** Marketing of the scheme**

4.137 Several of the schemes have clauses in their founding legislation which aim to ensure that the scheme is adequately publicised. Schemes in Great Britain, Northern Ireland and the District of Columbia have developed supporting explanatory documentation, which provides a

¹⁴⁹ W Raschka 'Austria' in *Compensating Crime Victims: A European Survey* edited by D Greer Freiburg: Max-Planck Institut 1996 p.25.

¹⁵⁰ Söderholm, 1996, p.167.

¹⁵¹ Interview with Sir Kenneth Bloomfield, Stormont, Belfast, 27 April 2000.

basis for applicants to understand their rights to compensation with relative ease in terms of the relevant scheme.

* **Victim support and an integrated compensation scheme**

4.138 As previously argued, compensation schemes work best when run parallel to other victim support services. Having victim support services that can assist victims with claims dramatically reduces the incidence of false claims and the costs of lawyers' fees. Compensation should not stand alone, but rather be seen as a component of a comprehensive victim empowerment programme. In Great Britain, for example, victim support is seen as integrally linked to the compensation scheme; support workers help victims fill out forms for compensation and hook them up to other services.¹⁵² It has been found that the more victims get from the other services, the less the need for compensation. The best course of action is for victims to receive the adequate services and compensation for the costs incurred because of the crime. Currently, in Great Britain £18 million is made available a year to victim support agencies, which are seen as critical to a proper victim compensation scheme. Senior policy-makers, and the victim support programme, feel even more should be allocated.¹⁵³

* **Fraud**

4.139 Fraud is a problem within the South African context. Medical insurance fraud in South Africa (in the private sector) is estimated to amount to about R750 million a year.¹⁵⁴ Recently, high levels of fraud have also been detected in the Road Accident Fund¹⁵⁵ and the Department of Social Development.¹⁵⁶

4.140 The compensation schemes in Great Britain and Northern Ireland report low levels of fraud.¹⁵⁷ Fraud is kept to a minimum because of the many checks and balances in the system,

¹⁵² Interview with Richard Thew, Head of the Victims & Compensation Team of the British Home Office Justice and Victims Unit , 19 April, 2000.

¹⁵³ Interview with Richard Thew, Head of the Victims & Compensation Team of the British Home Office Justice and Victims Unit , 19 April, 2000.

¹⁵⁴ Figure published in Discovery, Issue Number 5, Winter 2000, p.48.

¹⁵⁵ Business Day, August 29, 2000.

¹⁵⁶ Business Day, September 15, 2000.

¹⁵⁷ Interview with Richard Thew, Head of the Victims & Compensation Team of the British Home Office Justice and Victims Unit , 19 April, 2000.; Interview with Desmond Greer, Queens University, Belfast, 18 April 2000; Interview with Sir Kenneth Bloomfield,

such as the proof of medical records and police reports required. The record keeping by these agencies, unlike in South Africa, is also efficient and reliable. Large numbers of staff also allow caseworkers to follow and track cases carefully. However, in the South African context, the incidence of fraud could be considerably higher. Police and hospital staff could be paid to falsify records, and the likelihood of a high staff to applicant ratio is small given limited resources.

4.141 The issue of internal fraud will also need consideration. People working for the compensation body could falsify claims, working with outside accomplices. This has occurred in Great Britain in relation to their compensation fund.¹⁵⁸ Recently in South Africa, employees of the Road Accident Fund working with outsiders were responsible for extensive fraud. Typically this occurred when one of the fund's claims handlers decided on a higher than justifiable level of compensation and split the difference with the attorney who lodged the claim.¹⁵⁹

4.142 Appropriate precautions would have to be implemented in order to avoid such incidences of fraud. Prosecution of offenders is also key to discouraging potential fraud, and this is instituted immediately in Great Britain and Northern Ireland if any irregularities are discovered. However, above all, a well-resourced system, with levels of checks and verifications of claims, as well as reliable police officers, is the best mechanism for the prevention of fraud.

Stormont, Belfast, 27 April 2000; Interview with Denis Stanley, Head of Northern Ireland Compensation Agency, 18 April 2000.

¹⁵⁸ Interview with Richard Thew, Head of the Victims & Compensation Team of the British Home Office Justice and Victims Unit , 19 April, 2000.

¹⁵⁹ Business Day, August 29, 2000.

PART I**CHAPTER 5****PARTICULAR PROBLEM AREAS TO CONSIDER WITH REFERENCE TO
ESTABLISHING A COMPENSATION SCHEME IN SOUTH AFRICA****INTRODUCTION**

5.1 This chapter deals with four particular problem areas which are regarded as major stumbling blocks in establishing a compensation fund in South Africa, namely, the cost of establishing a compensation fund, financial resources of a compensation scheme, the mechanics of a compensation scheme and information required to assist in adjudicating claims.

1. THE FINANCIAL IMPLICATIONS OF A COMPENSATION SCHEME**BACKGROUND**

5.2 This part seeks to summarise the findings made in the discussion paper regarding the costs a victim compensation scheme might incur in South Africa were one to be established. The full results were published in detail in the discussion paper and is not repeated here. For the purposes of this report it is deemed sufficient to highlight the important conclusions made in the discussion paper regarding the cost of a fully fledged compensation fund, to refer to the methodology used to make these conclusions and to refer to the administrative costs of running a compensation scheme.

5.3 The methodology used to determine the cost implications was to define the variables that would determine the overall cost of a compensation scheme and to set out estimates of the financial impact of various policy permutations and applied eligibility parameters.

5.4 In assessing the likely costs of establishing a VCS in SA, it was necessary to try to estimate the costs of crime to its victims and their families. In doing so, it was obviously necessary to estimate the loss of income a victim or her/his dependents would have suffered as a result of his/her death or injury. In doing this, the Commission was aware of the fact that the history of injustice and inequality which has given rise to high levels of crime in SA, has also

meant that victims and their dependents of differing races were, on average, likely to suffer different levels of material loss as a result of their victimisation. This has meant that, when looking at the value of the compensation which victims will receive, it is an unfortunate reality that victims of different races would, on average, receive different levels of compensation. This does not reflect a different valuation of the loss of life, but the objective reality that, as a result of apartheid, the absolute value of the material losses sustained by the formerly disadvantaged will be lower than those of the privileged. In reading the discussion paper, readers will become aware that, for a variety of reasons, the conclusion was that instituting a compensation scheme premised on the full compensation of all losses which would, inter alia, result in the giving effect to these inequalities, is unaffordable and undesirable.

INTRODUCTION

5.5 Because there exists no pre-existing legal right to compensation from the State for the financial and material effects of a violent or property crime committed by one (natural) person against another, the Commission concluded in the discussion paper that a victim compensation scheme (VCS) may be established on the basis of pragmatic policy choices made by a government emerging from the political processes. A VCS, therefore, like many other spending programmes, would be developed on the basis of policy choices founded on political priorities and fiscal constraints. The Commission concluded that any discussion concerning the desirability of establishing a VCS in South Africa must, therefore, be premised on a reasonably realistic appreciation of the potential costs of such a scheme.

5.6 In the discussion paper the financial implications of the establishment of a VCS in South Africa were accordingly costed on the basis of a variety of policy permutations. In general, the necessary data have not been available, and, as a consequence, the researchers had to rely on assumptions about key variables. These assumptions were based on relevant data that were available and on the knowledge gained by the researchers in working on issues of crime and violence over the past few years. However, being assumptions, they were made in the full knowledge that they were subject to possible distortions. The researchers therefore tried to make reasonably conservative assumptions about the relevant variables. This means that, to the extent that the costing of this VCS is erroneous, it tends to understate the likely consequences of various policy permutations.

5.7 The Commission is of the view that the basic premise of the costing of a compensation

scheme is that for a VCS to begin to meet the needs of victims, it must meet the following criteria:

- * the range of crimes covered by the scheme could vary, but should, in ideal circumstances, cover all forms of violent criminal victimisation;
- * given the impact of violent crime on victims, the average pay outs of the VCS must be reasonable;
- * the coverage of the VCS must be sufficiently widespread so that it would not discriminate against victims purely on the basis of where they lived and possible differential accessibility of VCS offices;
- * its working procedures must be sufficiently speedy so that victims do not experience undue hardships attendant on administrative delays in the payment of compensation;

FORMULA TO DETERMINE THE COST

5.8 The method used by the Commission to determine the cost implications of a compensation fund is to evaluate different constructions of these criteria to assess how they might impact on costs. This method flowed directly from the basic formula which establishes the cost of the VCS and which can be stated as follows:

$$\text{VCS Cost} = (\text{number of claims paid} \times \text{ave. pay out}) + (\text{admin costs})$$

5.9 The value of the formula, as well as the value of the variables of which it is composed, includes some variables – such as crime levels – which are determined outside of the VCS and others – such as the value of pay outs – which are, ultimately, determined by policy and financing decisions. This can be seen if the variables in the above formula are broken down further as follows:

$$\text{Number of claims paid} = (\text{number of applicants} - \text{ineligible applicants})$$

Where the number of applicants is a function of:

- the number of violent crimes committed;
- VCS policy on which types of victims are to be considered;

the number of applicants who want to apply for compensation; and
the accessibility of VCS application forms/offices; and

where the number of ineligible applicants is determined by:

VCS policies on ineligibility; and
the quality of dockets and medical information supplied by the victim and related
to the criminal victimisation for which compensation is claimed.

Ave. pay out = sum of average pay outs of all of the heads of damages used

Where:

the nature of the heads of damages accepted is determined by policy; and
the average pay out for each depends on the nature of the formula used to
calculate the value to be attached for each payment.

Administration costs

Administration costs are determined by:

the character of the scheme used (is it a stand-alone scheme or linked to
existing administrative structures;
the manner in which claims are evaluated, etc); and
the number of applicants processed through the scheme.

5.10 Given the very wide latitude possible between different constructions of the policy variables in the above formula, it is, in the Commission's view, quite possible to develop widely different costings of a VCS in South Africa. For instance, the financial implications for a scheme which paid only destitute dependants of murder victims would be quite different from a scheme which paid all victims of violent crime (as well as the dependants of murder victims) compensation, including unlimited payments for lost income.

5.11 The essential trade-off with which policy-makers will have to deal is that between the

coverage of the VCS and the **generosity** of it.¹⁶⁰ While the basic goal should be to have reasonable coverage and a reasonable level of generosity, it is useful to consider alternative models of a VCS so that the financial implications of various alternative policy scenarios can be tested. This also allows for a more detailed consideration of the costs associated with different trade-offs between coverage and generosity.

5.12 However, before looking at the calculation of potential costs attached to a compensation scheme, it is necessary to consider the manner in which the various coverage and generosity variables are likely to impact on overall costs.

COVERAGE VARIABLES

Eligibility requirements

5.13 The most important variable for determining the ultimate cost of any possible VCS is the number of victims of crime who might qualify for compensation. The criteria used to determine who qualifies and who does not can, and should, be shaped to ensure that as many people are covered within the constraints of affordability. In this regard, the primary, non-negotiable criterion for any consideration of the victim's eligibility for compensation is that s/he is the victim of a violent crime. 'Mere' property crimes can and should be excluded from consideration as is the case in most foreign jurisdictions. Given the focus on violent crimes, for the purpose of this report, the following crime categories used by the criminal justice system were considered for the purposes of costing a VCS:

- * Murder;
- * Attempted murder;
- * Rape;
- * Assault with the intention to inflict gross bodily harm;
- * Indecent assault; and
- * Aggravated robbery.

¹⁶⁰ Coverage would include the number of different types of victimisations deemed 'worthy' of compensation (and, hence, the number of victims to be compensated by the scheme). Generosity would include the nature and value of the pay outs associated with their compensation.

5.14 The reasons for the inclusion of most of these categories are reasonably clear-cut and broadly based on their severity. To expand:

- * murder is the deliberate killing of another person with financial and psychological consequences for the victim's survivors and dependants;
- * rape, by its nature, amounts to an act of criminal violence with physical and psychological consequences for the victim;
- * attempted murder has been included, despite the fact that some victims of this crime do not suffer very severe physical injuries but sustain psychological injury,¹⁶¹ although data assessing how many victims do suffer severe physical harm are not currently available;¹⁶²
- * assaults with intent to cause grievous bodily harm have been included as this category of crime includes the bulk of attacks involving injuries to victims that do not result in fatalities;
- * indecent assault may have long-term psychological effects, particularly in younger victims, which may warrant compensation;
- * aggravated robberies, the bulk of which involve the use of firearms or other weapons, may result in psychological consequences for the victim and have therefore been included, even though a very violent robbery would, in all likelihood, have been captured as a murder, attempted murder or assault GBH.

5.15 A second non-negotiable criterion for the coverage of a VCS in South Africa is that the victim of a violent crime must have experienced real, material losses that can be directly attributed to the crime. Thus, people who are exposed to violent crime, but who are neither injured nor suffer financial losses attributable to the psychological effects of the experience of the actual or threatened violence, are assumed not to qualify for compensation.

5.16 These 'bottom-line' criteria aside, however, determining who should be eligible to receive compensation from a VCS in South Africa and where to draw the line between eligibility and

¹⁶¹ Typically, attempted murder dockets are opened by the police when an attacker has fired a gun at a victim irrespective of whether physical harm is caused or not, or when the facts make clear that the assailant intended to try to kill the victim using either another weapon or his/her hands.

¹⁶² It has been necessary to make some assumptions in this regard, the import of which will be described further on in this report.

ineligibility remains the greatest difficulty. The wider the coverage offered, the more people will be eligible and the greater the costs associated with compensation will be. It is possible to limit coverage of the scheme. However, given the data constraints, it has not been possible to assess precisely how different definitions of the coverage criteria will affect the number of victims eligible for compensation. Where possible, assumptions and estimates had to be used to assess the impact on cost. The criteria suggested for expanding or contracting coverage could include the listed items below, many of which are used in other jurisdictions to control costs.

- * Only victims who suffer physical harm, rather than only psychological harm, might be compensated, and those who suffer physical harm might not be compensated for losses attributable to the psychological consequences of their physical injuries.
- * Standards pertaining to the severity and long-term impact of the injury could be set, which would include a wider or narrower range of injuries sustained by victims of violent crimes. Obviously stricter criteria – such as requiring that the injury’s effects last a long time – would tend to reduce the number of victims who would be eligible for compensation. At the extreme, only permanent injuries and deaths may attract compensation.
- * Compensation could be limited only to ‘blameless’ victims, whose behaviour in no way contributed to their victimisation. People injured in fights linked to the consumption of alcohol could be regarded as ineligible for compensation. Victims who have been convicted of certain crimes in the past might also be excluded from compensation.

5.17 Particular categories of victims and dependants may be identified and prioritised for the receipt of compensation. These could be victims in one or more of the following categories:

- * woman and/or children;
- * poor victims (by establishing means tests); and/or
- * victims in certain geographically defined areas (rural areas, urban poor, **etc**).

People who are insured against the financial effects of crimes could be deemed to be ineligible to claim compensation.

The use of crime statistics

5.18 One of the more difficult problems encountered in attempting to model the costs of a VCS in South Africa is the absence of data which would guide the approximations used in constructing the model. These data deficits result from a number of factors, three of which are considered below.

5.19 The under-reporting and under-recording of crime in South Africa are well-documented phenomena resulting from problems including police legitimacy, fraught police-community relations which prevail in certain areas of the country, inadequate police data management systems, and perverse incentives regarding the allocation of resources, which can tend to discourage the police from recording crimes. The impact of these problems tends to mean that the actual incidence of crime is likely to be higher than the levels of crime captured in police crime statistics. This is also borne out by Medical Research Council research which suggests that a much larger number of victims of violence receive treatment at primary, secondary and tertiary medical facilities every year than would be predicted on the basis of crime statistics alone.

5.20 The recording of crime in police crime statistics is subject to a variety of methodological problems arising from difficulties with the crime codes used. No absolute standards exist to distinguish between assaults, assaults with intent to do grievous bodily harm and attempted murder. In practice, a set of recording conventions is used, which relates to the weapon used (the use of a firearm, irrespective of whether an injury results will tend to be recorded as an attempted murder, while a stabbing would, in general, will be recorded as an assault GBH).¹⁶³ There is no basis on which one can determine the character of the injuries sustained as a result of the crime purely on the basis of recorded crime statistics. This was confirmed by the case study referred to above.

5.21 The docket, because it is opened soon after the crime, cannot reflect the long-term impact of the injury. This problem can be overcome if a sufficiently large sample of victims of

¹⁶³ This was confirmed by the results of our case study reported above. As described at 5.3.12, in only 2% of instances in which a knife was used was the crime coded as an attempted murder. Similarly, in only 4% of the cases in which a gun was used was the crime coded as anything other than an attempted murder or an aggravated robbery.

violence is traced through their subsequent medical and psychological treatments in order to assess the range and frequency of injuries resulting from crimes.¹⁶⁴ This was also apparent in our case study reported on above.

5.22 These problems aside, police crime statistics are generally regarded as about the best – if not the only – source of reasonably consistent data on the incidence of crime in South Africa. One alternative to the use of police crime statistics is the use of data derived from victimisation surveys conducted in South Africa over the past few years. However, the findings of these surveys are themselves relatively inaccurate, with victims often, for example, failing to identify the precise year in which a crime occurred. Such surveys, therefore, are a poor basis on which to build a model of the potential costs of a VCS in South Africa.¹⁶⁵

Generosity Variables

5.23 As described in the basic formula of the costs of a VCS, generosity variables are as important as coverage variables in determining the ultimate costs of a VCS. These variables, like the coverage variables, can be manipulated through VCS policies so that their impact on the final costs of a VCS can be expanded or contracted depending on the resources available. These variables should be determined with the coverage variables so that the impact of increasing generosity is offset by decreasing coverage, or vice versa. In this manner, it is ensured that compensation paid is reasonable and will not add insult to the already injured victim.

5.24 Policy control over generosity variables arises from two sources: the control of the range of heads of damages paid by the VCS; and the average pay outs associated with each of the heads of damages. Compensation to victims of violent crimes (or their dependants) can be based on some or all of the following heads of damages:

¹⁶⁴ No such research appears to have been undertaken. As a consequence it has been necessary to make assumptions about the short- and long-term effects of crimes on the victims for purposes of the costing exercise in this study.

¹⁶⁵ One example of this is that a victimisation survey conducted by Statistics SA in 1998 returned the finding that about 45,000 families experienced a 'deliberate killing' during 1997. This figure is roughly twice the number of murders recorded by the SAPS for that period, implying an under-reporting rate of about 50% - a figure which should, we believe, be treated with a good deal of scepticism.

- * loss of income during convalescence;
- * loss of potential income over the long-term;
- * medical expenses associated with the injuries sustained (including or excluding psychological care);
- * costs incurred in assisting victims to adapt to their injuries (such as the purchase of necessary devices such as wheelchair, *etc*);
- * compensation for pain and suffering for the victim only;
- * compensation for the loss of the amenities of life; and
- * funeral expenses.

5.25 Definitions of these heads of damages can be used to increase or decrease the average generosity of the pay outs, which would be made by a VCS. Some examples of how this could be done are:¹⁶⁶

- * setting caps on the compensation claims that can be made for lost income in order (a) to reduce the pay outs to more affluent victims of crime; and (b) to focus the compensation pay outs on people who may experience greater relative hardships as a result of crimes committed because of their pre-existing economic vulnerability;
- * reducing or prohibiting pay outs made to applicants who are insured against suffering financial losses as a result of crimes committed against them;
- * setting limits on medical expenses that can be claimed where the relevant services are available at low or no charge from state hospitals;
- * limiting compensation to the direct effects of physical harm and not compensating people for psychological suffering;
- * setting limits on or prohibiting compensatory payments for pain and suffering and for the loss of the amenities of life.

5.26 The methods described above to control average payments from any VCS are all premised on a model of compensation evaluation which is individual and case-specific, and where the exact effect of the crime on the applicant must be proved. A simpler, but perhaps controversial, method might be the establishment of fixed compensation tariffs based on the nature of the injury suffered by the victim. Such a system, which has recently been introduced in the UK, sets precise amounts for compensation payments in terms of a pre-defined schedule of injuries. A similar approach is adopted in South Africa with regards to compensation for occupational injuries and diseases.

¹⁶⁶ The sheer number of heads of damages, as well as the wide range of policy choices that could be made in relation to each make it impossible to construct a model which deals with all the policy permutations which could be considered and applied. However, it is possible to construct a framework for thinking about the range within which a particular set of policy choices regarding these variables might be considered.

5.27 This method, though a radical departure from the common law methods of individual assessment of compensation claims, has the advantage of being both simpler to administer and more likely to create predictable levels of compensation disbursements.¹⁶⁷ Whether such a system makes the establishment of a VCS affordable, however, depends on the level at which the payments are set in the appropriate schedules. The above examples demonstrate the numerous methods that exist and, in some cases, are already used in some jurisdictions to reduce the relative generosity of compensation payments. In common law, diversions from these norms could be controversial as they will, inevitably, reduce the amounts which victims might have been awarded had compensation been ordered by a civil court.

5.28 The above examples demonstrate the numerous methods that exist and, in some cases, are already used in some jurisdictions to reduce the relative generosity of compensation payments. In common law, diversions from these norms could be controversial as they will, inevitably, reduce the amounts which victims might have been awarded had compensation been ordered by a civil court.

COSTING THE SCHEME

The Contents of the Costing Model

5.29 An accurate costing of the likely claims on a VCS in South Africa is made difficult because of the paucity of data that exists in respect of factors such as the demographics, employment status and income of victims of crime. The absence of data on the medical and psychological impacts of crime – and the effect of these on the income and expenditure of households – makes costing a VCS almost impossible.¹⁶⁸ Nonetheless, a possible model has been developed in the discussion paper on the basis of cost projections that remain dependent on the assumptions made. To the extent that these are inaccurate, the conclusions too are inaccurate.

¹⁶⁷ Indeed, it was for these reasons that this was the system to which the VCS in the UK moved.

¹⁶⁸ This problem is not unique to SA. As Greer notes in commenting on the difficulty of assessing the proposals for reforming the VCS in the UK, 'A major problem with assessing the government proposals ... is the lack of empirical evidence of the *financial* effect of crime on its victims, particularly in the case of those who are seriously injured' (Greer, 1996, p 620).

5.30 In light of these difficulties, the Commission's starting point was to try to estimate the full cost of crime to victims along various dimensions. This approach was adopted even though it was fairly obvious that its outcome would be unaffordable and, in any event, would include a wide variety of victims who would not, in the ordinary run of a VCS, qualify for compensation. Nonetheless, this was regarded as a sound basis for assessing what a full-blown 'bells and whistles' VCS would cost the taxpayer if it were to be fully funded, in order that variations from this norm could be assessed and also help us understand the 'costs' of violent crime to victims in our society.

Elements included in the costing of compensation payments

5.31 The following damages payable to victims have been included in the model:

- * Lost income;
- * A welfare payment for unemployed persons;
- * Medical costs;
- * Funeral costs; and
- * Pain and suffering in the case of surviving victims, and *ex gratia* payments in the case of dependants who have lost a provider.

The number of victims

5.32 The number of victims used in the Commission's model and which is outlined below, is derived from the number of violent crimes recorded by the SAPS in 1998, modified by an assumed, though reasonably conservative, under-reporting rate:

Number of victims (1998)			
Crimes covered	Recorded crimes	Under-reporting	Total crimes
Murder	24,875	3%	25,644
Attempted murder	29,418	20%	36,773
Rape	49,280	30%	70,400
Assault GBH	234,056	20%	292,570
Indecent assault	4,851	20%	6,064
Aggravated Robbery	88,319	20%	110,399
Total	430,799	26%	541,849

5.33 The model is therefore premised on the effect of crimes committed against 540 000 people in South Africa during the course of 1998.¹⁶⁹ 54% of these were assaults GBH, 20% were aggravated robberies, rapes, attempted murders and murders. Indecent assaults made up a little more than 1% of the cases.

5.34 The raw crime statistics as recorded by the SAPS have been used in this regard, although approximately 18% of all relevant cases recorded by the SAPS were subsequently withdrawn or closed as unfounded:

Withdrawn and unfounded cases (1998)					
	Crimes	Withdrawn	Percent	Unfounded	Percent
Murder	24,875	2,299	9.2%	664	2.7%
Att. Murder	29,418	6,574	22.3%	693	2.4%
Rape	49,280	8,456	17.2%	862	1.7%
Assault GBH	234,056	46,170	19.7%	3,095	1.3%
Indecent ass.	4,851	1,918	39.5%	101	2.1%
Agg. Robbery	88,319	5,368	6.1%	1,121	1.3%
Total	430,799	70,785	16.4%	6,536	1.5%

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SAPS, 1999.

5.35 There are a number of reasons why it would be inappropriate to treat these cases as not being ineligible for compensation, even though they currently are not taken forward by the SAPS into the criminal justice system. They include cases that are reported to the police but which are subsequently withdrawn after a cooling off period or in favour of an alternative form of dispute resolution, often involving the intervention of both the victim's family and the family of the perpetrator. These cases ought not to be excluded from the appropriate statistics because the establishment of a VCS, by creating a financial incentive to pursue cases through the courts, is likely to significantly reduce the number of cases withdrawn.

5.36 The inclusion of cases subsequently deemed unfounded is more controversial than the inclusion of cases subsequently withdrawn by the complainant. There exist very real doubts about the quality of the determination made by investigating officers that a complaint is, indeed, unfounded in law. The control and management of this function has not been properly assessed and a perverse incentive may be found to exist, namely that a case closed is one which does not have to be proceeded with. In addition, there exist real possibilities that cases such as acquittals have been incorrectly recorded on the SAPS database as unfounded.¹⁷⁰

THE COSTS OF FULL COMPENSATION

5.37 This model seeks to establish, on the basis of the assumptions described above, what the costs of violent crime borne by victims in South Africa are. This model, which is based on providing full compensation, serves as the basis against which subsequent policy modifications might be assessed. It is, therefore, not offered to be implemented in its present form, but as a point of departure to try to assess what a VCS might cost in SA.

5.38 There are a number of factors which have not, however, been taken into account in this model. These include:

- * the fact that permanently injured persons who cannot obtain any income as a

¹⁷⁰ Given that these arguments in favour of including both categories of cases for which there is some basis for exclusion are in large measure issues of judgement about which reasonable disagreements could exist, it is possible that some will be unpersuaded by the rationales for inclusion provided. If, indeed, that is the case, the reader is advised merely to reduce the projected cost of compensatory payments to victims of the crimes under consideration by the proportion of cases which are subsequently withdrawn by the complainant or deemed unfounded by the investigating officer.

- * result of their injuries are entitled to a disability; and that no provision has been made regarding welfare payments to unemployed persons who would not otherwise qualify for compensation for the loss of income.

5.39 The overall cost of a VCS that seeks to compensate victims fully is set out in the table below. As can be seen, the full cost of violent crime to its victims (based on the assumptions described above) is R4.7 billion. This amount can be broken down between different categories of compensation reflected in the tables below:

Total pay out		
Crime	Total	Ave. per victim
Murder	R 3,898,640,830	R 152,027
Attempted murder	R 144,453,529	R 3,928
Rape	R 112,957,859	R 1,605
Assault GBH	R 484,983,088	R 1,658
Indecent assault	R 2,665,640	R 440
Aggravated Robbery	R 70,810,532	R 641
Total	R 4,714,511,478	R 8,701

Total pay out		
Category	Total	Average
Long-term income	R 4,003,565,855	R 7,389
Short-term income	R 46,628,783	R 86
Pain and suffering	R 584,572,340	R 1,079
Medical	R 21,803,224	R 40
Funeral costs	R 57,941,276	R 107
Income support for unemployed	R 0	R 0
Total	R 4,714,511,478	R 8,701

5.40 Long-term loss of income is by far the largest contributor to the size of any compensatory payments, averaging at about 81% of all payments. Pain and suffering constitutes 12%, with the bulk of the remainder made up by medical and funeral costs. Given the assumptions, the loss of short-term income makes up a negligible 0.9% of the total paid out.

The averages here reflect the averages paid to all victims, although not all will receive each category. The average of R107 for all victims is, therefore, not reflective of the payments that a murder victim's family would actually receive for the funeral costs of the victim. Similarly, only a minority would qualify for payments based on the loss or diminishment of their long-term income. Those who did receive such payments would receive considerably more than the R7 389 – which is the amount that recipients would receive when averaged over all victims, irrespective of whether they were entitled to such payments.

5.41 This initial costing of a full VCS needs to be qualified in a number of respects, including:

- * the 'over-compensation' of persons who might qualify for disability grants;
- * the fact that many murder victims will not have dependants, and will, therefore, leave no-one who will qualify for compensation;
- * considerations regarding the medical costs associated with being raped; and
- * the 'over-compensation' of persons who are privately insured for death, disability and loss of income.

SUMMARY OF EFFECTS OF ADJUSTMENTS

5.42 The table below reflects a running total as different adjustments are made to the total calculated in terms of the original specification of the model. As is apparent, even after all adjustments have been made, the overall cost of a VCS is considerable:

Adjustments		
Total	Total:100% murder victims have dependants	Total: 50% murder victims have dependants
Total	R4,714,701,518	R4,714,701,518
Less "over-compensation" of those eligible for permanent or 12 month disability grants:	-R 95,224,389	-R 95,224,389
Total	R4,619,477,130	R4,619,477,130
Less income compensation for murder victims with no dependants (assume proportion is 50%)	R 0	-R1,949,315,048
Total	R4,619,477,130	R2,670,162,082
Compensation for rape survivors	R 140,800,000	R 140,800,000
Total	R4,760,277,130	R2,670,962,082
Less "over compensation" of insured victims	-R 714,802,739	-R 714,802,739
Total	R4,045,474,391	R2,096,159,344

5.43 This costing exercise is based on an overly generous set of policy assumptions, all of which will be tightened in the models that follow. Before proceeding, however, there are certain variables that ought to be considered.

ADMINISTRATION COSTS

INTRODUCTION

5.44 It is, of course, extremely difficult to determine the cost of administering a VCS in South Africa given the absence of any historical data in this regard and the uncertainties about the character and scale of such a scheme.

5.45 It is, however, vital for the success of any scheme that there be no illusions that existing administrative structures – be they the police, courts or social development offices – are equipped to take on the burden of administering a VCS. Currently there is no spare capacity in these structures for accepting such responsibilities without the provision of additional resources. This assessment has been confirmed through interviews with relevant departmental senior policy-makers and administrators. The consequence of this is that infrastructure and personnel will be required to set up and run a VCS. To do so, a sense of the potential scale of the administration had to be developed, which is impossible without further work being undertaken on the structure and scale of a VCS. A possible administrative process to be followed in applications would assist in this regard.

Costing the administration of the scheme

5.46 On the basis of the assumption that victims or dependants of victims of the crimes of murder, attempted murder, rape, indecent assault, assault GBH and aggravated robbery would have a claim to compensation, the number of applicants would probably equate to the number of crimes (including those assumed to occur, but which are currently unreported). This would amount to about 542 000 applications per annum:

Victims of crime	
Murder	25,644
Attempted murder	36,773
Rape	70,400
Assault GBH	292,570
Indecent assault	6,064
Aggravated Robbery	110,399
Total	541,849

5.47 A number of the applicants who were victimised in assaults, attempted murders and robberies, may, however, not have been injured at all and would, therefore, not qualify for compensation. A more realistic number of potential applicants would therefore be approximately 279,000:

Injured victims	
Murder	25,644
Attempted murder	14,760
Rape	70,400
Assault GBH	117,438
Indecent assault	6,064
Aggravated Robber	44,314
Total	278,620

5.48 Depending on the criteria used, a very large number of these applications may be rejected on grounds such as that victims have contributed to their own victimisation or have criminal records. Moreover, it is possible that only a select group of victims will be eligible for compensation if poor victims or only victims of rape and murder are to qualify:

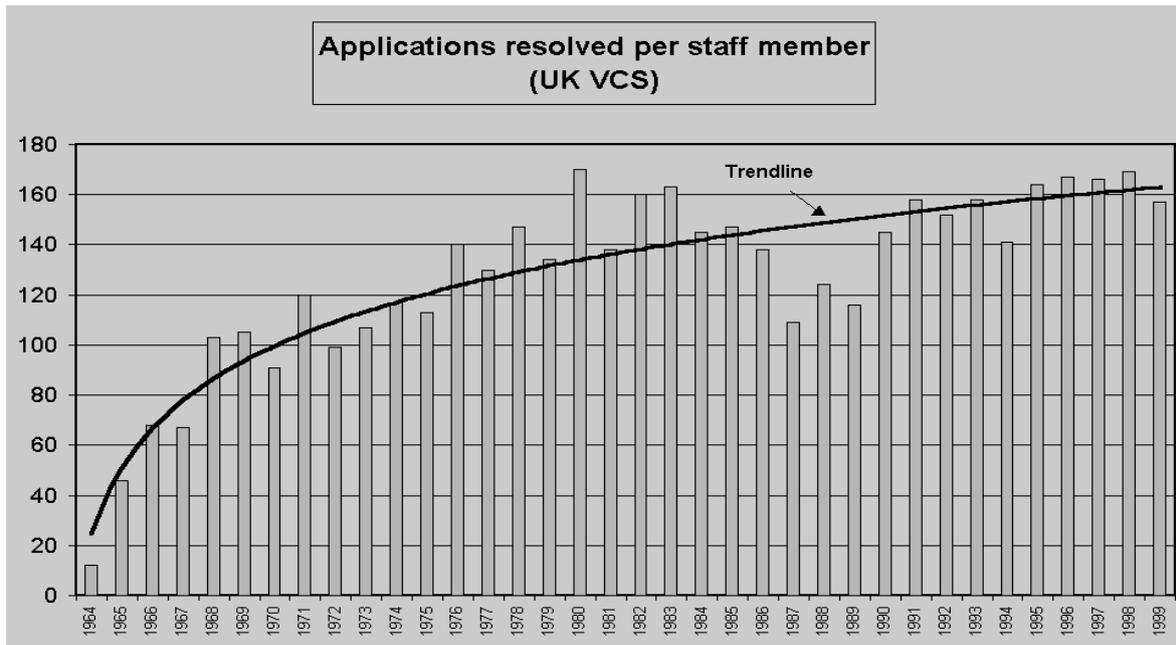
Likely applications					
	Crimes	Percent uninsured	Uninsured	Percent 'chancers'	Applications
Murder	25,644	97%	24,888	0%	24,888
Attempted murder	14,760	93%	13,676	20%	16,411
Rape	70,400	98%	68,816	20%	82,579
Assault GBH	117,438	94%	110,796	20%	132,956
Indecent assault	6,064	98%	5,927	20%	7,113
Aggravated Robbery	44,314	86%	38,132	20%	45,758
Total	278,620	94%	262,235	18%	309,704

5.49 If 278 600 cases are referred to the VCS, a number will be eliminated because they are fully insured (which, as assumed, meant all those earning more than R60 000 per year). A significant number of applicants will also apply either fraudulently or without comprehending the preconditions for eligibility, which may increase the number of applications to 310 000 per year. The number of staff required to process such applications efficiently and without creating backlogs will, therefore, need to be determined. In this regard, much depends on the character and scope of the scheme, with more staff needed the more supporting evidence is required to be followed-up and assessed.

5.50 In the UK, over the 35 years of operation of the VCS, it has been determined that one staff member is required for every 127 applications resolved.¹⁷¹ Using that ratio, a VCS in SA would require 2,439 staff members to resolve the estimated 310,000 applications received annually.

¹⁷¹

Interview with Richard Thew, Head of the Victims & Compensation Team of the British Home Office Justice and Victims Unit , 19 April, 2000.



5.51 It is unlikely that a VCS in SA will achieve such a ratio. It would be wise to assume that, even under the best possible circumstances, we would not achieve a ratio of much more than 1:100 in the first few years of operation. If that is the case, then approximately 3 100 staff would be required to run the VCS. In the current financial year, South Africa's 1 130 000 civil servants employed by national and provincial governments earn, on average, R81 163 per annum. Thus, with 2,439 staff, salary costs alone can be expected to be about R198 million while with 3100 staff, the VCS will have a wage bill around R252 million per year.

5.52 The VCS in the UK resolves about 52% of their 80,000 annual applications with an award of funds. Since there are numerous parameters of the VCS, which, if applied, may reduce the proportion of successful applications in a South African VCS to below 50%, it might be argued that a lower staff-to-applicant ratio could suffice.¹⁷² If the VCS were to have only limited coverage of victims, and decisions on ineligibility could be made with limited room for legal challenge, the number of staff members required, and therefore administration costs, may be reduced.

¹⁷² Tightly defined eligibility criteria, which serve to reduce the number of successful applications, will save costs both in terms of pay out and in terms of the administration of the scheme. At the same time, the tightness of those criteria will tend to 'encourage' applicants to be more litigious, potentially raising any legal costs of defending the scheme's decisions in court.

5.53 Administration costs exclude the following operational costs:

accommodation,
computer consumables, paper and printing,
electricity and fuel,
infrastructural maintenance and replacing equipment,
legal costs associated with defending decisions of the VCS (if such cannot be prevented); and
on-going training and development.

5.54 In addition to annual administration and operational costs, the following start-up costs can also be anticipated:

vehicles and furniture,
computers and data-lines, and
initial training of staff.

Administration costs and the number of successful applicants

5.55 It is not surprising that the administration costs of a large scheme with a large number of applicants will be high, as it will take great deal of organisational capacity to handle the volume of applications. These costs will not, however, vary directly and proportionately with the number of successful applications since there will always be a reasonably large number of applicants who do not understand the eligibility criteria, who seek to test the limits of such criteria, or who apply without much hope of success. All of these applications, no matter how poorly they meet the criteria, will have to be dealt with, and will require personnel and infrastructure dedicated to that end.

CONCLUSION

5.56 Any VCS that is established in SA will be enormously costly to implement, given this country's high levels of crime, and the consequent high levels of victimisation. This chapter has sought to cost the impact of establishing a VCS by estimating the actual and economic losses incurred by victims and their families. It has sought to do so in spite of much of the necessary data being unavailable. Estimates and assumptions have accordingly been used, where appropriate erring on the side of conservative assumptions. As a result, it is expected that any errors would tend to underestimate the full cost of a VCS in SA. Given the range of possible policy permutations, combined with the lack of data, it is impossible to estimate accurately the possible consequences of changes to various policy variables that may be effected in order to assess their financial impact.

2. FINANCING A VICTIM COMPENSATION SCHEME

INTRODUCTION

5.57 In the part above the costs of establishing a victim compensation scheme in SA was estimated. It attempted to determine the possible number of victims who might qualify for compensation, and the cost of administering such a scheme. These costs, almost irrespective of how the VCS is conceptualised, were great since our violent crime levels are high. The extensive cost of such a programme need not necessarily lead to the conclusion that it should not be established. Nonetheless, for obvious reasons, the sheer scale of the financial implications of establishing a VCS will create difficulties for those who motivate for the necessity of such a scheme. In seeking to make the case for the establishment of such a VCS, it is, therefore, necessary that possible sources of funding be explored. This part looks at the financing of a VCS, exploring the options that may exist in this regard.

FUNDING SOURCES

5.58 In general, the bulk of funds for compensation schemes internationally are sourced through the relevant budgetary authority at national, state/provincial or local level. Countries such as the USA have created legislation that directs the revenue generated through the payment of fines or forfeited bail monies towards victim compensation and victim assistance. Such monies must be used for both victim compensation (as defined in this report) as well as to support other forms of victim assistance, such as counselling, public awareness, and victim advocacy.¹⁷³

5.59 The Victims of Crime Act (VOCA), like legislation used in other parts of the world, imposes penalties on convicted criminals, which must be paid into the Crime Victims' Fund, with minor offenders paying as little as \$5 into the Federal Fund (in addition to the monies they are required to pay into state compensation scheme funds) irrespective of the character of their

¹⁷³ In the USA, the Victims of Crime Act, passed in 1984, created the Crime Victims Fund, which directs fines and forfeitures in Federal Courts to the states on condition that the states have in place a VCS (conforming to certain criteria laid down in the VOCA) in order to support the work of the Schemes. The VOCA incentivises the states to create and sustain reasonably large schemes by awarding amounts equivalent to 40% of the expenditure of those Schemes in the preceding year (OVC, 1999).

offence or the nature of their sentence.¹⁷⁴

5.60 An alternative mechanism, increasingly used internationally, is to require a larger number of convicted criminals to pay compensation to their victims, thus sparing the VCS the responsibility – and burden – of compensating that victim. This approach has, however, often stumbled in the courts, where judges and prosecutors appear to be unwilling to complicate the purely criminal trial with the difficult process of making compensation orders through the assessment and award of damages. This is so even in jurisdictions in which the law requires that magistrates must issue compensation orders unless there are compelling reasons not to do so, such as the UK.¹⁷⁵ In some states in the US, notably California and Iowa, the state compensation scheme has employed people to pursue convicted criminals who have been ordered to pay compensation to their victims but have failed to do so. The expectation is that the cost of employing people to do so is covered by the reduction in claims paid by the VCS.

5.61 In addition to fines and surcharges levied on conviction, compensation schemes also sometimes draw on funds confiscated through the application of asset forfeiture legislation. While there is much merit in the use of these funds to compensate victims, there is often competition from law enforcement agencies that also seek to supplement their funding from such funds.¹⁷⁶ Offenders can, therefore, be required to contribute to the financing, or reduce the cost of a VCS through:

- * fines paid and forfeited bail monies;
- * an additional surcharge levied against the offender on any sentence, whether such sentence is custodial, non-custodial or a fine;
- * asset forfeiture in terms of which the proceeds of crime are attached and used by the VCS to finance compensation; and
- * improved strategies to increase the direct compensation of the victim by the offender.

¹⁷⁴ Office for Victims of Crime *OVC Fact Sheet* Washington DC: US Department of Justice 1999.

¹⁷⁵ Greer, 1996.

¹⁷⁶ In SA, section 63 of the Prevention of Organised Crime Act of 1998 provides for the establishment of a Criminal Asset Recovery Fund, to be managed by a committee of ministers, and tasked with advising on the provision of financial assistance to law enforcement agencies and to organisations and institutions providing services to victims of crime (s64).

5.62 In addition to ordinary appropriations from the budgetary authority, a second way in which ordinary citizens might contribute to the financing of a VCS is through dedicated taxes that might be levied in respect of the purchase of certain goods and services. In this regard, we know of no such schemes elsewhere, but would submit that there are two legal activities which might reasonably be taxed in order to finance the compensation of victims of crime: the consumption of alcohol; and the purchase of firearms and ammunition.

5.63 The links between the consumption of alcohol and the prevalence of violent crime in SA are well supported by the data, and, as such, it might be reasonably argued that the consumers of alcohol ought to provide funds for the compensation of victims. Similarly, and even more directly, the accessibility of firearms correlates with the very high levels of violent crime in SA. In the light of this, there is a case to be made that the owning and using of a firearm might be regarded as activities which increase the possibility of crime in South Africa, and which might, therefore, be taxed to enable government to recover some of the costs of crime from the individuals whose activities directly and indirectly contribute to the creation of conditions conducive to high levels of violent crime.

5.64 In addition to these sources, funds might also be provided to a VCS from individuals, corporations and philanthropic organisations, both foreign and domestic. The flow of these funds, however, is seldom consistent, and excessive reliance on these will create problems of sustainability.

5.65 In essence, therefore, there are three sources of funds that might be tapped for the funding of a VCS: taxpayers, donors and criminals themselves. One, two or all of these sources are involved in the financing of all of the compensation schemes at which we have looked, as well as in the proposals that have been made for the financing of a VCS in SA. Each of these sources might be tapped in different ways, and a summarised typology of these approaches is offered in the following table.

Donors

Taxpayers

Criminals

- Grants from international and domestic individuals and institutions
- Appropriations from Parliament
- Dedicated taxes on goods and services (e.g. the consumption of alcohol or the purchase of firearms or ammunition)
- Fines paid
- Bail forfeited
- Proceeds of crime
- Pursuing compensation orders on criminal conviction

What do victim compensation funds finance?

5.66 Aside from the compensation of victims, funds dedicated to improving the lot of victims appear seldom to fund compensation exclusively. Indeed, compensation, while generally making the largest portion of expenditure from the fund, is regarded as only one tool among many in the programme of addressing the needs of victims. In the USA, for instance, the Crime Victims Fund is used to assist state compensation schemes, but will do so only if those states also provide funding to organisations offering victim assistance such as counselling support and advocacy work. It is a proviso that an amount equal to that granted to states to compensate victims must be provided for victim assistance. A further portion of the fund must, by law, be used to fund the training and development of public servants involved in victim empowerment programmes. In addition, by law, \$10m is set aside annually from the fund to prosecute child abusers, prevent child abuse and build the capacity of law enforcement agencies to prosecute child abusers.

5.67 In the UK, the compensation scheme is also involved in the development and provision of victim assistance services, motivating this on the basis that empowered victims are less in need, or desirous, of compensation from the state.¹⁷⁷ Thus, victim compensation funds are

¹⁷⁷ Interview with Richard Thew, Head of the Victims & Compensation Team of the British Home Office Justice and Victims Unit , 19 April, 2000.

seldom pure compensation schemes but also provide resources for other forms of victim empowerment.

Estimating the Flow of Funds by Source

5.68 It is impossible to assess the amount of funding which is likely to be secured from each potential source of VCS funding. This section considers the possible flow of funds from some of the sources discussed above.

*** The National Revenue Fund**

5.69 All revenues collected by the national government, with some minor exceptions,¹⁷⁸ are deposited into the National Revenue Account. These are appropriated to government departments and agencies in terms of the Public Finance Management Act. Such appropriation is undertaken through the budget process run by the National and Provincial Treasuries, culminating in the passage of the budget through the relevant legislature. These funds originate in the taxes levied on companies and individuals, as well as from the taxes and tariffs on particular activities. Included among these sources of revenue are taxes levied on the purchase of alcohol and revenue generated through the imposition of fines as sanctions when offenders are convicted in court.

5.70 Funds flowing into the National Revenue Account are used to fund the bulk of government's activities, and would, therefore, form the main source of funding for any VCS that might be established in South Africa. These funds are, however, allocated through a complex budgetary process in terms of which all government departments submit their financial needs based on existing departmental practices and new policy initiatives. The outcome of this process is extremely difficult to predict. However, the case for establishing a well-resourced VCS would have to be enormously powerful, and enjoy a very high level of support to be accommodated in the budget process.

5.71 It is of interest to note that the special Poverty Relief Fund, which will be allocated to provincial governments in order to run projects aimed at alleviating the plight of the poor, was

¹⁷⁸ One of the exceptions is the flow of funds originating in the seizure of the proceeds of crime and the assets from criminals in terms of the Prevention of Organised Crime Act.

allocated R450 million in 1999/00, R547 million in 2000/1 and R847 million in 2001/2. The HIV/Aids allocation on the other hand is limited to R75 million in 2000/1, R125 million in 2001/2 and R300 million in 2002/3.¹⁷⁹ The relatively small size of these allocations, each of them lower than some of our estimates of what a reasonable VCS would have to pay out, is in spite of overwhelming public and political support for the programmes.

5.72 It may, however, be countered that, since government spends between R300m and R400m on the provision of legal defence to persons accused of crimes every year through the Legal Aid Board, the provision of a similar amount to the compensation of victims of crime would be appropriate.

* **Fines and forfeitures**

5.73 Estimating the revenue that might be generated through fines and forfeitures is somewhat easier than estimating the size of potential appropriations from the National Revenue Account since at least one of these categories is reasonably well accounted for. Between 1995/6 and 1997/8, fines and forfeitures generated R124.5 million, R165.5 million and R133.9 million in each of the three financial years. Estimated revenue from 1998/9 to 2000/1 has, however, fallen to R79.2 million, R100 million and R110 million, although there is no explanation for this fall.¹⁸⁰

5.74 Since the passage of the Prevention of Organised Crime Act of 1998, new tools and a new fund have been created for seizing and depositing assets forfeited from convicts and those who have acquired their riches from criminal activity. This fund – the Criminal Asset Recovery Fund – has been established too recently for any meaningful assessment of the revenue that is likely to pass through it. However, at present it contains approximately R150 000, with a further R120 million in frozen assets which might be deposited into the fund at a later date.

5.75 The Act provides that a committee established to manage the Fund will advise on the

¹⁷⁹ Department of Finance *The 2000 Budget Review* Pretoria: Government Printer 2000, statistical appendix, table 3.

¹⁸⁰ Department of Finance, 2000, statistical appendix, Table 2.

use of the funds, and that such advice must cover the potential for funding law enforcement agencies and for funding organisations which provide services and assistance to victims. This provides a legal framework for the transmission of assets forfeited by criminals to victims of crime via the appropriate agencies and institutions (the Act does not contemplate the direct provision of compensation to individual victims). The management of the Fund is dominated by representatives of the criminal justice system: the Ministers of Safety and Security and Justice, and the National Director of Public Prosecutions. This, together with the formulation of the objects of the Fund, is likely to result in law enforcement securing the vast bulk of seized assets. It would, therefore, be unrealistic to assume that anything more than a small percentage of funds seized in terms of the Prevention of Organised Crime Act will be dedicated to the compensation of victims.

* **Costing a 'guilt-tax'**

5.76 In the US, the accused is charged a levy after any conviction, on a sliding scale between small fees for minor misdemeanours and higher levies for persons convicted of more serious charges. According to police records, in South Africa in 1998, there were 203 071 serious cases¹⁸¹ which resulted in at least one of the accused person's being found guilty in 1998. Since the minimum number of guilty persons is one, on average, more than one accused person will have been found guilty in each of these cases, thus, we can assume that something like 300 000 to 400 000 people were found guilty of serious crimes in 1998.¹⁸²

5.77 It is, however, not possible to ascertain the number of charges on average in respect of which each of these persons was convicted. This number must however be greater than one since one charge is the minimum. This gap in our data arises from the fact that police system from which these data are drawn records only the most serious charge which arises from a crime. Thus, a murder arising from a hijacking will have been recorded as a murder, although

¹⁸¹ In terms of police record-keeping, serious crimes include: murder, attempted murder, culpable homicide, armed robbery, aggravated robbery, robbery, public violence, illegal strikes, rape, statutory rape, indecent assault, *crimen injuria*, cruelty to children, kidnapping, abduction, assault (common and GBH), housebreaking (residential and business), stock theft, shoplifting, car theft, theft out of cars, theft, arson, malicious damage to property, fraud, driving under the influence, drug (possession and sale), illegal possession of firearms, and illegal possession/use of explosives.

¹⁸² There are, unfortunately, no accurate records of the number of people convicted.

the accused person might eventually be found guilty of murder, robbery and possession of an illegal firearm. Conversely, a gang-rape is one case, but has many offenders.

5.78 We can assume, however, that there were approximately 400 000 to 500 000 serious charges in respect of which there were guilty findings in 1998. Unfortunately, the precise breakdown of guilty verdicts between the various types of charges is unknown and the number of convictions in respect of particular charges is therefore not known. It is accordingly not possible to develop a reasonably precise estimate of the revenue that might be generated for a VCS if a sliding scale were used to levy convicts based on the seriousness of the charge on which they are found guilty.

5.79 That said, we do know that the 203 071 cases on which at least one conviction was obtained can be broken down as follows:¹⁸³

Convictions in 1998								
Crime	Amount	% of total	Crime	Amount	% of total	Crime	Amount	% of total
Murder	3,897	2%	Crimen injuria	2,680	1%	Car theft	2,511	1%
Att murder	1,886	1%	Cruelty kids	192	0%	Theft from car	3,897	2%
Culp homicide	1,143	1%	Kidnapping	171	0%	Other theft	24,157	12%
Robbery agg	2,317	1%	Abduction	111	0%	Arson	426	0%
Robbery other	2,800	1%	Assault GBH	29,409	14%	Property damage	6,666	3%
Public violence	37	0%	Assault comm.	19,341	10%	Fraud	5,289	3%
Illegal strikes	1	0%	Bus burglary	6,239	3%	Drug related	21,223	10%
Rape	4,382	2%	Res burglary	13,743	7%	Drunk driving	13,704	7%
Rape stat	62	0%	Stock theft	2,587	1%	Poss firearms	3,692	2%
Indecent assault	564	0%	Shoplifting	29,919	15%	Explosives Act	25	0%

5.80 It is clear from the above table that a fairly large proportion of convictions are for reasonably minor crimes such as shoplifting, theft other and common assault. If it is assumed that such crimes were levied at R50, while all other crimes were levied at R100, the amount that would be raised would be R16 168 950 per year, or between R24 253 425 and R32 337 900 per year if a fine is levied on each person convicted. One caution to bear in mind with regards to a so-called 'guilt tax' is that the bulk of offenders are probably poor, and may be unable to afford to pay the tax. It may not, however, be a simple matter to determine the consequences of non-payment.

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Source: SAP 6 data from SAPS (1999)

* **Dedicated taxes**

5.81 There are two possible activities on which a dedicated tax might be levied: the consumption of alcohol and the purchase of guns or ammunition. A dedicated tax on alcohol would simply be added to the existing taxation of that activity which currently generates the revenue levels indicated in the following table:¹⁸⁴

Revenue generated from a taxing alcohol (R'000)						
	1995/6	1996/7	1997/8	1998/9	1999/00	2000/1
Beer	R 2,010,441	R 2,232,193	R 2,425,534	R 2,540,601	R 2,750,000	R 2,976,200
Sorghum beer	R 36,258		R 47,935	R 45,938	R 80,000	R 83,000
Wine and spirits	R 190,641	R 227,346	R 309,694	R 361,095	R 400,000	R 463,200
Total	R 2,237,340	R 2,459,539	R 2,783,163	R 2,947,634	R 3,230,000	R 3,522,400

5.82 As is apparent, taxes on alcohol will generate about R3.5bn in this financial year. Were these taxes to be raised by 10% in order to fund a VCS, about R350 million might be generated, although such taxes may either discourage demand or encourage tax avoidance, thereby reducing the amount of revenue generated for the VCS. The revenue that might be generated by a tax on gun or ammunition purchases is more difficult to estimate as there are no historical data on which to base such an estimation. Nonetheless, it might be possible to give an indication of the revenue that could be generated by looking at the number of licensed firearms owned by South Africans and the number of licenses processed by the Firearms Registry of the SAPS annually.

5.83 There are currently 3 554 336 licensed firearms owned by individuals in SA, with a further 95 772 owned by institutions such as security companies and 397 146 owned by firearm dealers.¹⁸⁵ If the ownership of each of these 4 047 204 firearms entailed a tax of only R20 per year, R80 944 080 could be raised for a VCS. In addition, in each of the past 6 years, the

¹⁸⁴ Source: Department of Finance, 2000, Statistical Appendix, Table 2.

¹⁸⁵ R Chetty *Firearm use and Distribution in South Africa* Pretoria: National Crime Prevention Centre 2000, at 33.

Firearm Registry has licensed 192 000 firearms.¹⁸⁶ If each of these licenses were levied at R100, a further R19.2 million could be raised.

* **Donor funding**

5.84 There is no way to assess the extent of possible donor funding for a VCS as this has not been a source tapped for this purpose. It would, however, be unwise to assume that there would be a large flow of funds from this source, unless large companies are persuaded to offer a contribution to the VCS on the basis of goods purchased from them. Donor funding levels are also notoriously erratic, making long-term planning next to impossible.

Obstacles to Public Financing of a Victim Compensation Scheme

5.85 The financing of a VCS, like all other government programmes, is dependent on a number of factors. These include:

- * The extent of political commitment to funding such a scheme, over and above other priorities;
- * The social benefits to be obtained from funding such a scheme;
- * The extent to which the benefits thought to derive from such funding may be obtainable from other social programmes, and the relative cost of delivering those services through other programmes; and
- * The costs associated with either redirecting expenditure from one set of services to the provision of funding for the functions of a VCS (including the costs of closing down existing operations, retrenchment or redeployment costs, the political and economic costs of dealing with consumer confusion/complaints, etc), or the costs of raising additional revenue for the funding of a VCS (including interest charges on borrowings, administrative charges associated with collecting revenue, the distortionary effect of increased taxes or tariffs and so on).

5.86 The basis for the decision to allocate public funds to a VCS is, therefore, whether or not the utilisation of public funds in this way improves the welfare of the community more than would either the retention of those funds by tax-payers or their utilisation for other purposes. The sheer cost of a VCS is not, therefore, a basis for its being rejected out of hand for if the benefits exceed the costs, the spending of public funds in this way is sound. Thus, if the case made for the establishment of a VCS is incontrovertible, it ought to stand a reasonable chance of being funded. This ideal of rational decision-making in public finance is seldom achieved, however, in the real world of the political and bureaucratic contestation for resources. Moreover, there

¹⁸⁶ Chetty, 2000, at 35.

are some issues associated with making the case that the benefits exceed the costs for a VCS and that the VCS, has a better cost-benefit ratio than do other areas of social spending, which may prove all but insurmountable.

5.87 Among the most important of these issues is government's commitment to reducing the share of GDP consumed by the state, as articulated in the Growth Employment and Redistribution Strategy (Gear). This commitment is founded on an assessment that the costs of government's raising revenue and spending a larger share of GDP are greater than would be the benefits associated with any form of increased public expenditure. This commitment to a tight fiscal policy implies that a VCS would essentially have to compete for a share of the existing revenue of the public sector and, therefore, that any commitment of funds to a VCS will require that other areas of public funding will have to be cut.¹⁸⁷

5.88 The upshot of the above is that it would be unrealistic to expect government, at this stage, to relax its fiscal policy and to raise more money in the form of taxes or borrowings in order to increase expenditure for projects such as the implementation of a VCS. If numerous other areas of potential government spending in poverty alleviation or job creation cannot support a claim to relax fiscal policy, it seems unlikely that government will entertain this as an option to facilitate the establishment of a VCS.

5.89 Despite the fact that all existing and potential government programmes ought to compete on a level playing field, it is well established that the nature of government budget decision-making is that it tends to favour existing programmes over new ones. This finding dates back at least to Widavsky.¹⁸⁸ The case for funding a VCS must therefore be superior to the case made for the funding of any of government's existing programmes.¹⁸⁹

¹⁸⁷ In practice, government may not cut the budgets of other public services in real or nominal terms, but it may simply cap their growth so that spending on them falls as a share of GDP. Although qualifying the point in this way does imply that there is a somewhat greater chance that government might find the resources for a VCS, one must bear in mind that most public functions ought to grow with the economy or, at least, with population growth. That being the case, the basic arithmetic of the point holds.

¹⁸⁸ *The Politics of the Budgetary Process* Boston: Little Brown 1969.

¹⁸⁹ The reasons for this a combination of the inertia of government spending policies and the organisational implications of switching programmes, which often require, at best the retraining, and, at worst, the retrenchment of existing workers. Moreover, it is much more

5.90 Thus, despite the fact that there exist compelling arguments for the establishment of a VCS, the fact that it will have to compete with existing policies and services for funding means that the odds are dramatically stacked against the likelihood of government's choosing to fund such a scheme to the full extent outlined above. However, a more targeted or limited scheme, which is seen to be running in tandem with the Victim Empowerment Programme, may have a slightly better chance of competing with other priorities.

The role of dedicated taxes

5.91 The use of 'dedicated taxes', which are revenues collected from a particular source, used solely for a particular programme or purpose, could be considered to fund a VCS. Such taxes are not subjected to competition from other actual or potential programmes. An example of this sort of tax is the fuel levy in South Africa which is dedicated to the maintenance and building of roads, and to the funding of the Road Accident Fund. These funds do not go into the National Revenue Fund of government, and cannot be utilised for any purpose other than those defined in law.

5.92 Having access to the such proceeds would reduce the size of the hurdle which a VCS would have to clear in order to obtain funding from the state in that a source of funding would be created which might be dedicated to the VCS, and which could, therefore, fund its activities. There exist, however, a number of reasons for believing that these proposals would not necessarily overcome the difficulty of securing public funds for a VCS. These include objections based on the fiscal policy of the state, objections based on the theory of public finance, objections based in the practice of public financial management, and difficulties associated with the size of the revenue stream that will be created.

5.93 Before dealing with these difficulties, it is worth stating the basic principles with which a tax needs to comply. These principles, defined in the theory of public finance are:

- * a tax ought to be fairly apportioned between taxpayers without unnecessary arbitrariness in the distribution of the burden;
- * a tax ought to not require excessive additional expenditure on the revenue collection agencies for its collection; and

politically difficult to cut existing benefits than to refuse to attend to the needs of people who have not yet become used to the receipt of particular services/benefits from government.

- * a tax ought to be reasonably simple to understand and administer, without creating too many loopholes and exceptions.

These principles create a basic framework against which any new revenue stream dedicated to the funding of a VCS might be judged, and, in general, there seem to be no insurmountable problems for such dedicated tax when judged against these principles. However, the other difficulties alluded to above still remain.

Difficulties arising from fiscal policy

5.94 The mere fact that a tax is dedicated to a particular expenditure programme of government does not mean that that revenue ceases to be a tax. It is, therefore, important to recognise the difficulties of creating new taxes in the context of a fiscal policy which is explicitly dedicated to reducing the overall tax burden in South Africa. Thus, creating a dedicated tax such as that proposed on the purchase of firearms or ammunition would have to overcome the objection that such a tax, by raising the overall tax burden on South Africans, vitiates from the achievement of government's stated fiscal policy objectives.

5.95 This argument can be overcome if it is shown that the additional burden of such a tax can be justified by the benefits to be accrued from the utilisation of the funds. However, there is a strong likelihood that the imposition of additional taxes would meet with fairly strong resistance, if not from within the state, then certainly from the people who would be taxed.

Difficulties arising from the theory and practices of public finance

5.96 A further set of objections to the establishment of a dedicated tax with which to fund the operations of a VCS, or any programme of public expenditure, is that the creation of a dedicated revenue stream creates inefficiencies. In essence, the argument is that programmes which are funded by dedicated revenue do not have to motivate for their continued existence along with every other programme of government: their access to finance protects them from the sort of scrutiny which other programmes must endure, creating an inappropriate set of incentives for maintaining efficiency and effectiveness.

5.97 For these reasons, the establishment of a dedicated tax is generally frowned upon by public finance officials, and may create an additional set of difficulties in making the case that the establishment of VCS in South Africa is desirable.

Difficulties associated with the size of the revenue stream

5.98 Although we have sought to estimate the size of the revenue streams which may flow into the VCS from a dedicated tax – and from other sources – the uncertainties described above would make it a very risky basis on which to build the foundations of a VCS as whomever was running the establishment of the Scheme would have very little idea how much she/he had with which to budget. This would obviously make developing policies and appointing staff well nigh impossible.

Alternatives Expenditure Choices

5.99 This report has raised the great difficulties which a VCS will encounter in seeking to secure adequate funds to make a meaningful contribution to the lives of victims. The question therefore arises as to whether it might be more appropriate to secure funds to provide assistance to victims so as to improve their lot, while not necessarily being used for financial compensation. Such assistance could focus on the provision of victim services, and could run in sync with other programmes of government, rather than being conceptualised as a completely new initiative.

5.100 Such an approach has much to recommend it, including that:

- * It recognises that financial compensation is often not the most pressing need of victims;
- * It seeks to supplement the funding of victim assistance programmes and does not entail arguing *de novo* for the provision of resources for victims;
- * Separate or duplicate administrative structures would not need to be established since the existing programme's infrastructure ought to be able to support the additional work made possible by the provision of additional funds; and
- * It acknowledges that existing programmes are under-resourced relative both to the demand for their services, as well as relative to their stated objectives, and would not compete with them for funds.

5.101 There are several existing programmes of government (amongst others) which either do already, or might with additional resources, be able to spread their focus to the victims of crime. These are:

- * **Trauma units in South African hospitals**

5.102 Trauma units in SA treat victims of violent crime as a matter of course after their injury. However, emergency treatment is expensive and places a great deal of pressure on the budgets of hospitals. Treatment is also generally only medically based with no follow up, counselling or crime prevention education taking place at the hospital. In addition, hospitals significantly under-recover the real costs of providing trauma care to patients.¹⁹⁰ Moreover, while there exist many good examples of patients receiving proper emergency treatment in hospitals in South Africa, this is not always the case. In motivating for the state to provide assistance to victims of violent crime, the fact that many of these victims will receive inadequate medical and psycho-social attention in trauma units may, therefore, form the basis for additional allocations to hospitals.

5.103 The advantages of this approach are that it:

- * provides resources to victims who certainly need it;
- * may reduce the long-term impact of the injury by providing better care to the victim at the site of their primary support intervention;
- * avoids the risk of fraudulent claims, as there is no direct financial benefit to victims; and
- * targets the poor who use state hospitals.

5.104 The main disadvantages are:

- * the funds would not be used exclusively for victims of crime;
 - * the long-term impact of injuries is not compensated; and
 - * only surviving victims benefit, with murdered victims' families receiving no finance to compensate for their loss.
- * **Supplementing the Disability Grant Programme**

5.105 The state currently provides a disability grant to persons whose disability prevents them from working either temporarily or permanently. This programme does not, however, cover all potential recipients due to its limited resources. Currently, 68% of disabled people who are not pensioners are receiving neither a grant nor a private insurance pension, and 78% who are eligible for pensions are not receiving them.¹⁹¹ Since we have assumed that some proportion

¹⁹⁰ Van der Spuy & Peden, 1998.

¹⁹¹ M Schneider, M Claasens, Z Kimmie, R Morgan, S Naicker, A Roberts and P McLaren 'We Also Count! The Extent Of Moderate And Severe Reported Disability And The

of victims of violent crime become permanently disabled, providing additional funds to this programme might increase coverage, and, therefore, deal with the needs of disabled victims of crime.¹⁹² Moreover, this approach could target addressing the particular needs of victims by providing specialised medical equipment such as wheelchairs.

5.106 The main advantages of this approach are:

- * the administrative systems, assessment procedures and payment processes already exist; and
- * the long-term needs of disabled victims of crime are dealt with.

5.107 The main disadvantages are:

- * the additional monies would not reach victims of crime alone;
 - * the level of funding, at R520 pm, is relatively low; and
 - * only surviving victims who are permanently disabled and unable to work would benefit.
- * **Providing emergency medical care for rape survivors**

5.108 The prevalence of HIV/Aids has worsened the plight of rape survivors in South Africa. Providing funds for the provision of the necessary drugs to reduce the likelihood of infection would appear to be a very attractive option.

5.109 The main advantages of this are:

- * it targets a group of victims whose needs are widely regarded as a high priority; and
- * the services which would be provided are matters of life and death.

Nature Of The Disability Experience In SA' Johannesburg: CASE & the Department of Health 1999.

¹⁹² 5% of people with disabilities say they were disabled in the course of violence (Schneider, Claasens, Kimmie, Morgan, Naicker, Roberts & McLaren, 1999, p.18).

The main disadvantages are:

- * it focuses on a small class of victims;
- * it might open up the possibility of false claims made by people hoping to secure the medication either for themselves or for subsequent sale.

5.110 In addition, to these alternative funding options, the idea of raising funds for witness fees is another alternative.

CONCLUSION

5.111 This part has sought to consider the possible sources of funding for the establishment of a VCS and the obstacles that may be encountered in attempting to secure such funding. It has highlighted the difficulties which is envisaged will be encountered in obtaining funding of the magnitude necessary to establish a compensation scheme. Alternative expenditure choices have also been considered, including the provision of limited and targeted assistance to crime victims (e.g. AZT for rape victims, funding trauma units, *etc*).

3. THE MECHANICS OF A COMPENSATION SCHEME

INTRODUCTION

5.112 This part does not intend to make highly detailed recommendations on the administration of a victim compensation scheme. In part, this is because the type and structure of a compensation scheme could vary a great deal depending on the model or parameters adopted. The report has outlined a number of different possible permutations and the administrative structures for each would vary dramatically. However, there are a number of administrative issues that would remain relatively similar across any model.

Procedure for Applying for Compensation¹⁹³

5.113 It is suggested that the steps listed below would need to be followed in every application

¹⁹³ This procedure is based loosely on the procedure used in the United Kingdom as set out in paragraphs 22 to 27 of the Criminal Injuries Compensation Scheme (Criminal Injuries Compensation Authority *A Guide to the Criminal Injuries Compensation Scheme* No 1 4/96).

for compensation.

- * Applications would be submitted to the scheme on forms developed by the scheme. Such application forms would be forwarded to a central office.
- * A cut-off date by which applications would have to be made should be provided for so as to prevent victims lodging claims many years after the event, which would pose difficulties for the scheme in considering and investigating such a claim.
- * Provision should be made to allow an applicant to apply for the late filing of an application to be condoned, giving reasons for the delay in filing such application. It is envisaged, for example, that the late filing of applications by victims who are minors, have been hospitalised for extensive periods or even imprisoned would be condoned.
- * If exclusionary criteria exist – such as contributory behaviour or a previous criminal record – information attesting to the applicant’s status in this regard would also have to be provided in the application form.
- * The application would have to include relevant medical information and evidence, with a medical practitioner or district surgeon’s report attached.
- * An affidavit from the SAPS investigating officer detailing the factual basis and status of the case, together with an assessment as to whether the injuries arose from a criminal attack, would have to be attached.
- * The application would have to be processed by administrative staff of the scheme who would assess whether all the relevant documentation was in place, acknowledge receipt of the application and request the applicant to provide whatever additional information or supporting documentation that might be absent or required.
- * The content of some portion of the applications would have to be followed up at this stage to assess whether or not fraudulent applications were entering the system.
- * The administrative officer would then assess complete applications and make a recommendation to a senior assessment officer.
- * If the original application were incomplete and the applicant failed to provide the further particulars requested within 12 months, provided that reasonable efforts had been made to contact the applicant, then the administrative officer would recommend to the senior administrative officer that the case be closed, with the applicant being informed of that decision in writing.
- * The senior administrative officer would review all completed applications and either request that further information/evidence be provided, or forward the application to the VCS Board for a decision.
- * Uncontroversial applications below a certain amount would be decided by a single board member, with decisions subsequently ratified by the board as a whole.
- * More controversial or larger applications would be motivated to the board by the administrative officer handling the matter.
- * After the board had made its decision, the applicant would be informed in writing as to the outcome.
- * Where the application was successful, the administrative team would complete the necessary requisitions, and would instruct the financial office to make payments. The payments system would require the signatures of at least 3 officials, and be fully auditable.
- * If the application was rejected, the applicant would have the right to appeal to the board, and an Appeal Board would review the case. The applicant would be

entitled to make verbal submissions to the Appeal Board. If the appeal is founded on new information, or on the basis that the original information used was incorrect, then it will be treated as a new application.

- * Decisions of the Appeal Board could not be appealed or reviewed by any other authority or court.

Accessibility

5.114 The claims process needs to be accessible to all South Africans irrespective of income, geographical location, education and other demographic characteristics. The applicant must be provided with sufficient information as to the existence of a victims' compensation fund and as to where such fund may be found. This would require the fund to advertise itself. So as to spread the coverage of the VCS as widely as possible, and, in particular, to focus on poor victims, it is proposed that the VCS will have to have a wide network of offices in urban and rural parts of the country. Although a great deal of the administrative and executive functions of the VCS can be centralised, these field offices will be responsible for popularising the scheme, and for offering advice and assistance to applicants who wish to apply for compensation. In addition, these offices may be required by the VCS to investigate the authenticity of otherwise of an application.

Assistance in the Application Process

5.115 Sufficient assistance will have to be provided to enable an applicant to complete and lodge the application form without legal assistance. This would entail a standard application form being developed, with an attached description, in various official languages as to the manner in which the form should be completed. Examples of such forms can be found in, for example, referrals of a labour dispute to the Commission for Conciliation, Mediation and Arbitration. It would be this application form that would then provide the basis of an application for compensation. A medical report and an affidavit from the investigating officer would need to be attached to such form, together with any other necessary information. The form would also have to state that a police officer is not entitled to a fee for providing the affidavit or advice on completing the forms.

Reporting

5.116 A victim should be placed under an obligation to report the commission of the offence

and the injuries sustained both to the police and a medical practitioner. A specified time period within which compensation claims would have to be lodged with the VCS should be specified to avoid excessive delays in lodging such claims. This would limit the difficulties that would otherwise be experienced by the VCS in the investigation of delayed claims. Provision should be made for condoning the late filing of a claim under certain specified circumstances and where a reasonable and satisfactory explanation for such delay has been provided by an applicant.

Police Reports

5.117 Most schemes rely on a police report to verify the nature and extent of the incident. Whilst it is acknowledged that this may pose real administrative difficulties in the South African context in that reports may be mislaid and police may be unable to complete such reports satisfactorily, it may not provide sufficient grounds to avoid providing for such a mechanism. In fact, obtaining an affidavit be obtained from the investigating officer to confirm the validity of a claim is a viable alternative. Whilst it may be argued that the requirement that complaints be lodged with the police could impact on the reporting of crimes and their investigation, this does not justify the removal of such a requirement from the system in that police verification provides an essential check against fraudulent claims.

5.118 In the event that a points system along the lines of the British compensation system were instituted, the involvement of the police in compiling reports could be extended to enable a check on the claimant's criminal record. It should be noted, however, that criminal record checks require fingerprints to be taken and compared to records in Pretoria. This process can be very time-consuming and will be traumatic for some applicants.

Medical Reports

5.119 Most similar compensation schemes require reports from medical officers to verify the injuries sustained by an applicant. This necessitates that victims report their injuries to a medical practitioner as soon as possible after such injuries have been sustained. When criminal charges are laid arising from a crime, a J88 report must be completed by the district surgeon. This report verifies the nature and extent of a victim's injuries. Clearly, this is not likely to happen properly in South Africa at present, as is evidenced by the case study undertaken and outlined below. It is therefore a viable alternative if provision is made for a VCS to require that

an applicant, under certain circumstances and at the discretion of the scheme, submit to the assessment of an independent medical practitioner, occupational therapist or psychiatrist for evaluation.

5.120 Such requirements are in line with other South African compensation schemes such as those in terms of the Road Accidents Act and Occupational Health and Safety Act. Without medical evidence to support a claim it would be close to impossible for an administrative decision to be taken with regards to the awarding of compensation.

Appeal or Review

5.121 Provision should be made for a claimant to appeal the decision of the compensating authority to an Appeal Board of the VCS. Such a board could be appointed by the Minister. The applicant would be provided with the opportunity to make oral submissions to the Appeal Board and must be provided with full reasons for the Board's decision. The applicant would not be entitled to appeal or review the decision of the VCS or its Appeal Board in any court or before another authority. This would limit unnecessary litigation arising from such appeals, which would ultimately deplete the financial resources of the authority, adding to its administrative and legal costs.

Administration Costs

5.122 It is difficult to determine the cost of administering a VCS in South Africa given the absence of any historical data in this regard and the uncertainties about the character and scale of such schemes. What is clear is that extensive infrastructure and personnel will be required to establish and run a VCS. There exists limited capacity within existing government departments such as police, justice or social development to administer a VCS. However, if additional resources were made available, a feasibility study could be undertaken to determine whether such responsibilities could be accepted by any one department. It would be preferable however that funding be made available for an independent administrative structure to be established, such as has been done in the case of the Commission for Conciliation, Mediation and Arbitration (CCMA) which is administratively divorced from the Department of Labour. In this way, no confusion would arise between the functioning of the Department and that of the scheme.

Dealing with Fraud

5.123 Any VCS that might be established in South Africa would have to confront the challenges of attacks by fraudsters posed to all agencies involved in disbursing cash, be they in the public or private sector. These attacks, which cost both the Department of Social Development¹⁹⁴ and banking industry millions of rands every year, might involve the active or passive complicity of various people involved in the adjudication and awarding processes of the VCS, and might originate from any one of the following role-players:

- * victims' of crime, who may invent the crime *in toto* or exaggerate the extent of their injury;
- * police officers and medical officials who might assist in the process of defrauding the scheme by falsifying evidence relating to the nature, extent or origin of the injury;
- * officials within the VCS, who may either be complicit with a 'victim', or may simply insert false applications into the relevant processes, seeking to secure funds for themselves.

5.124 Dealing with these sorts of problems in South Africa is made extremely difficult by the relatively poor record-keeping practices that have developed, the sophistication of printing and copying technology available off the shelf, and the under-training of officials in the detection of falsified documents. These factors make it extremely difficult if not impossible to design systems which prevent fraud, and which would facilitate the reasonably easy investigation of frauds after they had happened.

5.125 Given the obvious dangers posed by actual and potential fraudsters, a VCS would have to invest heavily in technological, organisational and human development-based strategies aimed at reducing its exposure to fraud. These would have to seek to make it harder for fraudulent applications to be approved, and to limit the value of pay outs made to fraudulent applications. These solutions to the problems posed by fraud will be costly, and those planning the establishment of a VCS ought not to be complacent about these matters. However, the financial consequences to a system that is vulnerable to fraud may well be catastrophic, and need to be controlled.

¹⁹⁴ According to Social Development Minister Zola Skweyiya, fraud by its own officials cost the Department of Social Development more than R3.8m over the past three years (Business Day, 15 September 2000).

Establishment of a Victim Compensation Scheme

5.126 In most jurisdictions studied, compensation schemes are established by way of legislation. Examples include the US Victims of Crime Act, Britain's Criminal Injuries Compensation Act and Spain's Act for the Provision of Assistance to the Victims of Violent Crimes and Sexual Offences. Certain civil law jurisdictions in Europe have provided for state compensation by way of presidential decree. In the South African context, it is submitted that a statute would be the preferred mechanism by which to establish a VCS. Such statute should be passed by Parliament and would define the scheme's mandate, determine its powers and detail the appointment and functions of its office bearers.

4. INFORMATION REQUIRED TO ASSIST IN ADJUDICATING CLAIMS - CASE STUDY ANALYSIS OF POLICE DOCKETS

INTRODUCTION

5.127 This part contains the results of an analysis of selected police dockets at Randburg and Mamelodi police stations in Gauteng, South Africa. The analysis provides information about certain types of violent crimes and their impact on victims. This information was useful for making assumptions when costing a VCS and for shaping possible policy scenarios. The docket analysis undertaken in this chapter also focuses on the usefulness of police information in adjudicating possible claims for victim compensation.

5.128 Police dockets are the case files containing all relevant information about a recorded criminal case. Police dockets generally include basic facts and demographic information about the incident, statements by victims and witnesses, details of the activities undertaken by the police officers dealing with the case, and progress of the case through the criminal justice system.

5.129 It was thought that a docket analysis could provide some useful information about the nature of violent crime (and the responses of the criminal justice system to it), although, as will be shown below, the quality of the information contained in the dockets fundamentally influenced the usefulness of the analysis. The purpose of the docket analysis undertaken for this report, however, was to provide detailed information about certain types of violent crimes; and to assess the usefulness of police information in adjudicating possible claims for victim

compensation. This information was required to assist in quantifying the financial impact of a potential victim compensation scheme in terms of possible policy scenarios. The full results were published in the discussion paper¹⁹⁵ and is not repeated in this report. The findings are, however, important for the Commission's analysis on the costing of a compensation fund and problems associated with the establishment of such a fund and are therefore repeated.

METHODOLOGY

* **Scope of the study**

5.130 Police dockets were analysed at two SAPS stations in Gauteng province, namely Randburg and Mamelodi. Mamelodi is a former African township on the eastern side of Pretoria. It encompasses densely populated urban township areas, as well as some peri-urban areas. Randburg is a suburb in the north of Greater Johannesburg. It contains a new central business district (CBD), a number of large retail and entertainment precincts, informal settlements and formerly White suburban residential neighbourhoods.

5.131 The rationale for selecting these two stations was that:

- * both cover large station areas (jurisdictions) and would therefore provide us with a substantial number of cases to analyse;
- * they cover a range of different types of locales, i.e. suburban residential neighbourhoods, small CBDs, informal settlements, business and light industrial precincts, township residential neighbourhoods, and peri-urban areas;
- * urban areas have the highest rates of violent victimisation – approximately 4% of households in urban formal areas, and 3% of households in urban informal areas experienced at least one violent crime in 1997, as opposed to 2% of households in non-urban and traditional areas,¹⁹⁶ which makes it prudent, then, when estimating volume and cost of criminal injury and compensation, to base such estimates on data gathered in urban areas;

¹⁹⁵ South African Law Commission Project 82 *Sentencing (A compensation scheme for victims of crime in South Africa)* Discussion Paper 96, April 2001.

¹⁹⁶ Statistics South Africa *Victims of Crime Survey* Pretoria 1998.

- * these two stations were easily accessible to researchers within the budget of the project.

5.132 While the rate of victimisation of residents of Gauteng is roughly similar to the average rate of victimisation in the country as a whole,¹⁹⁷ the sample of crime trends in Mamelodi and Randburg should not be taken as representative of South Africa as a whole, because they are largely urban areas and reflect only trends in the metropolitan heartland of the country. However, the analysis is suggestive of trends elsewhere. The assessment of police treatment of the cases, and the quality of dockets, however, is probably fairly representative of national standards.

5.133 The following four crime types were studied:

- * Murder
- * Attempted Murder
- * Assault GBH (with intent to do grievous bodily harm): this generally refers to serious assault, involving knives or firearms
- * Aggravated Robbery: this generally refers to robberies involving knives or firearms, such as armed robberies and hijackings of motor vehicles.

5.134 These four crime types represent the most serious violent crimes to which the researchers could obtain access.¹⁹⁸ The selection of these crime categories for analysis was based on the assumption that these represent the most likely type of cases in which victim compensation would be sought, as they are generally considered the most serious crimes.

5.135 Closed police dockets concerning crimes that had been reported in the three months April-June 1998 were studied.¹⁹⁹ The selection of this period was based on three main reasons.

¹⁹⁷ Statistics South Africa, 1998, p38.

¹⁹⁸ There were legal problems and police concerns about allowing researchers access to rape and indecent assault dockets, which is why these cases were not examined.

¹⁹⁹ Some dockets concerning cases of family violence, child abuse and sexual offences (FCS) were not accessed because they were held at the specialised SAPS FCS Unit for the Area, and not at the local Police Station.

First, police docket management practice in 1998 was similar to present docket management practice, and is, therefore, a reliable basis for analysis and projections concerning police dockets and their usefulness in a victim compensation scheme.

Second, if a more recent period had been selected, there would probably have been access to very few 'closed' dockets; as it takes the police many months (sometimes years) to close an investigation, particularly in cases of serious violent crime.

Third, there are well-known patterns in the reporting of violent crime.²⁰⁰ For instance, significant increases are visible at month-end and over holiday periods. The researchers did not want the data to be too skewed by this; and also wanted to capture a sense of the impact of holiday periods on levels of victimisation. They chose a period, therefore, which includes the April holiday season as well as the beginning of winter, i.e., holiday periods and some 'ordinary' weeks. They found that most of the incidents studied took place over weekends, i.e., 26% on Saturdays and 19% on Sundays. Most incidents studied took place in the early part of the evening, largely between 19h00 and 21h00.

* **Method of data collection**

5.136 A data-gathering form was designed to enable capturing of relevant information. This form contained 26 fields of information, which could possibly be captured. Permission to access the dockets was granted by the Research Component of the SAPS at Head Office and the office of the Provincial Commissioner of the SAPS (Gauteng),²⁰¹ who instructed the officials at the Randburg and Mamelodi stations to assist the researchers.

5.137 Data capture at the stations consisted of the researchers²⁰² sitting in the stations' docket stores and reading through the relevant dockets. At Mamelodi,²⁰³ the docket clerks assisted by

²⁰⁰ Nedcor/Institute for Security Studies *Crime Index* Vol 3 No 4 Number 4 Pretoria: Institute for Security Studies 1999.

²⁰¹ Thanks to Dr J. Schnetler of the Research Component and Director Andre Venter of SAPS Management Services Gauteng for facilitating this.

²⁰² Mosely Lebeloane, Janine Rauch, Sibusiso Ntuli and Mike Rautenbach.

²⁰³ Thanks to Sgt Mahlangu and Sgt Seema at SAPS Mamelodi.

drawing the specific cases (murder, attempted murder, assault GBH and aggravated robbery) and handing them to researchers.²⁰⁴ At Randburg²⁰⁵ the docket clerk handed the full set of dockets for the months of April-June 1998 to the researchers, who then drew out the specific cases for analysis. The data captured on the forms were cleaned and entered into a statistical programme for analysis.

* **Problems with the data**

5.138 Various problems were experienced in the course of the data capture at the police stations. They included:

- * illegible handwriting by the police officers who completed the various forms and statements in the docket;
- * incomplete forms, sometimes with entire sections not completed;
- * the lack of data on injury.

5.139 The last point above relates to the fact that the SAPS forms and statements often do not contain any information about the nature of injuries sustained by the victim of the crime. Also, only a small proportion of dockets contained a J88 form completed by a medical doctor attesting to injuries sustained.

5.140 It needs to be borne in mind that many violent crimes are not reported to the police and, therefore, that any sample of police dockets cannot be taken to represent trends in the overall crime pattern in South Africa. The National Victim Survey found that only 60% of hijackings and attempted hijackings were reported, and only 83% of murders²⁰⁶). It also found that most individuals were unlikely to report assault (38% of cases were reported, 62% not) or armed

²⁰⁴ his may have resulted in some cases not being drawn and studied. For instance, where the officers made errors in their selection of cases to draw from the store (such as leaving behind a case) or where charges were incorrectly formulated e.g. a case labelled 'Motor Vehicle Theft' would not have been drawn because it was not labelled 'Hijacking', but it may, in fact, have been a hijacking incident involving use of a firearm, resulting in an injury to the victim.

²⁰⁵ Thanks to Sgt Makola at SAPS Randburg.

²⁰⁶ Statistics South Africa, 1998, at 53.

robbery cases (41% of cases were reported to the police, 59% not²⁰⁷). This means that the sample of reported cases is unlikely to represent the total picture of victimisation in these four types of crime. If compensation for such cases was available, levels of reporting might increase if victims saw reporting as a method of obtaining access to compensation.

ANALYSIS AND DISCUSSION

5.141 All compensation schemes require a victim to qualify for compensation. In this section the various criteria for awarding compensation, and for deciding on the amount of compensation are examined and these are compared to the data provided by the case studies.

DEFINING COMPENSABLE VICTIMS

*** Intentional or deliberate violent crimes**

5.142 Many compensation schemes are based on the idea that compensation is only payable in respect of 'deliberate' or 'intentional' crimes of violence. Some schemes will compensate for any crime that causes injury.²⁰⁸ The case studies have only examined serious violent crimes, i.e., murder, attempted murder, serious assault, and aggravated robbery which are all likely to fall within the definition of 'intentional crimes of violence.

*** Injury sustained**

5.143 The case studies showed that approximately half (46%) of the victims of the crimes studied did not sustain any injuries at all. The J88 form, which must be completed by a medical practitioner in order to document the injuries, was only completed in 19% of the cases studied. Of those who did sustain injuries, the most common injuries were cuts and bruises - relatively minor injuries.²⁰⁹

²⁰⁷ Statistics South Africa, 1998, at 57

²⁰⁸ Greer, 1999.

²⁰⁹ Although if these 'minor' injuries are repeated often, they could result in serious psychological and physical consequences.

* **Prosecution and punishment of offender**

5.144 Most schemes will award compensation to a victim even if it is not possible to prosecute or punish the perpetrator of the violent act. This would be important in South Africa, as it would not be fair to penalise the victim for the failings of the criminal justice process. The case studies suggest that the majority (63%) of police investigations into violent crimes are closed 'undetected' or unsolved; and that a further 23% of the cases were withdrawn by the complainants some time after the original charge was laid. This suggests that, in principle, a compensation scheme would assist particularly those victims (the majority) who rely on the criminal justice process and would not have recourse to civil law remedies to obtain compensation.

* **Citizen versus foreign nationals**

5.145 Most schemes cover only citizens of the country where the violent incident took place. As, in South Africa, information on citizenship or nationality of the victim is not required in the police docket, it was impossible for these case studies to examine the proportions of citizens and foreigners who are victims of violent crime, and who, then, might qualify for compensation. An additional problem in establishing nationality in the reporting process is that a large proportion of foreign victims may not report that they have been victimised in that they may be in South Africa illegally, and may therefore fear the consequences of their tenuous status being exposed. Alternatively, if they are in South Africa legally, they may fear secondary victimisation at the hands of the police if they report themselves as victims. According to research²¹⁰ by Harris, the SAPS often do not believe foreign victims, tell them to 'go home', refuse to help them, try to extort money from them, tear up any documents that they may have, jail them, or beat them up. Xenophobia, racism and/or corruption at the hands of the police seem to play a significant role in reduced reporting of violent crime by foreign victims (at least by Black foreigners).

5.146 While reporting rates may be lower than expected, there is, however, evidence²¹¹ to suggest that foreigners, particularly Black foreigners, do suffer from high levels of violent crime

²¹⁰ Work in progress by Bronwyn Harris at Centre for the Study of Violence and Reconciliation.

²¹¹ Southern African Migration Project (SAMP) (1999); Human Rights Watch (1998).

in South Africa. For example, SAMP²¹² explain that:

There is growing evidence to suggest that far from being the perpetrators of crime, migrants are disproportionately the victims of crime and xenophobia, made worse by inadequate redress in the law or lack of protection by the police.

Human Rights Watch²¹³ comments that:

Migrants have increasingly become the target of abuse at the hands of South African citizens, as well as members of the police, the army, and the Department of Home Affairs. Refugees and asylum seekers with distinctive features from far-away countries are especially targeted for abuse...Foreign hawkers...have repeatedly been the targets of violent protests and other forms of intimidation...A xenophobic climate in South Africa has resulted in increased harassment of migrants.

* **Financial hardship of victims**

5.147 Some schemes take into account the victim's financial status when deciding whether or not to award compensation. The application of some sort of 'means test' can ensure that limited government funds are allocated to those victims who most need assistance.²¹⁴ The case studies found that the majority of victims were either unemployed (25%) or blue-collar workers (38%). This is in line with the findings of the national Victim Survey, which found that those in the lowest income bracket (with a household income of under R3 000 per annum) were the most susceptible to violent crimes in 1997.²¹⁵ The case studies suggest that the majority of victims would fall into an economically vulnerable group who would require state compensation. This means, for example, that the system of having a high minimum loss to qualify for compensation may not function adequately in South Africa where losses may be small, but still have a great impact on low-income homes.

5.148 The issue of child victims (who cannot be defined as earners) would also need to be considered, even though the sample found very few child victims, probably because cases dealing with violence against children were housed elsewhere. A formula would need to be

²¹² (1999).

²¹³ *Prohibited Persons: Abuse Of Undocumented Migrants, Asylum Seekers, And Refugees In South Africa* 4-5 New York: Human Rights Watch 1998.

²¹⁴ Greer, 1999.

²¹⁵ Statistics South Africa, 1998, at 41.

developed to compensate victims who are not income earners, such as children, pensioners and the unemployed.

* **Conduct before/during/after the incident**

5.149 Most schemes will penalise or disqualify victims who provoked the crime incident, who refuse medical help, refuse to co-operate with the police, or who are themselves involved in criminal activity.

150 Whether or not a victim 'provoked' the crime incident is extremely hard to discern from the information provided by the police docket. If this criterion were to be applied, there would need to be new methods for gathering such information and far greater degrees of thorough and completed police investigation into crimes reported. From the available information in the police dockets, it was found that only 1% of victims were involved in a crime when they were injured, although this is hard to ascertain accurately from the dockets. The research determined that equal numbers were involved in some sort of dispute (35%) at the time, and had no role (40%) whatsoever in the incident. Even where victims were party to a dispute, they may not necessarily provoke or contribute to their own injury. More detailed understanding of the facts of each case is required.

* **Victim's co-operation with the criminal justice process**

5.151 Similarly, most schemes will penalise or disqualify victims who fail to co-operate adequately with the police and prosecutors. This is particularly relevant in the (22%) of the sample in which the complainant withdrew the charges against the perpetrator. This trend could be related to the high proportion of victims who knew the perpetrator (48%), perhaps the degree of familiarity or intimacy between victim and perpetrator increases the likelihood of retaliation or intimidation by the perpetrator. The high number of case withdrawals is a cause of concern to the police, who often feel that they are 'wasting' resources invested in recording and investigating cases that are later withdrawn.²¹⁶

5.152 Apart from cases being withdrawn, there remains a problem with getting victims to report violent crimes to the police in South Africa. The national Victim Survey found that less than half

²¹⁶ See Bruce, Newham & Reddy (1999).

of all 'individual crimes' were reported to the police in 1997, i.e., only 38% of assaults were reported, and 41% of aggravated robberies. The reporting rate increases for property-related violent crimes (where reporting is probably required for insurance purposes). For example, the national Victim Survey found that 60% of hijacking and attempted hijacking cases were reported to the police in 1997.²¹⁷

* **Victims of domestic violence**

5.153 Some foreign compensation schemes used to refuse compensation to victims of domestic violence who remained in the same household as the perpetrator of the violence. This approach may not be appropriate in South Africa, in light of the new Domestic Violence Act and the constitutional guarantee of equality.

5.154 Importantly, the Commission's case studies show that women were more often the victims of violent crimes committed by their families, friends and acquaintances. Women were also more likely than men to sustain injuries in the incidents. Therefore, patterns of victimisation and injury differ significantly along gender lines; and the incidents most likely to cause injury to women occur mostly in a familial context. It can be argued that if patterns of injury among male victims were to be taken as the 'norm' for the compensation scheme, then female victims would lose out in such a scheme. In addition, in certain cases the victim could be further victimised by being required to leave the household occupied by the perpetrator, in light of serious housing shortages.

* **Defining the seriousness of the injury**

◦ **Length of incapacity for work/percentage of permanent incapacity**

5.155 One of the methods of assessing the seriousness of the injury sustained in the criminal incident is to calculate the extent of permanent incapacity/disability, or the length of incapacity for work. This would be extremely difficult to do on the available SAPS data, as have been seen above. In very few cases in this study (less than 20%), was the complainant referred to a medical practitioner for completion of a J88 form describing the injuries. New or additional forms of recording and evaluating the extent of injuries would need to be found.

²¹⁷ Statistics South Africa, 1998, at 55-57.

5.156 In the case studies, the researchers found the following in respect of injuries sustained:

- 46% of victims sustained no injuries at all;
- most common injuries sustained were cuts and bruises, mostly to the face and head;
- bullet wounds (the most serious injuries) only constituted 6% of all injuries;
- only 15% of those injured were hospitalised at all, and the greatest proportion of these (17%) spent only one day in hospital, suggesting that injuries were not very serious;
- In only 1% of the cases in which victims sustained injuries was there a possibility that permanent disability could result.²¹⁸

* **Cumulative effects of minor injuries**

5.157 There are various problems related to the assessment of 'seriousness' of injuries. One of these, which seems particularly relevant to the findings of the study, is how to assess the cumulative impact of repeated minor injuries. The researchers found that the most common injuries were relatively minor (cuts and bruises) and that these were strongly related to domestic and family violence. While these could be dismissed as 'non-serious injuries', if they are repeated over a period of months or years, the cumulative impact could be 'serious'. If the definition of seriousness incorporated some aspects of psychological harm (see below), the occurrence of 'complex post-traumatic stress syndrome', for example, might cause repeated battering to be seen as a crime resulting in 'serious' injury, thereby enabling the victims to qualify for compensation. If this approach were adopted in South Africa, it would have severe financial implications for a compensation scheme.

* **Psychological harm**

5.158 There is a range of difficulties associated with assessing the seriousness of the psychological harm associated with violent victimisation, including, for example, being threatened with a gun, which was a common crime in our research. There was no information in police dockets surveyed in this study that could assist with this. The cumulative impact of repeated violence, and can result in, amongst other things, 'complex post-traumatic stress disorder'.

²¹⁸

Although this was difficult to ascertain from the evidence available in the dockets.

CONCLUSION

5.159 This case study demonstrates some of the trends in reported violent crime in urban South Africa. These were discussed throughout the chapter. The limitations of the available data were also acknowledged, i.e. incomplete dockets and lack of data on injuries. The researchers, however, confirmed relatively low levels of injury following crime in the case study (the number of murder cases was, however, low in the sample). In only 1% of the sample was permanent disability documented. However, it should be noted that victims in 54% of the violent crimes they studied did sustain injuries during the course of the incident.

5.160 In addition, the researchers found a high percentage (25%) of crime victims in the sample to be unemployed. They also found that almost half of the respondents knew the perpetrator (48%). A relatively high number (35%) of victims were involved in some sort of dispute at the time of the incident. Women were the most common victims of violence committed by families, friends and acquaintances.

5.161 The relevant findings are integrated into this chapter to assist with the financial costing of a compensation scheme. A further finding of the case study is that current police recording practices and systems provide inadequate data on which to base an assessment of the compensability such as may be required in a victim compensation scheme. Of particular concern is the fact that a medical report (J88 form) was not completed in over 80% of the cases studied.

5.162 The weakness in the police practice of record keeping has also been confirmed in other studies.²¹⁹ Some reforms of police statistics systems have been proposed by an internal government committee,²²⁰ but have not yet been implemented. The recording and referral systems used by the police and medical services in South Africa would, therefore, require substantial revision before they could be useful to a possible victim compensation scheme.

²¹⁹ Cf. G Newham 'Transformation and the Internal Disciplinary System of the SAPS' Johannesburg: Centre for the Study of Violence and Reconciliation Occasional paper 2000.

²²⁰ The 'Orkin Committee', made recommendations to the Minister of Safety and Security in 1998 (Committee of Inquiry into the Collection, processing and Publication of Crime Statistics).

PART I**CHAPTER 6****A COMPENSATION SCHEME FOR VICTIMS OF CRIME****SUMMARY OF PROPOSALS SUBMITTED FOR COMMENT IN THE ISSUE PAPER ON RESTORATIVE JUSTICE AND THE DISCUSSION PAPER ON A COMPENSATION FUND FOR VICTIMS OF CRIME**

6.1 The Commission's issue paper on restorative justice dealt with the broader issues of victim empowerment as well as the establishment of a compensation fund for victims of crime. Because the discussion paper also addressed the issue of a compensation fund for victims of crime the proposals for reform in both the issue paper and the discussion paper and the comments thereon are, for ease of reference, grouped together and dealt with separate from the issues on victim empowerment dealt with in the issue paper. The Commission first deals with the proposals on the establishment of a compensation fund and then with proposals on victim empowerment.

PROPOSALS IN THE ISSUE PAPER ON A COMPENSATION FUND FOR VICTIMS OF CRIME**1. IS THERE A NEED FOR A COMPENSATION SCHEME IN SOUTH AFRICA?****PROPOSALS FOR COMMENT**

- * The Commission invited any suggestions, proposals and comments on the necessity for a compensation scheme in South Africa. Attention was drawn to the fact that the introduction of a compensation scheme may have severe financial implications and respondents were specifically requested to comment on the issue of financial constraints.

2. WHAT SHOULD THE MOTIVATION FOR THE INTRODUCTION OF A

COMPENSATION SCHEME BE?

PROPOSAL FOR COMMENT

- * The proposed motivation for the introduction of a compensation fund was that the State has a moral duty to compensate victims. Victims should have a right to compensation.

3. HOW SHOULD THE ADMINISTRATION OF THE SCHEME BE REGULATED?

PROPOSALS FOR COMMENT

The following were submitted for comment:

- * The compensation scheme should be known as the “Criminal Injuries Compensation Scheme” and its administration entrusted to an independent and newly created Board known as the “Criminal Injuries Compensation Board”.
- * The members of the Board should be appointed by the Minister of Justice. The Chairperson should be a judge or a person with a legal background while the other members should represent the following occupations:
 - law;
 - medical science;
 - penology; and
 - police services.
- * The enabling statute should provide for the Minister of Justice in co-operation with the Minister of Finance to regulate the details of the management of the Fund, the procedure relating to grants from the Fund, the form in which applications should be made, the manner in which the accounts of the Fund should be kept and any other matter which is considered necessary or expedient to prescribe in relation to control of the Fund.

4. HOW SHOULD THE SOURCES OF THE COMPENSATION FUND BE OBTAINED?

PROPOSALS FOR COMMENT

- * It was proposed that the compensation scheme should be funded from the following sources:
- * twenty percent (20%) of all fines imposed by courts should be paid into the fund. Exceptions should be provided for, for example fines paid to local authorities;
- * a surcharge of R50 for every conviction in court should be paid by the accused;
- * money confiscated in terms of the Act on the Proceeds of Crime; and
- * an amount to be determined annually in the budget known as a “Grant in Aid”.

5. HOW SHOULD VICTIMS BE DEFINED?**PROPOSALS FOR COMMENT**

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

6. WHAT SHOULD THE NATURE AND EXTENT OF THE SCHEME BE?**PROPOSALS FOR COMMENT**

- * It was proposed that compensation should be awarded to:
 - ° any “victim” of so-called violent crimes including offences where the violence may be defined as indirect such as arson, poisoning or intimidation;

- victims of offences such as drug trafficking, sexual exploitation of children (child prostitution, child trafficking etc);
 - the dependants of victims contemplated above;
 - any person injured in an attempt to prevent the commission of a crime or when assisting a law enforcement officer;
 - any South African citizen, visitor to the country or guest labourer within the country who is a victim of the crimes contemplated above;
 - victims of human rights violations should at this stage not be included since they are to be dealt with in terms of the Promotion of National Unity and Reconciliation Act.
- * It was proposed that in order to qualify for compensation victims should be required to:
- report the crime to the police within a reasonable time;
 - apply for compensation within a year of the report to the police;
 - assist the police in its investigation; and
 - be prepared to disclose his or her role in the commission of the offence.
- * According to the proposal a tariff in terms of which the amount of the reward is fixed should not be considered with the introduction of the scheme.

7. WHAT SHOULD THE STATUS OF THE APPLICANT BE?

PROPOSALS FOR COMMENT

- * The following were submitted for comment:
- Should compensation be considered where -
- the victim and the offender are members of the same household; and
 - the offence is committed against a victim while he/she is serving a term of imprisonment?
- * According to the proposal injuries justifying an application for compensation

should relate to actual bodily harm, which may include emotional or physical harm and even pregnancy caused by or arising from a recognised offence.

8. SHOULD THERE BE MINIMUM AND MAXIMUM COMPENSATION AWARDS?

PROPOSALS FOR COMMENT

- * The following were submitted for comment:
 - ° A minimum amount which would justify a claim should be fixed by law (for example R200).
 - ° In order to make the scheme viable and cost effective a maximum award for compensation (for example R30 000) should be fixed by law.

9. WHICH GENERAL GUIDELINES SHOULD BE PROVIDED FOR?

PROPOSALS FOR COMMENT

- * The following were submitted for comment:
 - ° The State should be allowed to institute a civil action against the offender only after the victim has elected not to institute a claim.
 - ° Payment for compensation should be allowed either in a single amount or in installments.
 - ° Restitution for monetary loss should include loss of income, loss of maintenance to a dependant of the victim and funeral costs.
 - ° Claims for loss of property should not be allowed under the scheme although exceptions may be considered. (In cases of the so-called good Samaritan.)
 - ° Claims for compensation for pain and suffering should be allowed.
 - ° Claims for compensation should be considered in accordance with the principles of the common law as applied in civil actions.

COMMENTS ON THE PROPOSALS IN THE ISSUE PAPER ON A COMPENSATION FUND

FOR VICTIMS OF CRIME

1. THE NEED FOR A COMPENSATION SCHEME IN SOUTH AFRICA

6.2 Prof L de Koker, University of Orange Free State supports a compensation fund but also supports the creation of an asset forfeiture fund as well as mechanisms similar to the distribution of assets in an insolvent estate to ensure fair distribution of funds confiscated in terms of the Proceeds of Crime Act, 76 of 1996. The Act allows the State under particular circumstances to obtain a confiscation order which can drain the estate. Victims of the offender with claims for compensation may find that the confiscation order has left the estate with no assets to levy execution against. In English Law Section 71 (1C) of the Criminal Justice Act allows the court to take into account that a victim of any relevant criminal conduct has instituted a intent to institute civil proceedings for loss, injury or damage sustained in connection with that conduct. In particular, the court might preserve the assets of the defendant for purpose of a claim by the defendant while making the remainder of the assets subject to confiscation. According to him the creation of a compensation fund as proposed will not necessarily solve the matter - victims will then share money with the other victims.

6.3 The Democratic Party supports the creation of a compensation fund. They have introduced a private members bill to this effect in 1997.

6.4 The National Council of Women of South Africa points out that the concept of compensation to victims is not strange or alien to South African law. Our common law allows the victim to sue for compensation in a civil claim. Although a compensation scheme seems ideal the public is already grossly over the taxed and any further burden on the taxpayer should be avoided.

6.5 H L Hlongwane of the Directorate Community Corrections points out that when a court imposes a sentence of correctional supervision in terms of section 276 (1)(h) of the Criminal Procedure Act 5, of 1977 the court may set a condition to this sentence that the offender pays compensation to the victim. The Department of Correctional Services handles such payments. Failure by the offender to comply with such an order will result in him/her being referred to the trial court to consider a possible alternative sentence. After discussion with members of the community it became clear that in certain circumstances victims do not want monetary compensation. If, for example, a goat a sheep or cattle were stolen they would prefer restitution

- being reinstated. This is something they would understand. The creation of a compensation scheme would only encourage criminals to further their actions and it may lead to fraud and corruption by the community with a resultant increase in workload on the functionaries in the criminal justice system. If compensation is considered it should be paid by the offender.

6.6 All participants at a workshop hosted by the Centre for Criminal Justice, University of Natal, overwhelmingly supported the idea of a compensation fund. It is argued that because the scheme could be open to abuse any claim should depend on the seriousness of the injuries sustained by and the seriousness of the crime committed against the victim.

6.7 Mr S Segal suggests that in view of the ravaging and disabling criminal attacks, hijackings and robberies there is a need for the urgent creation of a fund (Victims Fund for Compensation for pain, suffering and bodily disfiguration. This fund would assist citizens who fell victim of criminal circumstances. Citizens who have medical aid schemes but who would exceed their prescribed medical expenses or limits because of the serious nature of their injuries, could be assisted by the fund. When the family bread winner has been brutally attacked by unknown thugs and who is on the verge of dying doctors would refuse treatment if there is no medical scheme or no money to pay the doctor. This fund could be used to assist the breadwinner.

6.8 Mr Maree, an attorney of Pietersburg points out the section 300 of the Criminal Procedure Act is inadequate in that it only provides for compensation in cases of damage or monetary loss as a result of theft or fraud. It is insufficient for compensation in cases of assault.

6.9 Advocate N Cassim (on behalf of the Johannesburg Bar) points out that in the South African criminal justice system as it presently exists, the victim of crime has been rejected. In *S v Lekgathe 1982 (3) SA 104 (B)* attention was drawn to the inadequacy of section 300 of the Criminal Procedure Act since it did not cater for the pain and suffering occasioned by the victim. Section 297 (1)(a)(i) of the Act entitles the court to impose a duty to compensate the victim of an assault as a condition of suspension of a sentence of imprisonment. This would be proper only where there is a real prospect that the accused will be in a financial position to pay such compensation within a reasonable time. This form of restitution once more serves the need of the offender in that he avoids the penalty of incarceration, but it cannot provide a comprehensive remedy in terms of victim compensation. Advocate N Cassim points out that members of the legal profession have since 1982 been calling for the establishment of a compensation scheme.

6.10 Ms van der Walt, Magistrate Pretoria-North, in general, supports the concept of compensation for victims of crime. However, whatever scheme is to be introduced, it would of necessity lead to actions being instituted on false charges for the sole purpose of financial gain. It would be very difficult to identify such cases prior to the eventual hearing and it would have a definite effect on court roles and could well lead to a significant number of additional courts having to be established to handle the extra work. Their office has embarked on a strategy whereby sentence is suspended in terms of section 297(1)(a) of the Criminal Procedure Act on condition that the victim be compensated directly by the offender. Ever since there has been a significant increase in the court attendance of witnesses.

6.11 Lawyers for Human Rights has reservations regarding a compensation scheme for victims of crime in South Africa. Given the fiscal constraints it would appear that the amounts paid would have to be limited. A system which would work like the Workmen's Compensation fund, where it takes years for the matter to be set down for a hearing, will only exacerbate the frustration of victims. Lawyers for Human Rights would instead support the establishment of Mediation, Counselling and Legal support centres in magistrates courts throughout the country. These centres could offer counselling and advice to victims as well as mediation between victim and perpetrator. These centres could be funded from fines as well as money confiscated from the proceeds of crime and an annual amount to be determined in the budget known as a Grant in Aid. The idea of a surcharge for every conviction may have some merit but would need to be thought through very carefully. Victimless crimes may need to be excluded as might juvenile offenders.

6.12 Mr PJ Jacobs, magistrate Bloemfontein, points out that the main problem is whether the State would be able to afford the financial burden of a compensation fund.

6.13 Mr M de Kok, Regional Court Magistrate, supports the establishment of a compensation scheme. He proposes that the courts should be compelled to consider compensation when considering sentence. In terms of section 297(1)(b) of the Criminal Procedure Act, court can impose a suspended sentence on condition that the victim be compensated for damages, and if the accused is prepared to pay compensation, the court can take it into account in mitigation of sentence. In many instances, however, accused persons are unable to pay compensation because they don't have the means to do so. It is therefor advisable that a compensation scheme such as the one proposed be established to compensate victims of crime.

6.14 Mr AM Bluhm proposes that if a criminal is in a financial position to pay compensation, this should be awarded to the victim through criminal procedures and not civil litigation. As a rule one out of possibly a thousand criminals might be in a financial position to pay compensation which will be to the detriment of his/her innocent family. No State paid claims for compensation should be considered, but the Criminal Procedure Act should allow for any compensation with respect to medical services, lost of property etc, but not for pain and suffering, if an accused is in a financial position to pay same. The State should provide free of charge these medical services and counselling to the victim and or his/her family. State pensions should also be paid to victim's children and families who lost their breadwinner or who is incapacitated.

6.15 The Women's Lobby thinks that the State is obliged to set up a compensation fund but all efforts must be made to locate assets of the offender.

6.16 Jacob Raseroka and Lawrence Muzame, researchers for the National Institute for Public Interest Law and Research are of the view that there is a need for the creation of a Compensatory Board, which shall regulate activities of the Compensation fund.

6.17 The criminal law committee of the Law Society of the Cape of Good Hope cautions that the criminal justice system attempts to achieve the most fair result for the offender and the victim by balancing their respective versions and interests against time honoured principles of objectivity. It is within the civil justice system that complainants have traditionally sought financial compensation, again within the context of time honoured principles geared to deliver the most fair results for both parties. The committee is concerned that the proposed blurring of the boundaries between these systems may undermine the aforementioned principles to the detriment of both systems.

6.18 In general, the committee is concerned that the prospect of compensation may cause complainants to exaggerate injuries suffered, with a view to improving the financial reward for such injuries. The committee is of the opinion that section 300 of the Criminal Procedure Act is under-utilised, that implementation of that provision might well be promoted and recommends that a similar provision be made in respect of correctional supervision.

6.19 The committee supports the principles of access to justice and fair treatment, restitution, compensation and assistance extracted by the Law Commission from the Declaration of Basic

Principles of Justice for Victims of Crime and Abuse of Power, but cautions that the level of compensation envisaged would constitute an impossible burden on the State. Accordingly, the committee recommends that consideration be given to the existing provision for compensation for pecuniary loss. The committee believes that such an amendment would make adequate provision for the perceived need to offer compensation in certain circumstances, without introducing a new area of investigation and new prosecutorial procedures to a criminal justice system which is already over-burdened.

6.20 With regard to the proposed introduction of a compensation scheme the committee agrees that there is a definite need for such a scheme, but cautions that although South Africa may be behind the rest of the world in the area of victim compensation, the creation of a compensation scheme cannot be a priority in the South African context where financial resources are already stretched. The committee does not believe that victim compensation will assist in addressing the prevailing crime wave and recommends that all financial resources be applied to the support of an effective justice system.

2. THE MOTIVATION FOR THE INTRODUCTION OF A COMPENSATION SCHEME

6.21 Advocate N Cassim points out that the rationale of such a scheme appears to be based on a social justice principle, namely that society is responsible for the environment which leads to crime and the fact that a crime is committed proves that the State has failed in its duty of affording safety and protection to its inhabitants and consequently the State must pay the cost of victimisation as a matter of right.

6.22 The criminal law committee of the Law Society of the Cape of Good Hope is not persuaded that the State has a moral duty or obligation to compensate victims and recommends that this premise be thoroughly investigated. While the case for compensation based on sympathy, goodwill and humanitarian reasons may be easier to argue, the committee repeats its earlier submission regarding the inevitable drain of such a scheme on the financial resources of the State. With regard to the proposed administration of the scheme it is clear that the creation of a Board, together with an administrative support system, would present a substantial cost.

6.23 Advocate Botha of the office of the Director of Public Prosecutions, Bloemfontein, is of the opinion that the State has a duty to create a safe and orderly society. If it fails in this duty

and the people suffer as a result thereof, the State should be held responsible and accountable. A compensation scheme should not be funded with taxpayers money, but rather from other sources. He proposes that the success or not of a prosecution flowing from an injury should play a role in determining whether the injured individual should be compensated.

6.24 The South African Agricultural Union supports the idea that if the State fails to create a safe environment it should be held accountable for compensation. Victims may suffer serious injuries during violent attacks and a compensation scheme should be structured in such a way as to include compensation for the following :

- a once of payment;
- compensation for medical expenses on the long term;
- compensation for ; and
- compensation for personal property in cases of violent offences only.

6.25 The proposed process should also make provision for compensation to be claimed from the offender. Awards in terms of the proposed procedure must be determined by the seriousness of the offence and the injury suffered as a result of the offence. The criminal process should be adapted to make provision for the needs of victims, in particular their practical, financial, medical and psychological needs. The establishment of a co-ordinated victim support service on a national and provincial level is welcomed. It is, however, not necessary to create a new structure in order to achieve this. The most important aim of the support service should be to co-ordinate the existing structure and to advertise the service as widely as possible.

6.26 Mr L Naidoo, member of the Criminal Law Procedure Committee of the Natal Law Society, is of the opinion that the State has a moral duty to compensate victims of crime and not a legal duty. Therefor victims should not have a right to compensation but a right to apply for compensation either from the State or the offender. The latter has a legal duty to compensate the victim. Where victims and offenders are from the same household compensation should only be allowed if the offender will not benefit directly from this compensation. If one subscribes to the view that prisoners do not forfeit their rights because they are in prison or have committed an offence then compensation should also be allowed to victims who are serving sentences of imprisonment.

3. HOW SHOULD THE ADMINISTRATION OF THE SCHEME BE REGULATED?

6.27 The SA Council for Social Work proposes that the administration of the Compensation scheme should be entrusted to a newly created board known as the Criminal Injuries Compensation Board and that it should be chaired by a Judge or other legal person and that members of this board should be drawn from other occupations such as law, medical science, penology and police services. People with a background in the social sciences should, however, play a crucial role in developing the board. Social workers, criminologists and psychologists are all directly involved with victims as people, such as in pre-sentencing reports, counselling and training of volunteers as counsellors and supporters to victims. This places them in a strong position to understand particular social and emotional consequences which victims suffer and these would be important considerations for the proposed board.

6.28 Mr Maree, an attorney of Pietersburg is of the view that in order to ensure effective administration of a compensation fund experts from the private sector should be appointed. In cases of fraud or theft the courts should make use of section 300. However, problems arise in cases of violent crimes. It is proposed that courts be allowed to order compensation in such cases according to established principles and that the award be recovered by means of an order for execution or other steps provided for in civil practice. An alternative would be to allow for claims against a compensation fund provided certain conditions are met. The victim should have the right to proceed in the Magistrate's or Supreme Court if he/she is not satisfied with the award in terms of the scheme. The proposed scheme would address the problem where offenders are unable to pay compensation to the victims of crime.

6.29 All participants at a workshop hosted by the Centre for Criminal Justice, University of Natal were of the view that the scheme should be properly administered by a transparent, independent body that will be democratically elected and audited on a regular basis. The scheme should also work at uplifting the victim by providing skills training. Rather than paying out money to certain victims they should be given loans or paid money towards their training in courses of their choice.

6.30 Mr de Kok, Regional Court Magistrate, supports the proposed composition of the board.

6.31 Jacob Raseroka and Lawrence Muzame, researchers for the National Institute for Public Interest Law and Research are of the view that the Compensation Board should not only

compose of members from the Police, law, and medical science, but should also be reflective of the diverse community. No standard form of compensation should be adopted, but each case should be viewed on its own merits.

6.32 With regard to the administration of the scheme the criminal law committee of the Law Society of the Cape of Good Hope states that the State should not inflate the bureaucratic structures to which civil service is prone and it seems likely that the proposed Central Board will require many regional sub-structures to manage implementation of the scheme throughout the country, and caution is raised against this getting out of hand and becoming an additional drain on the State's finances. The courts are understaffed in administrative staff, prosecutors, magistrates, and judges and these issues need to be addressed first before spending vast amounts on the new scheme. With enough of these officials in place, they can be delegated local application of the Compensation scheme, accountable to the National Board.

4. HOW SHOULD THE SOURCES OF THE FUND BE OBTAINED?

6.33 The National Council of Women of South Africa supports the proposed sources of such a fund i.e. a grant in aid a surcharge or levy in respect of all fines imposed and money confiscated in terms of the Proceeds of Crime Act is supported. However, in cases of a conviction for corruption where the victims are unidentified members of the public it would be difficult to allocate compensation. It is proposed that where large quantities of dagga are confiscated it should be exported to countries where the use of dagga is legal in stead of being destroyed as is the case at present. This would provide a fruitful source of revenue for the fund. Suitable convicts could be hired to work in gardens to engage in work to the benefit of the community. In cases of arson, for example gangs responsible for burning of huts during faction fight in the province could be sent to another province to rebuild the huts. In cases of assault priority should be given to the hearing of the case while victims should not be charged with hospital fees in respect of serious injuries sustained. In cases of rape no form of compensation seems sufficient, perpetrators should be punished severely while victims should not be dependent on the charity if bib-governmental organisations for support and therapy. A clear routine should be set up between the Police, the Department of Health and the Department of Social Development to render every possible assistance. The matter of Police protection of victims calls for serious thought.

6.34 All participants at a workshop hosted by the Centre for Criminal Justice, University of

Natal were of the view that the scheme should be funded by contributions from people such as Business Against Crime, the Government and others. Some wrongdoers should receive a sentence of community service whereby he or she would get paid but 80% of their earnings should be paid to the victim.

6.35 Advocate N Cassim points out that the levelling of a R50 surcharge for every conviction should be made payable by the offender failing which will result in an alternative of imprisonment.

6.36 Jacob Raseroka and Lawrence Muzame, researchers for the National Institute for Public Interest Law and Research are of the view that the scheme should be funded without inconveniencing the taxpayer. South Africa's economy is not advanced to levels similar to European countries where such compensation schemes are in place and can therefore probably not afford such a scheme.

6.37 The Women's Lobby is of the view that it is a good idea that compensation funds be supplemented with a levy payable by convicted offenders.

6.38 The criminal law committee of the Law Society of the Cape of Good Hope is not persuaded that the contemplated sources of funding are realistic, in particular the proposed surcharge for convictions. The allocation of 20% of all fines paid and moneys confiscated in terms of the Proceeds of Crime Act is unlikely to meet the inevitable demand for compensation, if introduced. The committee accepts the definition of "victim" and the suggestions regarding the range of persons who should receive compensation (were such a system to be introduced) but cautions that the wider the scope of the definition and the scope of persons qualifying for compensation, the greater the potential demand for compensation.

6.39 Hugh Wetmore is of the view that the most difficult questions are where will the money for compensation come from and how will the scheme be administered. He proposes that funds for a compensation scheme be obtained by:

- * the first claim to fine be to the victim for damages sustained;
- * a surcharge of R 50 for every conviction;
- * money confiscated in terms of the Act on the Proceeds of Crime
- * an amount determined annually by Government

- * attachment of the offender's assets;
- * where the offender has insufficient funds the State should provide work opportunities on prison-farms, prison factories and public works projects under appropriate security arrangements;
- * where the offender does not pose a threat to society he/she could be employed in the public labour market, ideally in the place of previous employment, where necessary under a form of house/work arrest, where his/her skills would not be lost to the nation and where higher earnings would make the whole compensation scheme more viable.

6.40 These additional sources of income would have many advantages. It will serve to hold the offender accountable and responsible for compensation; it will create a closer relationship between the crime and the penalty; the public sense of justice will be satisfied; and the offender will learn the reality of "what you sow is what you reap." If the offender bears the cost of the crime committed, he/she will have a sense of having atoned his/her sins and this will enable her/him to ameliorate the sense of guilt and begin a new way of life. Punishment should also be a deterrent to repeating crime and to preventing others from committing the crime. If the offender knows that after he/she has murdered his/her enemy he/she must then support his/her enemy's family for the rest of their lives, he/she may well think twice before committing the crime.

5. HOW SHOULD VICTIMS BE DEFINED?

6.41 The National Council for Women of South Africa supports the United Nation's declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Long delays in bringing criminal cases to court have the effect of denying justice to the victim. Victims should be entitled to full and regular consultation with public prosecutors and the situation where months go by without the victim knowing any information as to what is happening creates resentment and brings the law into disrepute.

6. WHAT SHOULD BE THE NATURE AND EXTENT OF THE SCHEME

6.42 Advocate N Cassim points out that the injuries justifying an application for compensation must relate to actual bodily harm, which includes emotional or physical harm and even pregnancy caused by or arising from a recognised offence as well as financial loss incidental thereto, such as loss of income, loss of maintenance to a dependent of a victim and travel

expenses. Provision should be made for minimum and maximum awards and similar provisions as those relating to fare paying passengers in the Motor Vehicle Insurance Act should apply. The State should be allowed to institute a civil action against the offender only after the victim has elected not to do so. Payment for compensation should be allowed either in single amounts or in instalments. Claims for compensation should be considered in accordance with the principles of the common law as applied in civil actions.

6.43 Mr PJ Jacobs, magistrate Bloemfontein, points out that in the light of financial considerations it is submitted that compensation be awarded to a small group of defined victims only; persons referred to as Good Samaritans should be excluded since they are not victims in the real sense of the word; there seems to be no reason why a victim serving imprisonment should not benefit from the scheme and an amendment to the Criminal Procedure Act to compel courts to consider compensation of victims of crime by providing for a compensation order as a condition of a suspended sentence wholly or partially is a necessity.

6.44 Hugh Wetmore propose that compensation should be extended to include property. While section 300 of the Criminal Procedure Act makes provision for the payment of compensation to victims of crime at the request of the prosecutor, this is not mandatory. Prosecutors do not even inform victims of this possibility and such compensation should be mandatory. No criminal should be allowed to benefit from his/her crime. The thief must make restitution. The issue paper's position is that those who suffered loss or damage of property must resort to civil action and rightly argues that this is beyond the understanding or ability of most of our citizens.

6.45 The South African Agricultural Union supports the idea that if the State fails to create a safe environment it should be held accountable for compensation. Victims may suffer serious injuries during violent attacks and a compensation scheme should be structured in such a way as to include compensation for the following :

- a once of payment;
- compensation for medical expenses on the long term;
- compensation for ; and
- compensation for personal property in cases of violent offences only.

6.46 The proposed process should also make provision for compensation to be claimed from

the offender. Awards in terms of the proposed procedure must be determined by the seriousness of the offence and the injury suffered as a result of the offence. The criminal process should be adapted to make provision for the needs of victims, in particular their practical, financial, medical and psychological needs. The establishment of a co-ordinated victim support service on a national and provincial level is welcomed. It is, however, not necessary to create a new structure in order to achieve this. The most important aim of the support service should be co-ordinate the existing structure and to advertise the service as widely as possible.

7. WHAT SHOULD THE STATUS OF THE APPLICANT BE?

6.47 Advocate Cassim is of the view that compensation should be paid even in those cases where the victim and the offender are members of the same household and where an offence is committed against a person serving a sentence of imprisonment.

6.48 The criminal law committee of the Law Society of the Cape of Good Hope supports the proposed requirements to qualify for compensation and recommends that consideration be given to broadening the scope thereof. The committee believes that the exclusion from compensation of victims and offenders of the same household and victims serving terms of imprisonment is not constitutionally sustainable. Furthermore, if such a scheme is to be introduced compensation will of necessity have to be paid for all physical injury, including pregnancy as a result of rape and emotional harm. Consideration should also be given to compensation for damage of property.

8. SHOULD THERE BE MINIMUM AND MAXIMUM AWARDS?

6.49 Mr L Naidoo, member of the Criminal Law Procedure Committee of the Natal Law Society, is of the opinion that a statutory maximum should be set as a ceiling limit in order to make the fund viable. However, the courts should make an order irrespective of whether it exceeds the limit. The balance would therefore be calculated and provision should be made to recover this balance from the offender.

6.50 With regard to the range of awards and the possible introduction of maximum and minimum awards, the criminal law committee of the Law Society of the Cape of Good Hope recommends that a bank of precedent decisions will inevitably be created and be reviewed

against changing circumstances. The committee cautions that a maximum award of R 30 000 may serve only to undermine the contemplated benefit of introducing a compensation scheme, especially where that amount offers no real compensation and causes lower awards to be disproportionate to the actual damages suffered.

THE PROPOSALS IN THE DISCUSSION PAPER ON A COMPENSATION FUND FOR VICTIMS OF CRIME

1. Feasibility of a Fully-Fledged Compensation Scheme

6.51 The research done by the Commission revealed that by defining the exclusions quite tightly, the amount needed for a fully-fledged compensation scheme for victims of violent crime could be as much as R2.3 billion per year. Thus, the Commission recommended that a fully-fledged compensation scheme for victims of crime in South Africa is not financially viable in the short-term. However, the Commission was of the view that the possibility of incrementally developing a compensation scheme needs to be explored further.

2. Pilot Targeted Compensation

6.52 Given the excessive expense of implementing a comprehensive compensation scheme for victims of crime in the short-term, it was recommended that a number of targeted areas for compensation be piloted. These should focus on those disabled by violent crime, rape survivors and the dependants of crime victims (particularly orphaned children) as these are considered victim groups of high priority.

6.53 It was further recommended that it would be viable to phase in the pilot targeted compensation schemes over the next three fiscal years. These would not only offer compensation to some victims of crime but allow some of the parameters and mechanics necessary for a full-scale scheme to be tested. In this sense the pilot schemes will be practical but also be part of a broader strategy aimed at incrementally developing a full compensation scheme at some point in the future.

6.54 It was proposed that the following pilot interventions be established:

2.1 Targeted compensation for rape survivors

6.55 It was recommended that by 2002, or sooner if possible, limited compensation for rape survivors be implemented to assist them medically and to ensure they receive the appropriate social and psychological support. As was stated in the financing sections of the discussion paper the initial sum of R2 000 was proposed. This could be used by the survivor at her own discretion for the purchase of services and support not currently available through the State (or their private medical aid), i.e. counselling, medication, and/or to pay for lost time from work, as well as travel costs to see District Surgeons, police, courts officials, etc. It was estimated the cost of this to be in the order of R141 million per year. The appropriate structure needs to be established to set this process up. Funding and administration needs to be a focus of this structure, which should work from the initial financing process and administration costs outlined in this report. The structure should ensure this recommendation is realised and that the legal parameters are established. In addition, they could also, if the programme is successful, consider increasing the amount of compensation to be in line with international standards.

2.2 Targeted compensation for crime victims disabled due to crime

6.56 It was recommended that by 2003 a grant be given to victims who have in some way been disabled as a result of violent crime. Such assistance should be dedicated to helping them purchase mechanical devices (e.g. artificial limbs, wheelchairs, hearing aids, etc) or making changes to their home, which may assist them to cope with such resultant disabilities. Small grants should be made available (in the range of R5000) and the allocation of such compensation awards should be based on criteria of financial need. The appropriate structure needs to be established to set this process up. As with the recommendation above, attention will need to be paid to the financial, administrative and legal implications of the scheme. The scheme should only target those without private medical insurance.

2.3 Compensation for the dependants of indigent murder victims

6.57 It was recommended that by 2004 a further pilot victim compensation scheme be established that will initially target the poor. Specifically, the dependants of indigent murder victims should receive a minimum payment of R5 000 to R15 000 (increased to take account of inflation rates between now and the time of development of the scheme). If indigent murder

victims' dependants were paid out, we estimate that this would cost between R44.4 million and R255 million depending on at what level indigence or poverty was defined and the amount granted. We recommend that dependants of murder victims who are orphaned as a result of a violent crime receive special consideration, and additional resources to these victims be considered. An appropriate structure should explore this option and lay the foundation for its establishment in 2004.

3. Consideration of legal parameters

6.58 The recommendations for the pilot schemes outlined above will need to be supported by legislation. It was recommended that the South African Law Commission should propose the parameters necessary for each targeted or pilot compensation process. The existence and operation of these schemes would also provide an opportunity to assess the extent to which constitutional issues arise through the targeting of compensation schemes in such a manner as to exclude some victims on the basis of a variety of criteria. The parameters outlined in the discussion paper should be used to establish the eligibility criteria for each recommendation. Specific attention will need to be given to the questions of how those in financial need and those who are considered 'blameless' victims can be made the primary beneficiaries of the scheme. A means test would need to apply to each recommendation, as well as first trying to ensure that the costs for the targeted compensation outlined are recovered from the perpetrator if convicted.

4. Funding a Targeted Pilot Compensation Scheme

4.1 Establishment of a Crime Victims' Fund

6.59 In order to finance the targeted pilot compensation processes outlined in recommendation 2, it was recommended that a Crime Victims' Fund be established immediately. It was also recommended that the Crime Victims' Fund – once established – be utilised for funding other areas of victim service if additional funds are raised. The focusing of this funding should be subject to stakeholder consultation.

6.60 In terms of raising the necessary funds the following were suggested:

4.2 State allocations

6.61 It was recommended that the Crime Victims' Fund obtain resources from the national government, through the budget process over the next four years. The primary aim should be to obtain funds for the establishment of pilot targeted compensation schemes. Additional funds may also be sought for other projects deemed necessary through stakeholder consultation.

4.3 Dedicated levies and taxes

6.62 Despite the cogent arguments against the imposition of a dedicated tax predicated on the need to maintain a credible and rational budget process, the Commission was of the view that the moral and financial case for getting persons whose activities are correlated with high levels of victimisation to pay for the broader consequences of these activities. It was proposed that a special levy on prosecutions (regardless of crimes punished), payable by all offenders, should be set up to procure funds for the Crime Victims' Fund. In addition, a dedicated tax on firearm ownership and ammunition purchase, as well as alcohol purchase, should be considered so as render more funds available. It was recommended that a relevant structure be set up to design a set of workable and creative motivations for the levy and dedicated tax approaches outlined.

4.4 Third party funding

6.63 It was recommended that the Crime Victims' Fund also raise funds from third party or voluntary sources such as corporate donations. This fund should be publicly managed and be complemented by a publicity campaign focusing on the impact of crime on victims. It was recommended that a task team consisting of representatives of Business Against Crime, of civil society and government, as well as consultants with insurance and economic expertise, should investigate the possibility of securing additional sources of financing for the fund.

4.5 Administration of the Crime Victims' Fund

6.64 It was recommended that the task team described above seek to define a management structure for the Crime Victims' Fund and suggest how it assesses competing claims for victim assistance and compensation in consultation with the SALC's focus on the legal parameters of the targeted compensation schemes (3).

5. Submission of the Discussion Paper to Relevant Structures

5.1 Submission to the Treasury

6.65 It was recommended that the discussion paper, and a brief submission, be forwarded to the Treasury. The purpose of this would be so that the issue of compensation for victims of crime can be considered within the developments currently underway by government into investigating a social safety net in South Africa.

5.2 Submission to the Criminal Assets Recovery Fund

6.66 It was recommended that the discussion paper, and a brief submission, be forwarded to the Ministers responsible for the Criminal Assets Recovery Fund to establish whether there is potential funding available that could assist in the establishment of the pilot, targeted compensation approaches as outlined in 2.

5.3 Submission to the appropriate Portfolio Committees

6.67 It was recommended that this report, and a brief submission, be forwarded to the National Legislature. The purpose of this would be to canvass the views of political parties and the relevant parliamentary committees, whilst beginning to build political commitment for the issue.

6. Role of the Private Sector

6.68 It was recommended that policy development be explored that would see employers take a greater interest in the impact of violent crime on their workforce. The Commission recommended that a study focusing on the current levels (and feasibility) of increasing employer responsibility to ensure that staffs are insured to cover disabilities that could result from crime be undertaken. Recommendations concerning how companies could better protect their staff following a criminal violent act should be drawn up. These could also consider whether employers could provide minimum insurance (*ex gratia* payment) and/or Employee Assistance Programmes capable of dealing with the effects of violent crime on their employees.

7. Supplementing Disability Grants

6.69 It was recommended that a feasibility study into the supplementing of disability grants for those disabled through crime be undertaken. It was proposed that the feasibility study consider the proposal that disability grants be made to blameless victims disabled by crime. This supplement should be targeted at the poor and those without other private insurance cover. This investigation would need to investigate the feasibility of such an approach from an administrative and financial point of view. If such a supplement were possible, the scheme should be operational by 2003 and the interface with implementing recommendation 2.1 (i.e. a pilot compensation scheme for those disabled by crime) explored. The eligibility criteria should be discussed and finalised with the South African Law Commission as outlined under 3.

8. Police Record Keeping

6.70 It was recommended that an audit be undertaken of police crime recording and statistics gathering processes, with a view to making proposals to improve such systems so as to ensure that they are rendered fully functional in respect of the requirements of a future victim compensation scheme or pilot schemes proposed. This process, which should engage role-players from across the relevant government departments, should be followed by a reform process which would ensure a sustainable and proper record keeping system.

9. Witness Fees

6.71 It was recommended that the issue of witness fees receive immediate attention. As an initial process we recommend that *victims* who are called as witnesses in trials be compensated for their travel and other reasonable costs, and a nominal and standardised rate also be paid for time lost by the victim/witness whilst attending the case. It was felt that could help reduce secondary victimisation and encourage more active participation in the criminal justice system. An investigation into the feasibility of compensating all witnesses in criminal trials should be undertaken.

10. Hospital Trauma Unit Record Keeping

6.72 It was recommended that a review of record keeping in hospital trauma units be

undertaken. The review should focus on what information is needed for injury surveillance purposes (see recommendation 11), and be undertaken with a view to making proposals to improve such systems so as to ensure that they are rendered fully functional in respect of the requirements of a future victim compensation scheme or proposed pilot schemes. Specifically, it was recommended that the causes of medical trauma be outlined in greater detail to ascertain if injuries were sustained in the course of criminal violence or other types of violence (i.e. accidental injuries). This process, which should engage role-players from across the relevant government departments, should be followed by a reform process which would ensure a sustainable and proper record keeping system.

11. Injury Surveillance

6.73 It was recommended that an injury surveillance system be set up over the next five years within all public health facilities. The establishment of an injury surveillance system would need to be done in conjunction with current initiatives focusing on injury surveillance and the pilot schemes already underway. In the long-term, this system should ensure that all cases of criminal injury are recorded as such and that records verifying incidents can be extracted with ease. Rural areas should be prioritised for this system. Such a system must be functional to the interim pilot compensation initiatives, and ultimately to the full future implementation of a victim compensation scheme should this become feasible.

12. Increasing Awareness of the Impact of Crime

12.1 The role of VEP and other government bodies

6.74 In compiling the discussion paper it became evident that the precise impact of crime on individuals and society is currently under-researched and inadequately understood in South Africa. It was therefore recommended that the South African Law Commission (at least in respect of its concern with the establishment of a victim compensation scheme), and the government's Victim Empowerment Programme, amongst other government agencies, place a greater public emphasis on the economic, psychological and physical impacts of crime. To do this it was recommended that a study be commissioned to research thoroughly the impact of crime on South Africa and on its victims. The profile of victims should be ascertained more precisely and the exact injuries that result from criminal violence should be examined (specifically the degree to which people are disabled). By publicising the results of such

research, it is hoped that support to victim assistance initiatives would be encouraged and advanced both within government and the private sector, as well as the limited areas of compensation proposed in this set of recommendations. This study should also be able to provide reliable information necessary to costing and budgeting for the targeted compensation schemes outlined above.

13. Restitution from Offenders

6.75 The discussion paper has argued that restitution from the offender is not always the most efficient way to compensate victims because many offenders are poor and conviction rates are low. However, restitution from the offender should always be the first priority in the case of convictions for crimes involving violence. A review of the law which provides for restitution and its implementation needs to be under-taken and/or processes already underway to do this supported. The findings of the discussion paper should be integrated into this process. A programme to improve the process of restitution should follow, along with the encouragement of greater judicial utilisation of the sentencing vehicle of making compensatory awards to the victims of violent crime. Furthermore, the exact percentage of victims who receive restitution must be quantified and mapped over time. The appropriate structures should be set up to facilitate such a process.

14. The Role of the Victim Empowerment Programme

6.76 It was recommended that the issue of compensation be placed on the agenda of government's victim empowerment programme. The VEP should:

- interface with the process to establish the pilot compensation schemes and assist in investigating how the victim empowerment programmes could support this process (e.g. make the public aware of the pilot schemes, train police to advise victims of the availability of funds through the pilot compensation schemes, *etc*);
- interface with development of a Crime Victim's Fund;
- Increase public awareness about the precise impact of crime as outlined in recommendation 12 above;
- contribute to the recommendations regarding restitution made in recommendation 13 above;

- host a number of workshops, with key role players and government departments, on international best practice with regards to the issue of compensation to victims of crime. This report should be distributed to participants prior to such workshops for discussion, and
- Facilitate greater international contact, particularly in Africa, regarding the issue of compensation for victims of crime (see recommendation 16.2).

15. Charter of Victim Rights

6.77 Currently, the draft Charter of Victim Rights only mentions a right to compensation with regards to the issue of restitution ordered by the court. A consultative workshop should be set up to discuss whether more far-reaching rights to compensation need to be established in the Charter. The discussion paper should form the basis of the discussion with key groups, including groups representing victims of crime. A consultation process should ensue. Stakeholder views should then be collated. Stakeholders should also be encouraged - using the information in this report - to participate in the public process of consultation with regards to the draft Charter of Victim Rights that will be unfolding in the coming months.

16. Stakeholder Consultation on this Report and Distribution

16.1 National debate

6.78 The discussion paper should be distributed as widely as possible with the purpose of facilitating a national dialogue amongst key stakeholders about the impact of crime on victims, as well as the debate concerning compensation. This will assist with laying an informed foundation for any future developments regarding compensation and ensure public support as the process unfolds – specifically for the strategic importance of the pilot compensation schemes. In addition, the international comparative experiences documented in this report need to be publicised and popularised, as well as their strengths and weaknesses scrutinised in the South African context.

16.2 International debate with a focus on the developing countries

6.79 The discussion paper indicated that compensation schemes within the developing world are virtually non-existent. A concerted effort should be made by South Africa to foster contact

and collaboration with other developing countries regarding debates about compensation for victims of crime. A number of structured exchanges on the issue with African countries and countries such as Brazil, Chile and Argentina should be undertaken in the next two to three years. This should be facilitated by the government's VEP programme in consultation with leading non-governmental agencies in the field.

17. The Feasibility of Compensation Scheme in South Africa in the Future

17.1 Ongoing review of the feasibility

6.80 Once the pilot targeted compensation scheme have been established in 2004 (see recommendation 2), and the various recommendations carried forward in the discussion paper undertaken, a review of whether a larger compensation scheme should be established should be undertaken. The criteria used to consider whether a compensation scheme would be viable have been discussed throughout the discussion paper. However, a number of issues would need to be considered in such a review process, which we recommend should take place bi-annually thereafter. The following issues would need to be assessed:

- the financial feasibility of a compensation scheme relative to other government funding;
- the reach of the criminal justice system and whether a compensation scheme would be accessibility to all - especially the poor;
- the administrative services necessary and the capability of the civil service to effectively run the scheme;
- the ability of the police to keep records, verify crimes and interface with a compensation granting body;
- the reliability of medical record-keeping and verification of injuries, as well as the ability of health authorities to interface with a compensation granting body;
- the resources and public service skills available to ensure the necessary checks and balances to minimise fraud;
- the relative strength of the victim empowerment programme, and the victim aid services it provides, which would need to complement any compensation process;
- the legal parameters of eligibility and types of injuries qualifying for compensation.

17.2 Issues to consider if a compensation scheme were established

6.81 The discussion paper recommended that a fully-fledged compensation scheme is not viable in South Africa in the short-term. However, if on review in 2 to 3 years time, and after implementing the pilot schemes, the above criteria can be satisfied, it was recommended that the discussion paper be used as starting point for establishing a more fully-fledged compensation

scheme in South Africa. If a compensation scheme were established in South Africa over the next few years it was recommended that:

- the scheme should adopt a 'safety net' approach and should ensure that its major beneficiaries are the poor;
- South Africa should adopt a tariff scheme approach to compensation and not use a system based on common law. This is consistent with current international norms, and will be more cost-effective, less administratively burdensome and will not prejudice those who do not have an income, as the compensation rates would be standardised;
- payments for compensation should be made as once-off payments rather than as annuities, or pensions, unless the approach of supplementing the disability grant process is adopted (see recommendation 7);
- the eligibility criteria for compensation (the parameters) should be finalised by the SA Law Commission. Pragmatic concerns (e.g. finances) will need to be balanced against ensuring maximum benefit to applicants;
- Any scheme should ensure that those in need, and only those victims considered 'blameless' and those who co-operate with the criminal justice system, are the beneficiaries;
- a public awareness campaign should go hand in hand with the development of the scheme;
- administration costs of the scheme should not exceed the benefits to victims.

18. Conclusion

6.82 In sum, the strategic approach adopted in these recommendations highlighted the importance of addressing a number of issues, before a comprehensive compensation scheme could be established. Many of the recommendations were geared towards this, e.g. improved record keeping, placing compensation as an issue more squarely on the national agenda, etc. Specifically, however, the discussion paper motivated for a number of targeted pilot victim compensation schemes to be set up over the medium-term. These should serve to assist the victims targeted by them (i.e. disabled crime victims, rape survivors and the dependants of murder victims) and galvanise a focus on these priority groups. These pilot schemes would also, amongst the other recommendations made, help lay the foundation for the incremental and strategic development of a more substantial victim compensation scheme in the future.

6.83 The recommendations were made in light of an awareness of the multiple needs of victims within the criminal justice system. Ideally, the types of remedies and incremental approach to victim compensation taken in the discussion paper should take place parallel to a process of developing victim support services more broadly. The recommendations made in the discussion paper were seen as complementing that process. Additional resources for the approach adopted in the discussion paper should be sought and some methods for achieving this have been recommended. It was thought that the recommendations made in the discussion paper would not only support the strategic development of a compensation scheme over time, but also simultaneously address some of the needs of victims in their own right.

6.84 As was apparent from the discussion paper the legal, financial and organisational obstacles confronting government in conceptualising and implementing a victim compensation scheme would be significant. However, it was thought that there were substantial social benefits that might be gained through the functioning of an appropriate compensation scheme. These included assisting victims who have suffered material harm, enhancing equity by providing a social safety net for poorer victims and improving the criminal justice system through enhancing its legitimacy.

WRITTEN COMMENTS ON THE COMMISSION'S PROPOSALS IN THE DISCUSSION PAPER

6.85 The written comments received on the proposals in the discussion paper are discussed hereafter under three headings, support for the establishment of a compensation fund; objections to the creation of a fund and objections to proposals relevant to the administration of the fund.

SUPPORT FOR THE ESTABLISHMENT OF A COMPENSATION FUND

6.86 Professor Beaty Naudé points out that the fundamental problem with all crime compensation schemes, and there are many throughout the developed world, is that it is difficult to find a satisfactory rationale for singling out violent-crime victims from other groups of unfortunates for special treatment by the state. She notes that there are two candidate rationales. First, it is argued that the state has a legal duty to compensate the victims of violent

crime because it has failed to prevent crime, or is responsible for the social conditions that produced the criminal, or accepted liability under some notion of a social contract. There are many who see the worm turning in this direction in the recent Constitutional Court judgement in the Carmichele matter. But the worm has a long way to twist before such a legal duty becomes fully enforceable in our courts. If this is the theoretical basis for victim compensation, then awards must be set at common-law damages levels. Such awards express public sympathy with the victim.

6.87 Secondly, she points out that it is argued that violent crime is an unavoidable feature of modern life and its costs should be borne by all citizens. This is a distributive justice or insurance-type rationale. If this is the theoretical basis for victim compensation, then awards can be set at tariff levels for each type of injury regardless of individual loss. Awards under a tariff system represent society's abhorrence of the offence. The main reason for our compensation scheme is the politicisation of the crime victim. Criminal-injuries compensation is an attempt to repair the social damage caused by crime.

6.88 In her view the Law Commission proposal has made an initial effort to measure the damage, but it fails to steer a clear line between two compensation models: common-law damages for victims or a system of tariffs based on the type of offence. The result is incoherent. A common-law damages scheme for victims of violent crime based primarily on loss of income will cost us R4.7 billion a year. This will compensate about 540,000 claimants, mostly the victims of grievous bodily harm. Yet the lion's share of this tidy sum, about R3,9 billion, will go to the dependants of the 24,000 murder victims. A fair price you might think when placed alongside the R60 billion and more set aside for the arms deal over the next ten years. Yet our many claimants will be a nightmare to administer. Last year the United Kingdom paid out ú206 million to a mere 44,000 crime-victim claimants. So the Law Commission set about restricting the entitlement of those who cost the most, the murder victims. Who are they precisely, you ask? She notes that we are seriously short of reliable data.

6.89 In her view the Law Commission makes an inspired guess that no less than a half of the murder victims have no spouses or have only minor dependants. This assumption is based on two factors. First, most murder victims are apparently young unmarried males. Second, young unmarried males may have fathered children, but if they were not paying maintenance at the time of death there would be no claim for compensation. Therefore R1,9 billion is knocked off the compensation estimate. The process of calculating common-law damages then proceeds

from bad to worse. In her view, somewhere in the middle of a long document the Commission loses its mathematical marbles and the figures make no sense at all. She points out that the discussion paper drifts into a tariff-based model with no explanation of the theoretical track the Commission is taking. The pragmatic pressure is clear: the ever threatening lack of resources. A tariff-based system is far cheaper to run than common-law damages. So the Commission falls back on an incremental approach and recommends the introduction of three pilot compensation schemes.

6.90 Professor Naude notes that the choice is revealing of who are our most deserving victims. First in line, for a scheme to be established by 2002, are rape survivors who are offered the princely sum of R2,000 each at a cost to the taxpayer of R141 million a year. Next up, in 2003, are disabled crime victims, who stand to benefit to the tune of R5,000 each, provided they pass a means test. There is no guesstimate of how much this would cost. Last in line, in 2004, are the dependants of indigent murder victims, who are offered between R5,000 and R15,000 at a cost of R255 million. The rationale for this pilot scheme is based purely on welfare and has nothing to do with either a legal duty or social insurance.

6.91 Professor Naude also attended the Compensation Fund for Victims of Crime workshop which the Commission hosted in Pretoria and submitted the following for consideration as she felt it was not extensively discussed and reported on at the work session:

I would strongly recommend that consideration be given to exclude victims of violent crime from any monetary compensation if they had abused alcohol at the time of the criminal victimisation. I would like to motivate this viewpoint as follows:

It is universally recognised that alcohol and drug abuse by the both the offender and the victim is a high crime risk factor. According to Butchard (Alex, Violence prevention in Gauteng: The public health approach (1996:10). Acta Criminologica 9(2)) a number of international studies indicate that 50-70 percent of all victims of violence were under the influence of alcohol at the time of the crime. People under the influence of alcohol and drugs often behave in an irresponsible, aggressive and reckless manner which can spill over into crime. In fact there is a very thin dividing line between victim and perpetrator in most assault cases and the determining factor is usually the individual who gets injured or killed first who is then labelled the victim while the other one becomes the perpetrator.

A study in the Northern Cape (by Shaw M, The violence of Alcohol: Crime in the Northern Cape(1997:8), Crime & Conflict(9)) established that violent crimes like murder, assault, rape and child abuse are associated with high levels of alcohol abuse and as many as 53 percent of homicide victims had considerably high blood alcohol levels while 63 percent of assault-related injuries were alcohol related. A recent study by the Medical Research Council found that 75% of sharp object homicides involved alcohol abuse by the victims (The Pta News, 17 March 2001).

In my view people who knowingly risk their safety by abusing alcohol and drugs can surely not expect ordinary tax payers to provide compensation for their reckless and irresponsible behaviour. This is not an unusual precedent as insurance companies will not pay out compensation to victims of property theft if there was not forced entry. In fact even if there was forced entry and they are of the opinion that the crime prevention measures are not adequate they will insist that the security be updated at the insuree's own cost before providing insurance cover.

I fail to see why the same principle cannot be applied in the case of violent victimisation. It will furthermore be relatively easy to exclude such victims by means of the usual blood alcohol test to determine the BAC when they report for medical treatment. Most of these victims, in any case, receive free medical treatment at an enormous cost to the tax payer and can surely not expect any monetary compensation at tax payers costs as well. They should instead be provided with free counselling and information to assist them to overcome their abuse problem.

The question whether the relatives of murder victims who were under the influence of alcohol and drugs should receive compensation is a difficult one as innocent people may be punished if they are excluded. Yet again there is already a legal precedent as anybody who negligently drives a vehicle while under the influence of alcohol thereby causing an accident can be imprisoned and I have not yet heard anybody question the hardship suffered by the innocent family.

I am a staunch supporter of victim rights but victims who are prepared to take a crime risk by abusing alcohol and drugs should not be entitled to monetary compensation but rather other forms of support and counselling to rehabilitate them.

The above exclusion will, in my view, provide adequate funds to compensate deserving victims of violent crimes which will not only improve the negative perceptions of the criminal justice system but will also show a government who cares for innocent victims of violent crimes.

6.92 Dr S King and Ms J Fredericks from the Industrial Health Research Group work closely with women who are abused in every possible way as well as other victims of crime. They support the proposal to start with a crime compensation fund. From their experience they have seen that this method works well in preventing crime in other countries and they are of the view that this is what South Africa needed for many years.

6.93 Advocate MT Chidi of the Office of the Premier of Limpopo supports the creation of a compensation fund since it may benefit the victim, but is opposed to a targeted compensation award of R 2000 for rape survivors. Colin and Mary Hayne support the notion of compensation for the victims of violent crime and firmly believe such compensation must be funded from the

seizure and sale of the assets of criminals, not from yet another tax on an already overtaxed public.

6.94 Mr Justice Bertelsman congratulates the Commission on a stimulating and thoroughly researched document. He supports the view that it will be impossible in practice to institute a fully fledged compensation scheme in the foreseeable future. He also supports the proposal on targeted compensation for certain classes of victims as a starting point, particularly if the focus falls on rape survivors and women and children generally. Because of shortage of funds he proposes that any pilot scheme should endeavour to provide as much compensation as possible in kind rather than in hard cash. This could consist of the referral of rape victims to existing rape crisis clinics and the support of NGO's who have proven themselves in the past of being both institutionally and administratively capable of providing support to victims who fall into these categories. Rather than to pay a sum of money to victims those services which are needed immediately after surviving a rape should be made available free of charge. The same should apply in respect of the provision of hospital services, the provision of medical aid, such as crutches, medication and counselling.

6.95 Mr Justice Bertelsman is of the view that the administrative and financial control of the victim compensation scheme, whether in an embryonic or in an advanced stage, should not be entrusted to a government Department and least of all the Department of Justice. Past experience has shown that the state and its ministries are exceedingly cash-strapped. Funds which are budgeted for particular services and are entrusted to these ministries for such purposes are also urgently required for other demands made upon state coffers. There is a real danger that funds allocated to a victim compensation scheme may be swallowed up by the establishment of further administrative structures and an amplification of red tape surrounding these. Given the proven inability of particularly the Department of Justice to manage finances properly and to allocate resources to essential priorities, the scheme will in all probability not get off the ground if the overall administrative and financial control is not entrusted to an NGO, or a cluster of NGO's. The relevant NGO's such as rape crisis clinics and women organisations would obviously have to be approved by the Auditor-General or a reputable firm of auditors before being awarded a tender to provide these services.

6.96 Mr Justice Bertelsman proposes that the Criminal Procedure Act be amended to make it obligatory for any presiding officer or judge to enquire as a matter of course after any

conviction whether the offender is possessed of an income or assets which could be devoted to paying the special levy suggested in the discussion paper and over and above such levy, to compensate the victim in appropriate cases. A sufficiently significant payment of compensation should be taken into consideration in imposing sentence, allowing a perpetrator to “buy off” a pro rata portion or even the whole period of a prison sentence. Similarly, all cases of serious crimes such as rape, attempted murder, assault, etc, where the perpetrator appears to be possessed of worldly goods, should be referred to the Asset Forfeiture Unit as a matter of course. A statutorily determined minimum payment into a victim compensation fund by any offender should be factored into the sentencing process to allow the attachment of assets and the liquidation thereof to operate as an effective reduction of the term of imprisonment in appropriate cases, and as an additional punishment or part punishment in those cases where imprisonment is unavoidable. The NGO’s should oversee this process and remain in constant interaction with the prosecuting authority and the correctional services authorities. The immediate provision of anti-retroviral drugs to rape victims should be made compulsory. Such drugs should be provided by State hospitals in instances where the NGO’s are unable to reach the victims. Compulsory testing for aids and any other STD of any sexual offender should be compulsory routine.

6.97 Mr Justice Bertelsman proposes that the Victim Compensation Programme should have the same profile and administrative structure as that of the inspecting judge: a high statutorily created structure presided over by a judge of the High Court or a person of similar stature, but administered in practice by the private sector and NGO’s.

6.98 The judges of the High Court KwaZulu Natal, are generally of the view that a compensation scheme is a good idea but that it is totally impractical.

6.99 Mr J Botma of the Free State Agricultural Security Committee supports the creation of a compensation fund. In particular he notes that compensation is an important issue for victims of farm attacks. He points out that according to statistics, the Agricultural sector is seriously affected when it comes to murders and violent attacks. He is, however, opposed to the taxing of firearm owners as a source of income for the compensation fund and proposes that government make money available for this purpose.

OBJECTIONS TO THE ESTABLISHMENT OF A COMPENSATION FUND

6.100 Professor SS Terblanche of Unisa is opposed to a compensation scheme and submitted the following comments:

The authors of the discussion paper is to be congratulated on their effort. The paper takes an admirably wide view of the whole question of compensating victims of crime. It also admits that the establishment of a compensation scheme is beset with difficulty. A few quotations from the paper makes this clear (my emphasis):

“In contemplating a victim compensation scheme in South Africa, careful thought needs to go into explaining why victims of crime should be given priority over other people in need. Financial pay outs for suffering and financial losses resulting from a rape or violent robbery make moral sense, but these **become difficult to justify** in a context of limited resources, where poverty alleviation, combating Aids and providing employment all demand increased resourcing.” (p 29-30)

“Of course, **like most arguments in the difficult** area of criminal compensation, there are complexities.” (par 3.3.3.3)

“Such funds have often been **plagued** by administrative inefficiencies and have been exposed to fraudulent claims. The Road Accident Fund has experienced **difficulties** with the involvement of lawyers in the application process, and has been required to pay extensive legal costs. The Compensation Commission has experienced its own administrative **inefficiencies and delays** in the settlement of claims. The experience of such statutory compensation schemes, it is recommended, should be carefully considered in the event of the establishment of a compensation scheme for victims of crime.” (par 3.2.1.2)

“...full compensation. Such an approach may extend further than a social security benefit to include other 'costs' associated with the crime. For example, pecuniary loss, physical and psychological injury, loss of amenities, pain and suffering, and moral damages. This end of the spectrum is far **more difficult to implement**, particularly within the context of limited state funds.” (par 3.3.2.3).

“Cane (1993) asks why government should select yet another group of unfortunates for special treatment? Is the justification that the State does little for victims of crime sufficient to argue for increased benefits for a minority of crime victims at the expense of the generality? **The answer is not simple**, especially in a context where there are competing needs for such basic services as water, sanitation and electrification.” (par 3.3.3.1)

“Thus, people who are exposed to violent crime, but who are neither injured nor suffer financial losses attributable to the psychological effects of the experience of the actual

or threatened violence, are assumed not to qualify for compensation. These 'bottom-line' criteria aside, however, determining who should be eligible to receive compensation from a VCS in South Africa and where to draw the line between eligibility and ineligibility remains the **greatest difficulty**." (par 6.2)

"Furthermore, the establishment of a compensation scheme in South Africa could depend on creating a substantially new administrative infrastructure and staff complement. To date, for example, the processing of some 18 000 Truth and Reconciliation Commission urgent interim reparations claims has proved to be an incredibly difficult and protracted process (*see 3.2.5 of this report*). Such inefficiencies, which have also been seen in the government's processing of pension claims, suggest that there may be **little realistic prospect for setting up a new bureaucracy** with the purpose of compensating thousands of potential victims." (p 29)

"Dealing with these sorts of problems in South Africa is made **extremely difficult** by the relatively poor record-keeping practices that have developed, the sophistication of printing and copying technology available off the shelf, and the under-training of officials in the detection of falsified documents. These factors make it extremely difficult if not impossible to design systems which prevent fraud, and which would facilitate the reasonably easy investigation of frauds after they had happened." (par 7.10)

"This chapter has sought to consider the possible sources of funding for the establishment of a VCS and the obstacles that may be encountered in attempting to secure such funding. It has highlighted **the difficulties** which is envisaged will be encountered in obtaining funding of the magnitude necessary to establish a compensation scheme." (par 8.6)

These are a few examples of the many complicated issues surrounding the introduction of a victim compensation scheme. Although the discussion paper proposes a solution to each of these difficulties, it is my submission that it is their **cumulative effect** that put a huge question mark over the wisdom of introducing a compensation scheme.

The discussion paper concludes that opposition to a compensation scheme is based on arguments of a "pragmatic and fiscal nature" (par 3.3.3.3). I confess that my opposition to the paper's final recommendations mainly fall within these categories as well. It is for good reason that current compensation systems in the world are limited to developed countries. Considering all the difficulties involved in any such system, and the South African track record with such schemes (one could add the Lotto to those mentioned in the discussion paper), it is clear that governance in South Africa is simply nowhere near the sophistication needed to run a compensation scheme with an acceptable level of success. On a fiscal level: the fact that "a substantially new administrative infrastructure and staff complement" (p 29) will be necessary to administer a new compensation scheme, and that this infrastructure will consume millions of rands before one cent can be paid to a victim, makes such a scheme something South Africa cannot afford. The recommendation that "administration costs of the scheme should not **exceed** the benefits to victims" (par 9.17) is an admission that this scheme will be extremely costly.

While it is true that a compensation scheme could learn from existing schemes and in

this manner avoid the main pitfalls, I submit that, if any of the current schemes cannot get rid of its own deficiencies and inefficiencies, the new scheme will not succeed either.

The arguments that are advanced in favour of a compensation scheme are not particularly compelling. I agree in broad terms with the “victim empowerment” argument (par 3.3.2.2), but this argument does not begin to explain why victims should be given preference to any of all the other groups of people in need of some assistance. The rest of the arguments in favour of a compensation scheme are characterised by “coulds”:

“Therefore, a compensation scheme ... **could** meet some of the needs of victims whose cases do not reach court or where compensation from the perpetrator seems unlikely. Simultaneously, a compensation scheme **could** build confidence in the criminal justice system by demonstrating that it is a system that is sensitive to the needs of victims. This **could** encourage victims to form a partnership with the State to combat crime and would clearly enhance reporting rates.” (par 3.3.2.2)

“Such an approach **could**, at least at the level of broad principle, strengthen the development of a restorative justice approach to dealing with crime.” (par 3.3.2.6)

“3.3.2.7 Compensation claims could benefit criminal justice system”

“This **could** result in greater reporting of crime and co-operation with the police as compensation is not generally available within the international context without such basic conditions being met.” (par 3.3.2.7)

“In this sense, it could be argued that a compensation system **could** substantially contribute to the transformation of South African society.” (par 3.3.2.7)

“Such a system **could** draw people whose lives are lived outside of the net cast by the modern criminal justice system into the system - a system which is built on respect for due process and other's rights. If this is correct, such a compensation scheme **could** become an important tool in the democratisation of South African society and in the expansion of the sphere of rights to encompass the numerous victims of crime who today live without the protections afforded by the Bill of Rights.” (par 3.3.2.7)

“A compensation scheme **could** provide individuals with some funds to offset the initial impact of the crime through providing them with a 'safety net'.” (par 3.3.2.8)

“It is arguable that early intervention by way of compensation and assistance to victims of crime **could** save the State money in the long run.” (par 3.3.2.8)

There are at least another 17 instances where the argument is used that a compensation scheme “could” have some beneficial result.

Clearly, therefore, much of the advantages of a compensation scheme lies in the area of conjecture. On the other hand, one can safely say that, unless the scheme works well (and the difficulties mentioned above indicate that it will not), it **will** cause further damage to the perceptions of the criminal justice system, **will** be expensive, et cetera.

Should the above-mentioned arguments be rejected, I also need to express my disagreement with the proposed pilot compensation scheme. Although the incremental implementation of a compensation scheme is an ingenious proposal, it appears to make more sense to launch a pilot scheme over a broader front of victims, but in a restricted locality only. If the pilot scheme operates for rape and disablement and dependants of crime victims only, but countrywide, a full infrastructure will nevertheless be required. This does not appear to be a practical option.

Although I believe that rape victims will speak for themselves, I think that the proposed R2 000 compensation will be considered by many to be a slap in the face. When compensation is linked with aims such as increasing the legitimacy of the criminal justice system, the seriousness of the offence becomes a relevant factor. Since rape is one of the most serious crimes that can be committed in South Africa, R2 000 will not improve impressions of the legitimacy of the criminal justice system.

6.101 Mr CGH Hlatswayo of the Department of Social Services and Population Development, Germiston, support the proposed Victim Compensation fund for the following reasons:

Before the healing process can be achieved the needs of victims should be met, his or her questions be answered and the fears and feelings of instability and insecurity be allayed.

Violent crime has increased dramatically and since no compensation scheme exists, any suggestion for the establishment of such a scheme is to be welcomed.

Most violent perpetrators are unemployed and therefore unlikely to be able to compensate victims.

The current provisions of the Criminal Procedure Act, section 300 of Act 51 of 1977, is seldom applied in practice and the majority of civil courts are under-utilized.

As the custodian of the basic Human Rights of our people the state has a responsibility

to protect all its citizens.

OBJECTIONS TO PROPOSALS RELEVANT TO THE ADMINISTRATION OF THE FUND

SOURCES FOR FUNDING A COMPENSATION FUND

6.102 Many respondents, mostly gun owners, were extremely critical of the Commission's proposal on dedicated taxes on firearms and alcohol to fund the proposed compensation scheme and they launched a severe attack on the Commission's proposal . Mr H Visage is of the view that the drafters are taxing the wrong people for crimes they don't contribute to, but actually tries to avoid. He points out that a good analogy is that all telephone users must now pay a tax to compensate for those people that are harassed by some telephone users. He proposes that more time be spend on actually addressing the core of the issues involved, ie. the high crime rate, government promises that haven't been fulfilled and the death penalty used as a deterrent for these crimes etc.²²¹

6.103 Mr Michael Folton is of the view that taxing ammunition, means less practice, less proficiency and means more accidents. Taxing firearms will force a growth in second-hand market, and substandard firearms with resultant defects, problems, etc. The people that legally buy firearms and ammo are not the ones that are responsible for the high crime and rape figures. He points out that the criminals/rapist obtain the tools they use in a unlawful manner, criminals pulling a armed robbery do not buy their getaway vehicles on payments , they simply steal them. The same is true with firearms. In his view the legal firearm trade in South Africa is very small, so the proposed tax will do better if introduced on motorcars, at least more people will help paying for the compensation to raped women.

6.104 Charles Norris is of the view that the fact that such a fund is envisaged indicates the extreme levels of crime in South Africa and shows the government, the police force and the judiciary in a very poor light. He specifically refers to the proposal that `guns and alcohol ` should be taxed. In his view it is not reasonable that law-abiding citizens should be made to pay

²²¹ This view is shared by Mr Trevor Babich, Paul Smulders, H W Mileson, Daan Coertze, Naveen Mahadew, Iain Campbell, Frik Jordaan, Merilyn Granger, John Neil, Clive and Anso Spencer.

for the misdeeds of violent criminals. Neither legal gun owners nor moderate drinkers abuse firearm ownership or alcohol and he states that while drunkards may contribute to the proposed tax, criminal illegal gun owners most certainly will not. He proposes that the Assets Forfeiture Unit fund should be utilised to compensate victims. This way the criminals pay. In his view the proposal to compensate victims has very little merit, would be difficult to implement and open to fraud. What South Africa does need is for the government to stamp out violent crime, which would be quite possible, were the government committed to doing so.

6.105 Colin and Mary Hayne support the notion of compensation for the victims of violent crime and firmly believe such compensation must be funded from the seizure and sale of the assets of criminals, not from yet another tax on an already overtaxed public. They point out that it should never be forgotten that the State is responsible for the safety and security of its people, and it is due to the State's inadequate response to this duty that is already causing citizens inordinate expense to hire private security services to protect their homes and lives. Further in their view it is ridiculous to suggest that the legal possession of firearms contributes to the high level of violent crime, when it is clear and obvious to all thoughtful people that the commission of violent crimes is usually accompanied by the use of illegal firearms. Citizens who possess legal firearms for the protection of their families' lives and homes would gladly hand them in if the State will shoulder its responsibilities, since the cost of the purchase, maintenance and security of legal firearms is considerable, a constant worry and should be unnecessary.

6.106 Dr DF Anderson is of the view that although he agrees that victims should be compensated, the money to do so should come from the criminals who commits these crimes, even if it means to sell all of their assets to recover the costs involved. He is strongly opposed to the use of dedicated taxes on firearms and ammunition as a source of a compensation fund.

6.107 Mr RH Boothroyd, Chairman of the Somerset West Pistol Club and Vice Chairperson of SAGA Western Province, objects in strong terms to the proposed special tax on firearms and alcohol. He points out that other countries have victim compensation but they are funded by the general revenue and not by taxing specific target groups. In his view no specific group should be made to bear the cost of a general societal problem. He notes that according to Alex Holmes, Chairman of the National Firearms Forum and the Arms Ammunition Dealer's Association, just over 2% of licensed firearms have been lost or stolen since records have been kept. Since records have been kept for more than 10 years, that is less than 0,2% or 1 in 500

per year or, put differently, once in ten life times. Negligence is therefore extremely uncommon under owners of firearms and the proposed tax is in these circumstance outrageous. On the contrary, firearm owners provide a significant deterrent against crime and it getting further out of control. Far from being taxed, firearm owners should, if anything, enjoy a tax concession in return for relieving the state of the burden of protecting them, and for the general deterrent effect they provide. In his view, in stead of sending a message to criminals that crime is fine, we'll pick up the pieces, the only real solution is to eradicate crime.

6.108 Mr Justice Flemming points out that the recommendations in the discussion paper are fundamentally flawed. The proposal on firearm taxes is a good example. Everyone is free to dislike firearms, but, in his view, the discussion paper gives no attention to the consideration that the harm inflicted by firearms emanates from unlicensed barrels and not from disciplined owners. The scheme will obtain no revenue from the unlicensed firearms and the trade therein. As far as the licensed firearm is concerned, there is a very basic truth: the woman who buys a firearm to protect her against AIDS- infected rapists, is now taxed as if she did something wrong, a punishment for doing what is necessary to protect life and limb because of a society which has failed and is failing increasingly to provide protection against crime and has no interest in doing anything about it.

6.109 Mr VR Ming registered his opposition to the proposals regarding the Victim Compensation Fund. In his view the proposals are unethical and misguided. Raising funds through taxing specific groups such as the alcohol industry and firearm owners is a form of discrimination and is unethical. It is government and not citizens who collectively are responsible for the levels of crime in this country as well as the underlying causes of crime. In his view people own firearms because they are of the view that the police is unable to give an acceptable level of protection to the general public and they are in fact doing what government should do. In his view, the proposal that white victims of crime over the age of 30 who are employed, should not receive compensation, is blatant racial discrimination.

6.110 Mr H Potgieter is of the view that in a country where violent crime has become part of our daily lives there is no objection to the idea of compensating the victims of these crimes and the Commission is to be commended for these noble plans. However, he is concerned that we will be victimizing a part of our community in order to pay for the crimes of others. As legal gun owner he should not be expected to pay for the actions of criminals.

6.111 Mr CGH Hlatswayo of the Department of Social Services and Population Development, Germiston, is of the view that a Victim Compensation Fund may be another financial burden for the taxpayer who is already suffering as a result of high taxes, the inflation rate and the weakening of our currency. He, therefore, suggests that an attempt be made to secure funds from the offender to compensate the victim in cash or in kind. He points out that experience has shown that compensation is not easy. The compensation scheme of the Truth and Reconciliation Commission has shown that the implementation of a scheme of this magnitude, might end up as a failure despite its good intentions.

INCENTIVES FOR FRAUD

6.112 Advocate MT Chidi of the Office of the Premier of Limpopo points out that a compensation fund may encourage victims to report crime to the SA Police but at the same time one should be aware of the possibilities which a compensation fund will create for fraud. In this regard many victims will report the crime just for the sake of benefiting from the fund.

AN INCREMENTAL APPROACH

6.113 Mr Justice Flemming points out that choosing rape victims for a cash payment is the apex for a wrong choice. In fact, assuming that a general scheme of compensation is workable and attainable, he is of the view that there would be a rather unarguable case to do something different for rape victims. The rape victim needs assistance immediately. A cash payment even if it is larger than R 2 000, at the later stage is a rather cynical "buying off". What the victim needs immediately is medical assistance, not money for arranging transport to the hospital or the district surgeon or the court. What the victim needs is not money so that she can sometime go and ask whether someone will prescribe for her and supply to her, but appropriate structures to apply measures to counteract AIDS, other venereal diseases, infections, etc. The victim needs limitation of harm, prevention of further harm and avoidance of the harm of rape having permanent consequences. She needs care to prevent, not compensation for permitted development thereof. He is therefore of the view that the proposal is unacceptable in its foundation. If the payment only follows upon conviction it is unacceptable because of its inability

to cater for immediate psychological, medical and emotional needs. He is furthermore of the view that the discussion paper reeks of an underlying class stratification, if not racism. People with private medical insurance have to pay for what they get. For many people membership of such a scheme is the expense of lowering living standards and is obligatory. To have a medical scheme which does not cover psychological counselling, going to doctors or to district surgeons, police, court officials etc, will in terms of the proposal, serve to disentitle some from getting what they need as much as others.

COMMENTS ON THE PROPOSALS IN THE DISCUSSION PAPER ELICITED DURING THE COMMISSION'S CONSULTATION PHASE

6.114 Several important issues were canvassed during five regional workshops which were hosted in Pretoria, Durban, East London, Kimberley and Cape Town on 19, 20, 21, 23 and 26 November 2001 respectively. At all the workshops the participants were divided into groups. For the purpose of the report the comments are reflected hereafter as discussed in the various groups. The following questions were canvassed during the workshops:

Should a compensation scheme be established in South Africa?

6.115 Under this question the groups were requested to consider a number of related questions. Should there be a Victim Compensation Scheme (VCS) in South Africa and can a country with such competing developmental priorities afford this, or is it an unaffordable luxury? Is there not a risk that in setting up such a fund, with all of its administrative demands (which even governments in developed countries struggle to manage), that we will simply create popular expectations that cannot be met and which might be frustrated – whilst simultaneously placing excessive additional pressure on governmental institutions and personnel. In fact, is there not a risk of alienating and secondarily victimising survivors further, by failing to meet their expectations of such a fund and the administrative systems upon which its administration will rely? Should we be prioritising a victim compensation fund over and above providing input and better resources for other victim support and empowerment structures, both inside and outside government? Is the priority compensation (however limited) or more investment in counselling services, medical and legal services, etc?

6.116 The participants at the Pretoria workshop supported a dual approach to the problem. While most participants supported the strengthening of victim support services, there was also support for the idea of establishing a compensation fund from which direct compensation should be paid to a particular group of victims, for example rape victims and murder victims of as was suggested in the discussion paper. It was suggested that the creation of a fund would encourage victims to engage more freely with the criminal justice system. While supporting the establishment of a compensation scheme, they were also mindful of the cost implications of a fully fledged compensation scheme and therefore proposed the strengthening and establishment of support services. They proposed that it would be ideal to have a package deal for victims, for example, to have support services for victims available at police stations which would include a trauma centre.

6.117 The view was also expressed that existing legislation should be used to improve the plight of victims of crime and there is no need to create new structures or establish a compensation fund. Specific vulnerable groups should be targeted , for example, the elderly. The improvement of the plight for victims of crime is a long process and the creation of a dedicated fund would bring immediate relief to victims of crime. The process should be approached carefully so as not to create expectations.

6.118 Participants at the workshop in Durban were divided on the need for a compensation fund. There was support for both the creation of a fund from which direct compensation is paid to individual victims and the view that instead of paying cash to individuals a fund should be created to improve services to be provided to victims of crime.

6.119 Participants at the workshop in East London were of the view that there is a need for services to be rendered to victims of crime. They discussed the issues of who should be eligible, how compensation should be paid and what award should be paid. Participants were concerned about the sources of the fund and the risks of fraud within the system should a compensation fund be established. In addition if compensation were to be paid even if an offender has not been identified, it would increase the risk of fraud. Compensation should also be limited to compensation for bodily injuries, or medical services or counselling and property crimes should be excluded for payment from the fund. They pointed out that compensation should be available immediately. They also realised that there are other demands on government and that it would be difficult to justify a fully fledged compensation scheme. Some

participants were opposed to the creation of a fund and pointed out that South Africa is a third world country and we cannot impose first world standards. It was proposed that the criminal justice system should be upgraded instead and that a fund should be considered only once the system has been upgraded.

6.120 Participants at the workshop in Kimberley were in favour of the idea of compensation but at the same time felt that it may be premature to introduce such a fund. If a fund is created it could raise expectations and it was proposed that in stead of a fund consideration should be given to improve support services and not provide cash payments to individuals. They also pointed out that there is an imbalance in the money made available to offenders (legal aid as well as medical treatment) and the money allocated to victims.

6.121 Participants at the workshop in Cape Town were in favour of some kind of compensation scheme. It was felt that individuals pay a lot of taxes and should get something from government in return. However, when looking at the cost implications of a compensation scheme as outlined in the discussion paper it seems that it is not a viable option. If, however, a compensation scheme is to be established certain categories of victims should be targeted, for example, dependants of murder victims. If a scheme is to be implemented it should be backed by an appropriate infrastructure, for example an administrative infrastructure to process claims, there must be a thorough investigation of the case, sufficient systems in place to verify information pertaining to claims, follow up procedures and verification of medical reports, systems to verify and determine loss or damages and an appropriate infrastructure to minimise the risk of fraud. These do not currently exist in South Africa which would complicate the creation of a compensation scheme.

6.122 An alternative to a compensation scheme is the creation of a dedicated fund to be used to improve the existing support services for victims of crime. There was therefore both support for a compensation scheme as well as an understanding of the problems of creating such a scheme. The creation of a scheme is part of a broader project of restorative justice which include other mechanisms to alleviate the plight of victims. The answer to the question whether a compensation scheme should be created is therefore a practical one - should we create a scheme with all its accompanying problems of money and administrative infrastructure and run the risk of creating an ineffective system which may contribute to further victimisation and creating expectations which cannot be met, or should an alternative approach be followed where

money is made available to improve support services. Participants were divided on the issue and there was support for both approaches. However, it was proposed that if a scheme is to be introduced it should dovetail with all other systems aimed at creating a better deal for victims of crime. A compensation scheme will present many problems which cannot be solved in the present climate.

6.123 Some participants at the workshop in Cape Town however felt that the criminal justice system is presently ineffective and not working at all. A lot needs to be done to make the system work and if money is available it should be used to improve the criminal justice system. Government does not have money and although the idea of establishing a compensation fund is noble without money it remains a pie in the sky.

How does the crime situation in South Africa influence the creation of a compensation scheme?

6.124 Exceptionally high levels of violent crime make South Africa different to most developed countries where victim compensation schemes exist. Under this heading not only the question of costs but also the question of information and the quality of services were discussed. Crime statistics and information management systems are very poor and unreliable in South Africa. Can we begin to develop a compensation scheme before we have these systems in place so that we can actually measure the impact of violent crime on those who are injured or the dependants of those who are killed? Are we able to prioritise particular crime types that are more appropriate for compensatory support? Does this present a risk of creating a “hierarchy” of crimes, which may in fact alienate the public? Is it viable to develop a victim compensation scheme for South Africa on an incremental basis, so as to limit the costs and compromise on spending priorities? In other words, can we identify specific categories of victims to whom we can start providing compensation, whilst slowly building the funding base for a more elaborate scheme? What process and criteria should government use to prioritise victims who require compensation? Should this be a once-and-for-all set of priorities, or should there be a board that will determine priorities on a more regular basis? How much citizen participation should

there be in this decision, and how should it be structured?

6.125 Participants at the Pretoria workshop were in favour of compensation for victims of violent crimes. They supported an incremental approach to compensation in the light of the unaffordability of the fund should a fully fledged fund be created. The opinion was expressed that NGO's would be able to accommodate support services for victims of violent crimes. It was suggested that victims of violent crimes should be targeted and it does not matter whether a compensation fund is created for payment of direct compensation or whether a fund is created to improve support services. There was agreement that the victims of sexual offences and murder victims should be prioritised. In this regard they proposed the provision of services rather than direct cash payments to victims.

6.126 Participants at the workshop in East London were of the view that cash payments from the fund should be limited and that a system of vouchers which would entitle a victim to access services is to be preferred.

6.127 Participants at the workshop in Kimberley were of the view that a fund should be established from which services provided to certain categories of victims should be improved. In this regard it was proposed that sexual offences committed against children should be prioritised. However, the view was also expressed that much more money should be made available for the purpose of combating crime. In addition it was proposed that services such as medical assistance and counselling should be funded. Participants were opposed to an incremental approach because it was discriminatory in nature.

6.128 Participants at the workshop in Durban were in favour of prioritising certain services or certain crimes for payment from a fund. Some proposed that certain services such as counselling or medical assistance should be prioritised. They also proposed that certain crimes be prioritised such as for example rape, sexual offences and as was proposed in the discussion paper dependants of murder victims. There seemed to be general understanding for the view that a fully fledged scheme would be unaffordable from there the need to prioritise.

6.129 Participants at the workshop in Cape Town considered the creation of a compensation

fund and whether or not and how it should be operated to make it affordable. They considered whether monetary compensation should be paid or whether certain categories victims should be prioritised to make it affordable. The view was expressed that monetary compensation raises many problems and the whole question of who would be responsible to adjudicate claims for compensation were considered. It was suggested that magistrates should adjudicate these claims, but the question was raised how cases where the offender is not known or not arrested should be dealt with? It was proposed that a system similar to the unemployment scheme should be used.

How can we ensure that the compensation scheme is affordable? - issues and strategies about eligibility and exclusion from the Scheme.

6.130 If there is agreement that there is a moral, ethical and political case for establishing a victim compensation scheme in South Africa, then how is this to be weighed against the sheer cost (and potential unaffordability) of such a scheme? The key question here is whether there are creative ways of financing such a scheme and for making it more affordable? Apart from the potential to build the victim compensation scheme incrementally or by reference to particular crime types only, all schemes have “systems of exclusion” which seek to limit the demands place on such limited resources. A typical example would be that those people who have “co-lateral sources of support” such as insurance, access to a disability fund, etc. have to claim on that source first and would be excluded from claiming from the victim compensation fund except to the extent that the amount they could claim would exceed the extent of their other options.

6.131 Should there be a means test to determine who can and who can't claim from such a scheme? Alternatively, should the victim's wealth/income be a factor in determining level of compensation? (Should people with higher lost income get more compensation or should rich victims not qualify at all?) Should people with a history of criminal/violent behaviour be deemed to be ineligible if victimised they are victimised in a separate crime? In other words, is a doctrine of support only for blameless victims appropriate to South Africa? Should access to the compensation fund be dependent on cooperation with the criminal justice system and could a victim compensation scheme therefore make a contribution to better reporting and greater efficiency of the system?

6.132 Participants at the Pretoria workshop were in agreement that a fully fledged compensation fund would be too expensive and they proposed that a dual approach should be followed, improve support services for victims of crime and provide for direct compensation for a limited category of victims, for example victims of sexual offences. They suggested that the offender should be the first call. If this is not possible other alternatives should be explored. Some participants pointed out that section 300 of the Criminal Procedure Act was insufficient as far as compensation by the offender is concerned in that it only provided for compensation for monetary loss. The section does not, for example, provide for compensation for medical expenses or counselling services which was incurred as a result of a crime. They were in agreement that we do not have the infrastructure of volunteer support groups which is necessary to support a compensation fund. The group proposed that we should start developing the necessary infrastructure and that we need to invest in the future. A fund should be created to develop the necessary infrastructure. The view was expressed that if compensation is to be paid it must be realistic and reasonable. The use of something similar to the tariff scheme in the UK was also proposed.

6.133 Participants at the workshop in East London were of the view that certain categories of services should be prioritised for compensation. In this regard they proposed that the fund should provide for psychological services (trauma counselling) and provision in basic survival needs, for example, food, shelter and water. They also suggested that services should be provided for families of victims and that each cases should be considered on its own merits. As far as eligibility for compensation is concerned the participants were of the view that certain restrictions should be introduced. They proposed that the fund should be administered by a statutory body of high integrity. Its members should be elected and ordinary community members should be represented. As far as the administration of the fund is concerned it was proposed that less cash be paid out to victims and that more emphasis should be placed on the provision of services. If victims have been favoured by the system, for example through private insurance, the amount of compensation awarded should be adjusted accordingly.

6.134 Participants at the workshop in Kimberley were opposed to the payment of cash to individual victims but proposed the provision of services instead. Specific victims, such as those with a violent history, should be excluded from receiving money from the fund but in general participants were in favour of including dependants of such victims to be eligible to benefit from the fund.

6.135 Participants at the workshop in Cape Town supported the prioritisation of a category of victims for compensation. It was suggested that victims of the most serious crimes should be targeted. A panel or body should be created to screen victims and to determine eligibility for claims. It was suggested that instead of direct payment of cash to victims a system of providing victims with vouchers which would give them access to support services should be considered. It was further suggested that consideration should be given to prioritise the services to be provided to victims, for example the provision of medical services or medical assistance. A suggestion was also made that a Board should be tasked to do a needs assessment and determine the priorities.

6.136 Participants at the workshop in Kimberley were in favour of an independent board to take charge of the administration of the fund. Some participants were not in favour of restricting services to victims of certain crimes but instead proposed that all crimes should be included for the purpose of services.

6.137 Some participants at the Cape Town workshop were of the view that if a compensation fund is to be established an incremental approach should be followed. In doing so one should move away from creating another bureaucracy and a compensation scheme should be administered at local level. It should, however, not be embarked upon before ensuring that reliable crime statistics and information is available. A tariff scheme would probably meet this the best. The State has to provide services for victims of crime. On the question of eligibility some participants proposed that disabled rape victims and the poorest of the poor should be targeted for compensation. It was proposed that whatever is provided for victims of crime should be located within the communities. Government is already overburdened and a partner should be sought in Business Against crime.

How should the scheme be financed?

6.138 On the basis of a very conservative estimate, the discussion paper estimates that a comprehensive “bells and whistles” scheme – based on losses of income, but not on the exclusion of particular types of violent crime – would cost in the vicinity of R4,7 billion per annum. In addition, based on the experience of the UK victim compensation scheme, a claims-based victim compensation scheme might need an administrative bureaucracy of between 2000

and 3000 staff, bringing the total cost of such a scheme to around R5-billion. This would seem to render such a proposal hopelessly unaffordable without systems of exclusion or some sort of incremental approach to pilot schemes. Nonetheless, there would be great costs incurred. The key question therefore is how such a scheme should be financed if it is implemented? It is argued in the discussion document that the financing should be drawn through standard governmental budgetary appropriation processes. However, what are the other options for financing a victim compensation scheme – whether it is a fully-fledged scheme or a partial one? Should consideration be given to dedicated taxes such as on alcohol or firearms, because of the close correlation between these commodities and violent crime? Should financing arrangements prioritise support for victim services and service providers, or should it be oriented around monetary compensation for victims/survivors?

6.139 Participants at the Pretoria workshop proposed that the following possibilities should be explored to provide sources for the fund-

- * Funds from the private sector;
- * Funds from the public sector;
- * Dedicated taxes; The view was expressed at the Pretoria workshop that alcohol contribute to crime being committed and there was justification to tax traders for the purpose of sourcing a compensation fund. There was also strong opposition at the Pretoria workshop to taxes on the owners of firearms to source the fund.
- * The national lottery;
- * Convicts through payment of fines;
- * Money which become available through bail forfeitures;
- * General taxation;
- * Proceeds resulting from forfeitures in terms of the Organised Crime legislation;
- * Money generated by forced labour;
- * Money generated by prison labour
- * Voluntary contributions by individuals; and
- * Deductions from salary of workers.

6.140 Participants at the workshop in Durban proposed the following sources:

- * Prisoners;
- * Fines;

- * Admissions of guilt fines;
- * Dedicated taxes. There was also strong opposition to the proposal in the discussion paper that dedicated taxes on firearms and alcohol be used as source for the fund. It was pointed out that there was no sufficiently proven link between alcohol and the commission of crime nor was it justified to tax lawful gun owners to finance payments to victims;
- * General taxes;
- * Asset Forfeiture Unit; and
- * Unclaimed bail deposits.

6.141 Participants at the workshop in East London proposed the following sources:

- * Offenders;
- * National Lottery (decreased jackpot);
- * Sponsors from Private sector;
- * Dedicated taxes (alcohol and gambling mentioned as examples). Participants were opposed to a tax on firearms owners as a source;
- * Prison labour;
- * Personal individual contributions;
- * Asset forfeiture Unit; and
- * Fines.

6.142 Participants at the workshop in Kimberley proposed the following sources:

- * Prisoners;
- * Fines;
- * Admissions of guilt fines;
- * Dedicated taxes;
- * General taxes;
- * Asset Forfeiture Unit; and
- * Unclaimed bail deposits.

6.143 Participants at the workshop in Cape Town proposed the following sources:

- * The offender;

- * Government Departments;
- * National Lottery;
- * Dedicated taxes. At the Cape Town workshop it was also suggested that dedicated taxes will have a host of unintended consequences and should therefore not be considered as a source of the fund.
- * General taxes; and
- * Tax incentives.

How should risks of fraud be addressed?

6.144 Compensation schemes such as a victim compensation fund are extremely vulnerable to high incidences of fraud. The key question is what mechanisms can be put in place to design fraud out of the system and are there lessons to be learned from other schemes such as the motor vehicle accident fund, for example?

6.145 Participants at the Pretoria workshop were of the view that social structures in South Africa were inadequately equipped to deal with victims. They were therefore in favour of a voucher system in terms of which a voucher would give the victim access to services rather than getting paid cash and then employ someone to victims. It was felt that this would minimise fraud. Participants at the Cape Town workshop was concerned about the creation of a compensation fund without having the necessary support systems in place. It was therefore suggested that unless reliable information is available to verify claims the creation of a compensation fund would increase the risk of fraud in a criminal justice system that already lacks public confidence.

6.146 Participants at the workshop in East London were concerned about the need to verify information provided in claims for compensation. In particular they expressed concern if compensation is to be paid out without an offender being identified or arrested. In addition they questioned whether in such circumstances, any compensation should be paid out.

6.147 Participants at the workshop in Kimberley were in favour of providing services rather than cash payments as the latter may contribute to increasing the risks for fraud.

PART II**CHAPTER 7****VICTIM EMPOWERMENT - IDENTIFYING THE ISSUES****INTRODUCTION**

7.1 From the issues dealt with in the issue paper and the comments received on victim empowerment it is clear that the investigation has to deal with a number of subjects. These include the following:

- * victims and their treatment in South African law;
- * the charter of victim's rights;
- * a comparative overview of the treatment of victims by the criminal justice system;
- * a restorative justice approach to the criminal justice system; and
- * victim support models and co-ordinated victim support services.

7.2 With regard to the proposals in the issue paper relating to a victim impact statement and victim participation in sentencing, the Commission has already completed its report into a new sentencing framework and its recommendations are currently under consideration by government. For the purpose of this report these proposals have been finalised and are not considered again. These include:

- * victim and community participation in sentencing;
- * victim impact statements; and
- * victim-offender mediation;

7.3 The Commission will, however, proceed to discuss the issues referred to in paragraph 7.1.

VICTIMS AND THEIR TREATMENT IN SOUTH AFRICAN LAW

THE CURRENT POSITION IN SOUTH AFRICA

7.4 In what follows the Commission briefly outlines relevant legislative provisions that deals with the treatment of victims of crime in their contact with the criminal justice system. In terms of section 3(d) of the Probation Services Act, 116 of 1991, the Minister may establish programmes aimed at the care and treatment of victims of crime. Provision is also made for programmes aimed at prevention of crime (3(a)), information to and treatment of offenders and other persons (3(c)), the observation, treatment and supervision of persons released from prison (3(e)), the establishment, financing and registration of shelters (3(g)) and the compensation of victims of crime. However, the Working Group on Crime Related Matters, in its input for the White Paper for Social Welfare, pointed out that victims of crime have been neglected in South Africa and services to date are *ad hoc* and piecemeal and there are too few social workers to assist and provide treatment for the victims of crime as stipulated in the Probation Services Act. They stressed that there should be more emphasis on the needs of victims of crime and their rights should be carefully balanced with those of offenders.

7.5 In the early 1990s legislation was passed to counteract family violence (see The Prevention of Family Violence Act, 133 of 1993). There is currently no State Compensation Fund to assist victims of crime although a State President's Fund for Victims of Terrorism was established on 20 May 1983.

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

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

7.8 Section 300 of the Criminal Procedure Act, 51 of 1977 makes provision for the payment

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

7.9 The Act, however, does not make provision for compensation to victims for injuries sustained as a result of crime nor for the payment of compensation to the family if the victim was killed. South African courts seldom pay any attention to losses suffered by victims of crime. Orders for compensation will furthermore not be considered unless the complainant requests the public prosecutor to apply to the court for an order and complainants seldom make use of the provisions because they are either not present or they don't know about the provisions of the Act. The position will, however change as the Commission made recommendations to address the problems with regard to section 300 outlined here in its report on a new Sentencing Framework.

7.10 As it became evident to the Government that the existing measures did not sufficiently address the need for the protection of witnesses and victims of crimes, and that there was a need for a system based on the voluntary co-operation of witnesses, specific measures were introduced to ensure that witnesses with material information come forward and testify. To this end, the Witness Protection Act, 112 of 1998, was passed to provide for the establishment of an Office for the protection of witnesses; to regulate the powers, functions and duties of the Director: Office for Witness Protection; to provide for temporary protection pending placement under protection; to provide for the placement of witnesses and related persons under protection; to provide for services related to the protection of witnesses and related persons; and to make provision for witness services at courts.

7.11 The Act provides that a witness or prospective witness who has reason to believe that his safety or the safety of a member of his family or household is being threatened, may report to a police station or local public prosecutor for protective custody for himself, his family or household, and that such persons are to be detained in or placed under protective custody.

Such persons are protected by a member of the South African Police Services at a place of safety or at his home, hotel etc, in the manner that is deemed necessary. To ensure that a witness does not endure financial hardship as a result of the programme, provision is, *inter alia*, made for the payment of allowances to a witness in protective custody as well as remuneration in respect of loss of income. A properly structured and successful Witness Protection Programme can be one of the major contributing factors in stemming the high crime rate in the Republic. The Department, realising the crucial role that victims play in the administration of justice and that witnesses are often too terrified to testify in court due to intimidation, therefore took steps to restructure the witness protection programme as a result of which the new Act referred to above was passed. Provision is also made in the Criminal Procedure Act for the protection of the identity of rape victims and cases can also be heard in camera. The testimony of child witnesses (child abuse victims) can be relayed to the court via closed circuit television.

7.12 In May 2002, following an investigation by the Human Rights Commission concerning cases involving sexual offences against children, the Office of the National Director of Public Prosecutions has issued directives concerning the prioritisation of such cases and the treatment of children as witnesses in these instances. Directives with specific instructions regarding the prosecution of cases of child abuse, have also been issued to public prosecutors by the Directors of Public Prosecutions and these cases are handled by skilled personnel, usually a specific group of prosecutors who has been detached to deal specifically with cases where children are the victims of crime. .

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

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

7.14 At present no provision is made in the criminal justice system for specialized courts to

adjudicate criminal matters involving juvenile offenders. Although such matters are dealt with by the existing lower - and supreme court structures in terms of the criminal law and procedure applicable to all offenders (adults and juveniles), provision is made by the Criminal Procedure Act, 1977 (Act 51 of 1977), for certain exceptions with regard to the handling of cases involving offenders under the age of 18 years. In terms of section 254 of this Act the proceedings in the criminal court may be stopped and the court may refer the juvenile accused to a children's court operating in terms of the Child Care Act, 1983. Section 290 and 291 of the Criminal Procedure Act, 1977, also provides for certain orders in terms of which a juvenile may be placed under supervision of a probation officer or sent to a reform school, instead of any punishment being imposed. The South African Law Commission has, however, completed its investigation into establishing a new child justice system and recommendations in this regard, which will dramatically change the current system, are currently under consideration.

7.15 The treatment of rape victims and victims of sexual offences is currently also under investigation by the SA Law Commission (the investigation into on sexual offences). A number of problems will be addressed in the course of this investigation. Advocates of women who have experienced male violence have long highlighted the unsympathetic, disbelieving and inappropriate responses or secondary victimisation that women experience at the hands of society in general and at each stage of the criminal justice process which exacerbate the effects of the sexual assault upon women. The state has also been criticised for its failure to respond to this secondary victimisation and for not providing any victim support infrastructure.

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

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

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

- * Court Officials - lack of private waiting facilities, long time delays between reporting of incident and appearing in court, perpetrators being released on bail without adequate protection for complainant, prosecutors not consulting with complainants before trial, biased criteria used by prosecutors in deciding whether to prosecute or withdraw a case, not involving complainants in or informing them about decisions that are taken, not ensuring police have thoroughly investigated cases, inadequate preparation for court cases, not making use of expert witnesses, little or no information of court procedures or the progress of cases, not objecting to inappropriate cross-examination and inadequate sentences.

7.17 In court stereotypes of who is a genuine sexual assault survivor are reflected to deny, justify or excuse male violence and to blame women or question their credibility. In 1992 the State responded to the outcry of women's organisations to the way in which two rape cases had been dealt with in the Cape Town Magistrates. In the first case a rapist of an eight year old girl was acquitted because the district surgeon ignored subpoenas to give evidence in court. In the second case the magistrate commented that it was unlikely that the complainant suffered psychological damage as she was not a virgin.

7.18 The then Attorney-General Cape Town appointed a senior advocate to develop new guidelines for prosecutors regarding the handling of sexual offence cases. A task group was also set up with NGO's to initiate interventions aimed at ending secondary victimisation of survivors of sexual assault. Since the inception of this task group a number of reform initiatives were devised and introduced by the state agencies involved, i.e. the police, the offices of the Directors of Public Prosecutions, the Department of Justice, and the Departments of Social

Services and Health. These initiatives included the introduction of police rape specialists, new guidelines for the handling of rape cases, the opening of the Sexual Offences Courts, of which the first one was at the Wynberg Regional Court and the selection of a number of regional court prosecutors to deal with rape cases in other courts. The task group also played a direct role in the recognition of Rape Trauma Syndrome in the Cape Supreme Court.

7.19 In September 1992 the first prosecutorial guidelines for prosecuting rape cases were issued by the then Cape Attorney-General's office (Circular 18/92). On 2 March 1993 the first full time specialised Sexual Offences Court (SOC) was established at the Wynberg Regional Magistrates Court in Cape Town. This court was intended to deal with all forms of sexual assault involving adult complaints. The Department of Justice viewed this court as an experimental project and that its failure or success would affect future decisions about whether such specialised courts should be opened throughout the country. These courts were subsequently rolled out to other regions as well.

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

THE CHARTER OF VICTIM RIGHTS²²²

7.21 There have also been some developments regarding the establishment of a Victims' Charter in South Africa. In 1998, the Department of Justice developed the first draft of the Victim Charter. This was based on international standards of victims' rights. This draft has been developed into a more comprehensive charter after the comment of a variety of stakeholders

²²²

Information on the Victims' Charter was extracted from a progress report issued by the Department of Justice and Constitutional Development, Subject: South African Victim Charter of Rights, August, 2000. Thanks to Marie Swart for supplying this information.

has been gathered. The types of rights focused on in the draft charter include:

- * the right to be treated with respect and dignity;
- * the right to offer information and to be heard;
- * the right to receive information;
- * the right to legal advice and timely processing of criminal proceedings following the arrest of an accused, within reasonable bounds;
- * the right to protection;
- * the right to restitution; and
- * the right to assistance.

7.22 It is hoped that the Victims' Charter will educate victims about their rights and improve the accountability of service providers who interface with victims (e.g. hospital staff, police, **etc**). The Victims' Charter is considered to be part of a holistic policy on victim empowerment, which will play a role in reducing incidents of secondary victimisation, experienced by victims within the criminal justice system. The draft charter also aims to ensure that the justice system strikes a balance between the rights and dignity of victims and the rights of accused persons.

7.23 Specifically, in terms of the right to compensation and restitution, it is important to note that the draft charter does not include a broad right to compensation, i.e., a unilateral right to compensation from the state if one is a victim of crime. At this stage the right to compensation (restitution) only exists in so far as the victim has a right to receive restitution from the offender, with the court having discretion about whether or not to grant a compensation order to this effect. The right to redress for damages through normal civil law channels is also stipulated.

APPROACH TO THE CRIMINAL JUSTICE SYSTEM

Background

7.24 The National Crime Prevention Strategy, which was released in May 1996, promotes a victim-centric approach to crime prevention where the onus is on the government to deliver a crime prevention approach which places the rights and needs of victims at the centre of the strategy. It furthermore acknowledges that victimisation lies at the heart of much retributive crime and the absence of means of victim aid and empowerment play an important role in the cyclical nature of violence and crime in South Africa. This approach to the crime problem in South Africa represents a shift away from the traditional retributive approach towards crime. Within the NCPS a National programme on Victim Empowerment was established which, amongst other things, seeks to -

- * enhance the effectiveness of victim empowerment as a source of relief;
- * improve the access of disempowered groups to the criminal justice system, including women, children, and victims in general;
- * redesign the criminal justice system to empower victims;
- * provide a greater and more meaningful role for victims in the criminal justice system;
- * improve the service delivered by the criminal justice process to victims of crime; and
- * deal with the damage caused by criminal acts by providing remedial interventions for victims.

The retributive justice model

7.25 According to this approach ALL the guilty MUST be punished for the wrong(s) they have done. There rests a moral obligation on the state/society to punish criminals through the due process of judicial application of prison sentences in proportion to the gravity of the wrong done - i.e., punishment can be seen as an end/goal in itself. Fair/just retributive punishment therefore means that all wrongdoers should be punished.

7.26 Traditionally, in South African law, the concept "justice" is not used in the general sense of fair procedures for the distribution of benefits and burdens, rights and duties in society. The emphasis is on the meeting out of punishment to criminals through the judiciary. "Just justice" therefore means: catch the criminals, prosecute and punish the perpetrators, i.e., put them in prison for as long as possible. Prison is therefore seen as a powerful emotional and symbolic answer to the crisis of control that exists in society, a guarantee of the state's ability to exercise law and order. The insecurity resulting from the high crime rate in the South African context can possibly be linked to many crime victims' unresolved feelings of anger, hurt and grief.

A different kind of justice - the restorative justice model

7.27 In order to explain the difference between restorative justice and retributive justice, some of the important principles of restorative justice are highlighted:

Principles of restorative justice

1. Crime is primarily an offence against human relationships, and secondarily a violation of a law (since laws are written to protect safety and fairness in human relationships).
2. Restorative justice recognizes that crime (violation of persons and relationships) is wrong and should not occur, and also recognizes that after it does there are dangers and opportunities. The danger is that the community, victim(s), and/or offender emerge from the response further alienated, more damaged, disrespected, disempowered, feeling less safe and less cooperative with society. The opportunity is that injustice is recognized, equity is restored (restitution and grace), and the future is clarified so that participants are safer, more respectful, and more empowered and cooperative with each other and society.
3. Restorative justice is a process to "make things as right as possible" which includes: attending to needs created by the offense such as safety and repair of injuries to relationships and physical damage resulting from the offense; and attending to needs related to the cause of the offense (addictions, lack of social or employment skills or resources, lack of moral or ethical base, etc.).
4. The primary victim(s) of a crime is/are the one(s) most impacted by the offence. The secondary victims are others impacted by the crime and might include family members, friends, witnesses, criminal justice officials, community, etc.
5. As soon as immediate victim, community, and offender safety concerns are satisfied, restorative justice views the situation as a teachable moment for the offender; an opportunity to encourage the offender to learn new ways of acting and being in community.
6. Restorative justice prefers responding to the crime at the earliest point possible and with the maximum amount of voluntary cooperation and minimum coercion, since healing in relationships and new learning are voluntary and cooperative processes.
7. Restorative justice prefers that most crimes are handled using a cooperative structure including those impacted by the offence as a community to provide support and accountability. This might include primary and secondary victims and family (or substitutes if they choose not to participate), the offender and family, community representatives, government representatives,

faith community representatives, school representatives, etc.

8. Restorative justice recognizes that not all offenders will choose to be cooperative. Therefore there is a need for outside authority to make decisions for the offender who is not cooperative. The actions of the authorities and the consequences imposed should be tested by whether they are reasonable, restorative, and respectful (for victim(s), offender, and community).

9. Restorative justice prefers that offenders who pose significant safety risks and are not yet cooperative be placed in settings where the emphasis is on safety, values, ethics, responsibility, accountability, and civility. They should be exposed to the impact of their crime(s) on victims, invited to learn empathy, and offered learning opportunities to become better equipped with skills to be a productive member of society. They should continually be invited (not coerced) to become cooperative with the community and be given the opportunity to demonstrate this in appropriate settings as soon as possible.

10. Restorative justice requires follow-up and accountability structures utilizing the natural community as much as possible, since keeping agreements is the key to building a trusting community.

11. Restorative justice recognizes and encourages the role of community institutions, including the religious/faith community, in teaching and establishing the moral and ethical standards which build up the community.

7.28 The primary objective of restorative justice is the restoration of ALL concerned: in the first place the victims of crime, but also offenders (AND their families), as well as the larger community. In contrast to retributive justice - where the first question is "How do we punish this offender? - restorative justice asks "How do we restore the well-being of the victim, the community and the offender?" At the heart of this approach to crime and punishment is not the isolated (and isolating) imprisonment of the individual law-breaker, but the future well-being of society and the re-integrative punishment of offenders.

7.29 Restorative justice offers better opportunities to meet the needs of victims, offenders and the community at large than punishment under the current, conventional criminal justice system. Victims become key participants, they are placed in the centre of the justice process. They are

given the opportunity to work constructively through the facts AND feelings surrounding the crime against them, rather than becoming spectators or state witnesses with very little, if any input into and no control over the prosecution of the offender - who have already harmed the victims' sense of control over their lives.

7.30 Offenders are not necessarily put behind bars. By removing criminals from society and the victims this form of punishment might bring temporary protection, but it also separates offenders from the effects of their crimes. This isolation tends to harden the "arteries of emotion", it encourages rationalisation and the denial of guilt and responsibility, which can be regarded as a principal reason why so many criminals become worse offenders once they leave prison. Re-integrative punishment tries to bring shame and personal and family/community responsibility back into the justice process: instead of just "doing my time", offenders - through negotiated community responses - are given opportunities to understand and acknowledge their crimes, to take responsibility and make things right. (Restitution)

7.31 Restorative justice can be seen as a community based, negotiated, more democratic form of justice, with responsible reconciliation seen as the best prevention. This stands in marked contrast to the typical criminal justice imposed by the state (on behalf of the victim and the community), which is strong on repudiation, but with questionable effectiveness in terms of long term protection and especially rehabilitation.

7.32 Restorative justice is not a soft option. It is indeed critical of a retributive focus on punishment as a goal in itself, especially when this punishment takes the form of imprisonment. However, the fact that restorative justice is primarily concerned with reconciliation, does not mean that appropriate penalties and sanctions do not play a very important role, particularly as far as serious offences are concerned. Restorative justice tries to involve the victims, the community and the formal justice system in the response to wrongdoing, it moves beyond the enforcement of a narrow conception of criminal guilt and legal responsibility and attempts to restore a real sense of shame and responsibility within the perpetrator.

A COMPARATIVE REVIEW OF THE TREATMENT OF VICTIMS IN SOME CRIMINAL JUSTICE SYSTEMS ²²³

7.33 For the purpose of this report the Commission briefly refers to the treatment of victims a few foreign jurisdictions:

Judges, as well as other criminal justice professionals, are most conscious of the public reactions from victims and victim support groups concerning the treatment victims receive within the criminal justice system. The public cry of victims has been an expression of alienation, even outrage, at their treatment by this system: a system beset by demands for increased services, but constantly threatened with reduced financial support. Perhaps a legal system so under siege that a change in the treatment of victims threatens not to be a high priority.

It is axiomatic that victims play crucial roles in any criminal justice system as complainants and witnesses, and thus they deserve to have their concerns and proposals for changes within the system openly and fully considered. In Canada some progress has already been made and it may be useful to compare our progress in victim treatment with that of other jurisdictions. How have others dealt with victims' demands for better treatment and for greater participation in a manner consistent with the other obligations and demands of a democratic criminal justice system?*

What should be the extent and nature of victim participation in the criminal justice system of Canada? Should victims be given standing to participate in any stage of the proceedings? If so, should they be granted legal aid, if entitled? What protections should be afforded to victims who participate in the legal process? Are certain witnesses deserving of special protection? Who should bear the financial burden of the victim's losses? To what extent should the victim be involved in initiating criminal action, in plea bargaining, bail hearings, the trial process, in sentencing and in correctional and release decisions? These are just some of the areas that are now the subject of often controversial discussion. In seeking to improve the system, the challenge is always to ensure that such changes can be accomplished without adversely affecting the constitutional guarantees and procedural safeguards of the accused: can we do justice to the victim without derogating from the accused's right to a fair trial?

This paper explores some aspects of these issues in Canadian law and compares them with corresponding practices of other democratic countries: The United States, England, Germany, Sweden, ... The review of these jurisdictions is not exhaustive and is intended only to give an overview of the various responses to the demand for a reconsideration of the treatment of the victim in the criminal justice system. We must initially acknowledge that any serious reconsideration may test assumptions we currently hold

²²³ The information is quoted from "The unfinished triangle: The criminal justice system, the victim, and the offender - A comparative review of victim treatment in some criminal justice systems" (presented at the C.I.A.J. 1995 Annual Conference on Public Perceptions of the Administration of Justice OCT. 11-15, 1995 BANFF, ALBERTA presented by Justice F.B. William Kelly Visiting Associate International Centre for Criminal Law Reform and Criminal Justice Policy at the University of British Columbia 1822 East Mall, Vancouver, B.C., Canada, V6T 1Z1).

about the nature and purpose of the criminal justice process. Such a reconsideration is beyond the purview of this paper. Its purpose is to review some of the Canadian reaction to the victims' movement, compare it with that of some other countries, and suggest some future direction for victim treatment which might improve the effectiveness and public perception of the administration of criminal justice. The paper will not make recommendations for change in the treatment of victims, only attempt to suggest how consideration for change could take place.

BACKGROUND

Although in many pre-medieval criminal systems the victim was substantially involved in judicial decision making and restitution, the growth of central feudal power and the central state reduced the victim's role. Throughout most of the nineteenth and twentieth centuries, the major role of the victim in Canada's criminal justice system has been as an informant and a witness. Although the rights of the accused have been greatly enhanced over the centuries, traditionally neither our courts nor society viewed victims as entitled to special "legal" rights. Indeed, in the common law adversarial systems, the presumption of innocence usually prevents the party injured by the criminal action from being referred to as a "victim" until a verdict had been entered. Police and the prosecutors have relied upon victims' complaints and identifications to lay most criminal charges, and on their evidence as witnesses to the event to obtain convictions. But as crime was considered principally an offense against the state, the injury to the victim was an incidental matter and its redress was not truly part of the criminal process. Consequently, until recently, the emotional, financial and physical wounds inflicted upon victims of crime have remained virtually unrecognized within the justice system, except to a limited extent in the sentencing process.

In the past two or three decades an unprecedented international movement has evolved, dedicated to improving the plight of victims of crime. This developing interest in the needs and rights of victims was initiated by different sources with varying agendas. However, one central theme that has united supporters of victims' rights has been the demand for empowerment and participation in the criminal justice system. This movement has been highlighted by the General Assembly of the United Nations adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985. Subsequently, the Economic and Social Council adopted two resolutions for the implementation of the Declaration through national and international actions. Resolution 1989/57 in part called upon Member States to ensure that victims are kept informed of their rights and opportunities with respect to redress from the offender, and of the progress of the relevant criminal proceedings. The Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders adopted a resolution in 1990 entitled Protection of the Human Rights of Victims of Crime and Abuse of Power, recommending that states consider the provisions of the Declaration in framing their national legislation, ensure the availability of public and social support services for victims, and foster culturally appropriate programs for victim assistance, information and compensation.

DEVELOPMENTS IN CANADA

Since the early 1980's, Canada has been active on victim's issues. Following a Federal-Provincial task force in 1986, Canada was one of the sponsors of the Declaration. Canada has also responded by introducing legislative, political and legal reform. In the Canadian federal system, the criminal law is enacted by the federal Parliament and applies throughout the country. In 1988, an Act to amend the Criminal

Code (Victims of Crime) was passed by Canada specifically to improve the lot of victims in the criminal law system. These Code amendments include provisions for the identification and prompt return of stolen property, protection of the identity of victims and witnesses of sexual offenses and extortion, the consideration of victim impact statements at the time of sentencing and the imposition of a victim fine surcharge, in addition to any other sentence imposed on the offender. The revenue raised by the victim fine surcharge is to be used to finance victim support and compensation programs.

In Canada, the enforcement of the law, the prosecution of criminal offenses and the administration of justice are matters generally within provincial jurisdiction and the provinces have authored most victim services legislation. Most provinces have enacted victim legislation which provides how victim services shall be funded and which includes a statement of purpose and principles relating to the fair treatment of victims of crime by criminal justice personnel. Additionally, all provinces and territories operate criminal injuries compensation programs which provide limited financial compensation to victims of violent crime. The compensable damages, eligibility criteria and limits of awards vary among jurisdictions and are set out in the governing provincial legislation.

a. PARTICIPATION OF THE VICTIM IN CRIMINAL PROCEEDINGS

Arguably, the most heralded change to the Canadian criminal justice system has been the introduction of victim impact statements. Victim Impact Statements (VIS) provide victims with a formal opportunity to inform the court, the public, and the accused of the actual effect that the crime has had on them. Before this legislation, most Canadian courts normally considered the effects of the offender's crime when sentencing, but this was only rarely based on a sentencing statement of the victim. In the absence of "standing", victim impact statements are the most direct way of increasing victim involvement in the sentencing stage of the criminal justice process. The perceived benefits of victim impact statements vary, but can be summarized as follows:

1. There is a reduction in the sense of powerlessness and estrangement that victims often feel.
2. Victims may be more willing to cooperate with the criminal justice system in the future by reducing their sense of alienation.
3. Some criminologists have suggested that the inclusion of victim impact statements may be beneficial to an offender's rehabilitation.
4. The victim is more likely to cooperate with and seek to improve the system if they feel they are part of the process.

Section 735 of the Canadian Criminal Code describes how a VIS is to be dealt with by the court. A victim is permitted to submit a written VIS which describes the harm done to or loss suffered by the victim arising from the offense. Section 735(1.2)(a) stipulates that a copy must be provided to the prosecutor and the defendant. "Victim" is defined in s.735 (1.4) as:

- (a) the person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offense, and
- (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement, includes the spouse or any relative of that person, anyone who has in law or in fact the custody of that person or is responsible for the care or support of that person or any dependent of that person.

Until the recent 1995 amendments, the Code provided that the court "may consider" the VIS in order to determine the sentence to be imposed on the accused and, although the a court was not obliged to consider the VIS, most sentencing judges did not ignore them. Recently, this summer (1995), the Criminal Code was amended to ensure that when a victim impact statement has been made, a court must consider it.

Since Criminal Code s.735 allows the use of victim impact statements only at the time of sentencing, there is no Code requirement to consult victims if the charge is resolved prior to the trial. Often as a result of plea negotiations, the vast majority of criminal cases result in an initial plea of guilty or a change of plea prior to trial. Unless there is a suitable protocol requiring it, there rarely is consultation with the victim in such cases. In 1987, the Canadian Sentencing Commission rejected the idea of victims becoming independent parties in plea negotiations. However, they recommended that prosecutors should be required to obtain a statement from victims that describes the effect that the crime had on him.

Although any citizen can lay a private information against an accused, this rarely occurs in Canada, and the prosecuting authority may, without explanation to a court, stay any such proceedings. Another stage of the pre-trial proceedings is the preliminary inquiry. Its purpose is to determine if there is sufficient evidence to put the defendant on trial. In Canada, victims have no right to participate in these proceedings other than as witnesses. In other words, unlike the prosecutor or defense counsel, a victim cannot call or interrogate witnesses or challenge any evidence.

Thus in Canada, other than through the use of victim impact statements at sentencing, victims have very little influence over the outcome of a trial. However, if an accused is sentenced to prison and a victim requests information about the offender, considerable information will be provided pursuant to the Corrections and Conditional Release Act proclaimed on November 1st, 1992. By this Act the rights of victims have been formally recognized in Canadian correctional legislation for the first time. The Act provides a right to information and a voice in the parole process to victims through the submission of a statement to the Board. This information includes the date and length of sentence, dates of eligibility for parole and the probable date of the offenders release on mandatory supervision.

When an inmate applies for parole, a Parole Board, independent of the Correctional Service of Canada, reviews any information that will assist in assessing whether an offender's release may pose a risk to society. If a victim wishes to become involved in the parole process, she or he may submit a victim impact statement to the board, preferably in writing. The Board will consider any information a victim believes relevant, particularly regarding the victim's fears or other long-term effects the crime might have caused, such as physical impairment, financial problems or the need for counseling. Victims are encouraged to supply this information as soon as possible after sentencing. If required, a victim can obtain assistance preparing the victim impact statement.

Persons over 18 years of age are entitled to attend a parole hearing, but only as observers. Observers, including victims, are not allowed to participate in any way or be present while the Board members discuss their decision. Victims who wish to give information to the Board must write to the Board before the review. Although the Board welcomes observers, they may deny a request if an observer's presence is likely to disrupt the hearing. In considering whether to allow someone to observe the hearing, the Board is required to consider the views of the offender as well.

If a victim submits a VIS, the Board must reveal to the offender any information which will be considered by the Board. However, the Corrections and Conditional Release Act provides that information from victims will be kept confidential if the Board believes that revealing such information to an offender could jeopardize the victim's safety. If the prisoner is granted parole, victims are informed only if they request notification of this information. The rationale is that some victims may want to put the incident behind them and have no further knowledge of the offender or may be further traumatized by unwanted contact regarding the subject. The Act, however, does not provide for any penalties if the above victim's rights are not granted nor are the proceedings voidable.

b. PROTECTION OF VICTIMS

Aside from victim participation, another question that has raised substantial controversy is the extent of procedural protection extended to the victim as witness during trial. In many instances, victims of crime have had no prior contact with the criminal justice system and find testifying as a witness a traumatic and confusing experience. In addition to the difficulties experienced by most witnesses, victims have additional stresses. Although most victims experience enormous trauma in testifying about the violation of their person and privacy, victims of crime, particularly victims of sexual assault, have the greatest difficulty in participating in the criminal process as witnesses. Needless to say, child victims and victims of sexual assault tend to be the most vulnerable of witnesses, the most likely to be re-victimized by the criminal justice system.

In recent years, considerable attention has been given to the special needs of child victims of sexual offenses. In Canada, the Criminal Code affords protection for such witnesses. Section 486(1) states that when the presiding judge is of the opinion that it is in "the interests of public morals, maintenance of order or the proper administration of justice", she or he may exclude the public from the courtroom for "all or any part of the proceedings". Although this section restricts the right to an open and public trial guaranteed by s. 11(d) of the Canadian Charter of Rights and Freedoms,²⁰ our courts have held that s.486(1) is saved under Charter s.1 in that it "is justified in a free and democratic society". Mere embarrassment at having to reveal personal sexual details is insufficient to invoke the section, it must be shown that the administration of justice is threatened because the capacity of the witness to testify significantly affected. When determining whether to exclude the public from the courtroom under 486(1), "proper administration of justice" includes ensuring that the interests of witnesses under 14 years of age are safeguarded when the accused is charged with any violent crime or a crime of sexual assault. If a witness is under the age of 14, s. 486(1.2) permits the judge to allow a "support person" of the witness' choice to be present and close to the witness while testifying. Additionally, when the accused is charged with a sexual offense, a court may allow a victim under 18 years of age to testify outside the courtroom or behind a screen so the victim will not have to see the accused. The judge must first be satisfied that the "exclusion is necessary to obtain a full and candid account of the acts complained of from the victim". A victim may only testify outside the courtroom where arrangements can be made, by means of closed-circuit television or otherwise, for the accused, the judge and the jury to watch the testimony of the child. Children can testify in Canada providing they promise to tell the truth and have the ability to communicate their evidence. The Supreme Court of Canada has held in *R v. Khan*²⁴ that children as young as three years of age may now testify in court if they can answer "a simple form of questions".

Sub-sections 486(3) and (4) of the Code deal with publication bans with respect to the testimony a victim gives in a sexual offense or extortion proceeding. The ban prohibits

publication or broadcast of the identity of the victim or witness, as well as any information that would disclose that identity. If a victim, witness or prosecutor applies for the ban, it is mandatory that the judge grant the order. Failure to comply with a non-publication order is a summary conviction offense under s.486(5). Additionally, s.486(4) imposes a duty on the presiding judge to inform the victim or any witness under 18, at the first reasonable opportunity, of their right to apply for an order.

The absolute nature of the publication ban under s.486(3) has attracted constitutional scrutiny under the Canadian Charter of Rights and Freedoms. In *R. v. Cdn. Newspapers Co.*²⁵ the Supreme Court of Canada held that the subsection does not infringe the accused's right to a public hearing under s.11(d) of the Charter as the mandatory ban on publication does not prevent the public or the press from attending the trial proceedings but only restricts publication of facts disclosing the complainant's identity.

Section 276 of the Code generally excludes evidence of sexual activity of the victim in sexually related offenses where it is tendered to support an inference the victim is more likely to have consented or to challenge the victim's credibility. The section also provides for certain exceptions where the judge determines such evidence is particularly relevant or has "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice". At the hearing to determine if such evidence is admissible, the victim is not compellable and the public and the jury are excluded (s.276.2). As well, publication of evidence is banned unless the judge orders otherwise (s. 276.3).

Finally, section 139(3) of the Criminal Code makes it an offense to "pervert or defeat the course of justice" in a judicial proceeding by persuading or trying to persuade prospective witnesses not to give evidence. This section further proscribes against any attempt to obstruct the course of justice, even if unsuccessful, and would include, for example, attempts to dissuade a victim from giving evidence by threats or bribes.

In addition to the procedural protections in Canadian criminal law, the Royal Canadian Mounted Police administer a modern and effective witness protection plan. It is suggested that the advances in procedural protections in Canada is evidence that it is possible to facilitate victim participation in a manner consistent with basic criminal justice principals.

c. RECOVERY OF VICTIM'S LOSSES

Supporters of victims' rights have been urging reform with respect to compensation for the pain and suffering and any financial losses victims suffer as a result of crime.

All provinces and territories have enacted legislation to provide compensation to victims of violent crime. These victim compensation schemes operate independently from the criminal process. Through programs administered by a compensation board, compensation is provided where a person is injured or killed as a result of the commission of certain criminal offenses. The provincial enactments vary somewhat, but generally compensate for the following expenses: medical aid, funerals, special damages, rehabilitation and counseling services, wage loss, loss of support for dependents. Most compensate for pain and suffering. Generally recovery is not available for stolen money or loss or damage to property, legal fees, injuries to accused persons found "guilty", and injuries resulting from motor vehicle accidents. Some

provinces also cover the maintenance of a child born as a result of a sexual assault.²⁸ Compensation schemes do not normally include an award for loss of amenities or expectation of life.

Federally, s. 725 of the Criminal Code authorizes a compensation order as part of the sentence for loss of or damage to property suffered by a victim as a result of the commission of an offense. A compensation order is a convenient, expeditious way to address the property loss of a victims of crime and does not bar any civil actions that a victim may have. A s.725 compensation order may be imposed on the accused in addition to any other punishments. However, there is presently no provision in the Code for compensation for bodily or other injuries suffered by victims.

In 1985 Parliament passed sweeping amendments to the Code which revoked s.725 as described above and provided for "restitution" orders which allowed the criminal court to require the offender to pay the pecuniary damages of the victim "including loss of income or support, incurred as a result of the bodily injury, where the amount is readily ascertainable." As of the date of this paper, these amendments and the other sections discussed below have not been proclaimed into law.

Further to s.727.1 of these amendments, the court can also order the restitution be paid from moneys found on the offender at arrest, if ownership of the funds is not disputed by others. Unless the offender acknowledges the capacity to pay the restitution, the court is authorized by s.727 to hold a hearing to determine the offender's ability to pay and the terms of any order made pursuant to s.725. Section 727.2 provides that the court may give notice of the restitution hearing to "interested parties"--presumably victims, the offender and the prosecutor. Under these amendments, victims do not have an independent right to bring an application for restitution. If an order of restitution is not complied with, s.726 allows a victim to enter it as a judgment against the offender in the same manner as if it were a judgment rendered against the offender in civil proceedings. The Supreme Court of Canada has ruled that the existing compensation Code provisions are *intra vires* federal sentencing jurisdiction and do not improperly invade provincial constitutional jurisdiction over property and civil rights.

On July 19th, 1995, certain Code amendments relating to restitution received Royal Assent but also still have to be proclaimed as law. It is presumed proclamation has of both the 1985 and 1995 restitution amendments have been delayed because the Federal Government and the provinces cannot agree on appropriate funding for the proposals. These latest amendments change the section number to 738 and, among other changes, provides that the court "may" make a restitution order, whereas the previous amendment (s. 725) provided that the court "shall" make a restitution order "if it is applicable and appropriate in the circumstances".

II THE UNITED STATES

In the United States, criminal law is constitutionally a matter of state jurisdiction. Generally, it can be said that all states are working to improve the quality of victim rights by changing the criminal process, giving special protection to children and sexual assault victims, and establishing victim services. In response to social and political pressures several states have enacted victims' bills of rights, strengthening the victims' role in the plea bargaining process, the sentencing process and at parole hearings. Other common provisions require that victims be notified of crucial developments in the case and be protected against intimidation and retaliation. Finally, about a quarter of the states require training in victims issues for judges, prosecutors and police officers.

As in Canada, in much of the United States the most apparent barrier standing between victims and the exercise of their "rights" is the fact that most victims' legislation and published rights are frequently not enforceable nor is there a penalty if they are not granted. Often, the legislation clearly states that no cause of action can be brought against the state or any employee of the state if a right granted by a victim assistance act has been infringed or denied. However, certain American states have enacted constitutional amendments that deal with victim's rights, specifying rights to dignity, respect, sensitivity, restitution, compensation and the opportunity to influence sentencing and be informed and present in the criminal process. By elevating statutory rights to constitutional status, these amendments have been one of the most significant American advancements in the area of victims' rights.

a. PARTICIPATION OF THE VICTIM IN CRIMINAL PROCEEDINGS

Today almost all states allow victim impact statements at the time of sentencing, and thirty-several states allow a victim to offer a statement of opinion (oral or written) about the appropriateness of the sentence. In the United States victims have been granted a much more active role in the plea bargaining process than is the Canadian experience. About a quarter of the states allow victims to consult with the prosecutor and address the court during the plea bargaining process. In Nebraska, prosecutors are required to consult with victims concerning negotiations if the victim is available, and California prohibits the defense from plea bargaining at all in any case in which it is alleged that a firearm was personally used by the accused, or in any offense of impaired driving. However, it appears that no state gives victims the power to veto a plea bargain.

Similarly, most states have also enacted laws which allow victims to present an impact statement to parole boards. Although some states require that victims submit written statements, about thirty states allow victims to present oral statements to the board. Most states' laws indicate the board is to receive impact information but do not direct or require the parole authorities to consider it. Even when the laws indicates that the board is to "consider" impact information, they lack specific guidance on the weight the board should give to such statements. Arizona and Oklahoma allow a victim to reverse a parole board decision if the victim was not give an opportunity to have input in the process. In Arizona the law entitles victims "to seek to set aside the post-conviction release until the victim is afforded the opportunity to be present or heard". The Oklahoma statute provides that if the victim has requested notification about his or her rights in the parole process and the parole board fails to notify a victim (who has requested notification), the board's decision is voidable.

b. PROTECTION OF VICTIMS

At the federal level, in 1982 President Reagan formed a President's Task Force on Victims of Crime which proposed legislation to meet the needs of victims. Additionally, The Report proposed a significant federal constitutional amendment that "[t]he victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings."

Under the guidance of the Task Force, the Federal government has moved to enhance victims' rights by passing legislation such as the Federal Victim and Witness Protection Act of 1982 and the Victims of Crime Act of 1984. The Federal Victim Witness and Protection Act criminalized threats or retaliation against victims, thereby attempting to provide some protection to victims from harassment and intimidation. This Act also required that restitution be awarded to victims of federal crimes, a provision that was

extensively challenged in the courts until those provisions were held to be constitutional by the US Supreme Court.

As of 1993, almost all states also protect against victim and witness intimidation and retaliation by toughening criminal penalties and allowing for "protective orders". About half of the states restrict the publication of victims' names and addresses in sexual assault cases. Again, about half of the states protect the identity of child victims; however some states oppose such privacy protection on the basis that it restricts freedom of the press and access to public records.

Most states have also provided other protections for child victims. Several states have children's bills of rights that require a guardian to inform the court of the child's capabilities and the likely impact of the trial on the child, advise when to use videotapes and when to help with emotional problems, and generally support the child at court proceedings. All but nine states permit children to testify through a videotaped statement, either alone (unsworn interrogatory) or under oath and cross-examination (deposition), or by live testimony through closed-circuit television. Additionally, more than half the states have extended the statute of limitations for child offenses.

c. RECOVERY OF VICTIM'S LOSSES

In the U.S. victims may receive financial assistance from the state victims' compensation programs and from restitution orders. In 1986, the President's Task Force on Crime reported that 29 states mandated restitution as a part of sentencing. In jurisdictions where restitution orders are common, courts exercise a considerable amount of discretion in determining the size of the awards. These American courts have significant experience which may be useful to Canadian courts if the restitution amendments are proclaimed in Canada, and a review of the procedure, costs and effectiveness of the U.S. restitution experience may assist in resolving whatever inhibits the proclamation scheme.

American states also have publicly funded compensation programs. California became the first state to adopt a victim compensation program in 1965 and, today, practically every state maintains some form of victim compensation scheme. Many of these programs require a claimant to meet certain eligibility requirements, for example, in most states, to obtain an award claimants must demonstrate financial need. Additionally, most compensation programs do not comprehensively redress the damage that victims sustain because many of them exclude recovery for pain and suffering.⁶⁰ However, there are many American victims' service agencies, aided by such non-government organizations as the National Organization for Victims' Assistance (NOVA), which support victims by attempting to ensure that they receive sufficient community support to assist them to cope with their pain and suffering.

III. ENGLAND AND WALES

In the United Kingdom, for historical reasons, the criminal justice system of England and Wales is separate from those of Scotland and Northern Ireland. This paper will discuss only the distinct criminal system of Wales and England, an area which encompasses 90 per cent of the population of the United Kingdom. The Home Office is the center of the criminal justice system: it prepares the legislation that give a constitutional framework to the system, directs vast funds into the system, administers the probation, police and prison services, and is responsible for most matters affecting the control of crime. In discussing the treatment of victims in European countries, the considerable role of The

Council of Europe should be noted.

Throughout the 1970's and 1980's, various changes were implemented in England to improve the position of victims. In the 1970's, thousands of volunteers united to provide local victim support schemes. These schemes make contact with victims of crime and offer comfort and practical advice. In 1979, the Home Office made its first grant (£1.5 million), and since then has continued to provide increasing support. There are currently over 350 victim support schemes covering all of England and Wales, whose services are coordinated and supported by the Home Office.

In 1990, the Home Office published the Victim's Charter: A Statement of the Rights of Victims of Crime. In Part II, the Charter sets out some guiding principles declaring: "...in considering the public interest no one should overlook or disregard the interests and wishes of the victim"; "it is essential that every possible step is taken to minimize the upset and even hardship which may be caused"; and "victims should always be treated fairly and without adverse discrimination". The Victim's Charter emphasizes that the additional traumatic effect of participating in the justice system should be minimized as much as possible. The Charter is a policy statement, outlining general government victim policy; it does not have legislative authority and thus is not enforceable and provides no remedies.

a. PARTICIPATION OF THE VICTIM IN CRIMINAL PROCEEDINGS

In England and Wales the right of victims to present their views and concerns during the criminal justice process is more restricted than the role victims typically exercise in North America. In England and Wales, in theory, victims have the legal right to privately commence a prosecution, but it appears that this right is considerably restricted both in law and in practice. However, if a private prosecution is commenced, the Director of Public Prosecutions may take over any case and, with the leave of the court, offer no further evidence against the accused. Notwithstanding such limitations, though, there is still some prosecution by other than the prosecutor, particularly by such bodies as British Rail and the postal service who may prosecute for certain offenses. Although prosecution by private citizens is rare, there is the exception of shoplifting cases where many prosecutions are brought by shopkeepers. Apart from this limited independent right to prosecute, it appears that victims in England do not have a right to participate in any stages of the proceedings, even through such means as victim impact statements.

b. PROTECTION OF VICTIMS

One area of victim involvement where significant changes have occurred in the last few years has been with regard to the protection that victims have been afforded in court. In 1988, the Home office produced a leaflet called "Witness in Court" which explains court procedure in a simplified manner and explains to victims what they may expect when testifying in court. As well, the Criminal Justice Act 1988 contains broad provisions to ensure the anonymity of rape victims. The victim's identity is safeguarded from the moment of allegation, whether or not any proceedings follow, and this protection extends indefinitely.

The Government has also introduced special protections relating to the evidence of children.. They are now allowed to testify outside the courtroom via live television links in cases involving violent, cruel or sex offenses; and a child's sworn statement no longer has to be corroborated by other evidence.

c. RECOVERY OF VICTIM'S LOSSES

In England and Wales, the courts are increasingly granting compensation orders. In 1982, the Criminal Justice Act provided that if a court wished to impose a fine and a compensation order, and the offender lacked the means to pay both, the court could issue the compensation order only. In 1988 the law was amended to require a court to give written reasons if it failed to grant a compensation order. Such an order is a penal sanction, enforced by the state, as distinguished from a civil order which must be enforced by the successful party. The court may imprison an offender who fails to pay compensation as ordered, unless it is satisfied there is a reasonable explanation for the failure to pay.

A Criminal Injuries Compensation Board is funded for England, Wales and Scotland for personal injury directly suffered as a result of a crime of violence or in an attempt to stop a crime. Compensation is assessed on the basis of "common law" damages, with a lower limit of £1000 after deduction of other benefits received.

IV SWEDEN AND GERMANY

There are a number of similarities in the manner a victim may be involved in criminal justice systems in continental Europe. As the northern European countries of Sweden and Germany appear to be somewhat similar in this regard, this paper will attempt to summarize some of the more interesting aspects of their treatment of victims.

a. PARTICIPATION OF THE VICTIM IN CRIMINAL PROCEEDINGS

The Swedish Code of Civil Procedural (Rättegångsbalken or RB) grants the victim the right to present civil claims as part of the criminal proceedings and it is the duty of the prosecutor to advance these claims (22:2 RB). However, if a civil claim may adversely affect the criminal proceeding, the court has the jurisdiction to direct that the claim be tried separately as a civil cases(22:5 RB). The victim is to be informed in the pre-trial stage of his or her right to have the prosecutor present the civil claim. In Germany, in a proceeding know as ashionsprozees, the victim may also present his or her civil claim as part of the penal process. A somewhat similar right exists in France, Belgium, Italy and Spain where the legal systems are based on the Roman law. By adjoining their civil claim to the criminal proceedings, victims are thus able to have their concerns directly reflected in the criminal justice process.

Sweden and Germany, as well as a number of other European countries such as Poland, (the former) Czechoslovakia, the Netherlands and Austria, allow the victim a prosecutorial role as a joint or subsidiary prosecutor. As joint prosecutor, the victim does not control the prosecution of the case, but has access to information on the prosecution case, can suggest questions to be put to witnesses, and generally can take a more active role in the prosecution of the offender. In both Sweden and Germany if the public prosecutor refuses to bring charges against a suspect, a victim may have the secondary right to prosecute. If the prosecutor decides not to prosecute in Sweden, a victim can appeal this decision to a senior prosecutor and the Attorney General. However, a Swede who prosecutes independently runs the risk of paying the defendant's costs in the event of an acquittal. A Swedish victim can also appeal against sentence if the prosecutor doesn't appeal, but again runs the risk of costs. (31:11 RB).

Victims in Germany rarely elect to proceed as a secondary prosecutor, that is to commence a private prosecution. However, this is not as attractive to the victim as the

joint or subsidiary prosecutor role. which carries the right to participate jointly with the prosecutor, alone or with counsel, and is thus more frequently used because it permits victims to express their views and concerns to the court while leaving the main prosecutorial burden to the prosecutor.

PROTECTION OF VICTIMS

In Germany, the Protection of Victims Act (Opferschutzgesetz) which became law in 1987, considerably improved the procedural protection of victims of crime and was substantially consistent with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

The Legal Affairs Committee of the German Federal Parliament (Bundestag) stated the objective of the legislation was the protection of victims:

"Particularly the victims of serious crime, e.g. rape victims or the victims of any other offense against sexual determination, are in need of a protected power of participation. Furthermore, they should get better protection, like other participants in the proceedings as well, of their personal sphere against damage emanating from the proceedings themselves. Also, the victim's chances of getting compensation for his material damage should be improved ...".

The Protection of Victims Act provided for considerable improvements in the treatment of victims in Germany. It provided that victims are to be fully informed of their rights and their role in the justice system, including the right to be informed of the outcome of all court proceedings as well, the right of victims to be involved in the prosecution as ancillary or joint prosecutor was extended to more categories of serious offenses and those who could not afford counsel for this purpose were granted access to legal counsel.

A victim's right to act as a joint or ancillary prosecutor was expanded by the Act and included such serious offenses as rape, grave bodily harm, and attempted homicide. When such victims elect to act as joint prosecutors, they may act through counsel and may have access to legal aid services if qualified. As well, victims as witnesses may have counsel act for them when they give testimony. Legal aid is also available for victims who proceed by way of adhesion, that is where the civil claim is joined with the criminal trial.

The German Protection of Victims Act further restricts cross-examination of victims as witness in matters of a "personal nature" and child victims of sexual assault may only be questioned by the presiding judge. In appropriate circumstances, the public, even the offender, may be removed from the courtroom during the testimony of a child sexual assault victim, if the court deems it necessary for the child's welfare.

The Protection of Victims Act also allow victims to change their names and general identity if they are in fear of intimidation or retaliation from the offender as a result of giving testimony. In addition to these attempts to conform with the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the German government has undertaken to continuously review other possible changes to improve the legal status of victims of crime

In Sweden, controversy over the treatment of victims and witnesses has centered on victims of sexual offenses. Since the 1980's, victims of sexual assaults have been

provided with an advocate or "support person" charged with looking after the victim's interests throughout the trial. Such assistants are appointed by the court as soon as the pre-trial investigation commences.

In Sweden, public counsel are also appointed in the pre-trial stages for victims of crimes against life, health or liberty and peace, if the committed offense carries a minimum punishment of imprisonment. Counsel protect the victim's rights, gives him or her support and has the right to be present whenever the victim is being interrogated. In addition to the public victim's counsel, the victim may also have a support person present during any interrogations.

c. RECOVERY OF VICTIM'S LOSSES

In both Sweden and Germany victims may obtain compensation from the state damages occasioned by certain criminal offenses. In Germany, the law concerning compensation for victims of violent offenses (Opferentschadigungsgesetz or OEG) came into force in 1976. Under this Act, a person who has suffered injury or damage as a result of a deliberate, illegal assault may obtain compensation for the physical and economic consequences of such an assault.

Compensation in Sweden is given for damage and harm caused by crimes against persons. However, compensation for crimes against property is awarded only when the crime in question has been committed by escaped prisoners "and similar persons". The general civil principles of damages are applied when compensation is determined. Thus, if the offender has paid damages or the victim has received compensation from his or her insurance, that amount is deducted from the compensation. Furthermore, the compensation is limited to certain maximum amounts.

As of July 1994, Sweden has also instituted a Victim Support Fund. A defendant who is sentenced for a crime which carries the minimum punishment of imprisonment shall always be ordered to pay, in his sentence, a fee of SEK 300 (\$60 CAN) toward the fund. The revenue obtained from these fees is used to promote activities beneficial to victims of crime (Law 1994:419 on Victim Support Fund).

VICTIM EMPOWERMENT - VICTIM SUPPORT MODELS AND CO-ORDINATED VICTIM SUPPORT SERVICES

7.34 Victim empowerment is the way in which victims are empowered following their victimisation by having their needs that arose from the victimisation satisfactorily addressed. As such the term empowerment would include principles of victim support. The latter being emphatic person centred assistance rendered by an organisation or individual following the victimisation.

VICTIM SUPPORT MODELS

7.35 In the provision of services for crime victims two general models can be discerned. Such services can firstly be delivered as special forms of welfare or charity. In this model the provision is governed by the ideology of care. Victim services can also be apart of the administration of criminal justice. In the latter case the provision is governed by the ideology of human rights or a just society. In an international perspective several practical examples of both models are available. In recent times there has been general support for a third model or point of view: *victim policies as an integral part of crime prevention*.

The care model

7.36 Prime examples of the care model are state compensation schemes- especially those which apply generous standards in determining awards. Historically, state compensation schemes belong to the oldest provisions for crime victims. In many Western countries such schemes were introduced between 1965 and 1980.

7.37 In most cases the existing schemes fall short of being a fully satisfactory welfare provision for crime victims. Only some victims are eligible and the actual delivery tends to be time consuming and burdensome for the claimants. Victims who are poor will of course welcome the money received. In developing nations where few people are fully covered by insurance for medical bills, state compensation is an important provision. Yet state compensation should not be seen as a cure for all.

7.38 In the Netherlands many victims who received compensation still expressed dissatisfaction with the way the police or courts dealt with their cases. The reception of a sum of money had not satisfied their demands. The awarding of state compensation does not satisfy the need of victims that justice is done. Many victims would in fact rather receive recognition by the judge that they were wronged by the offender - and a verdict that he must therefore pay some sort of restitution.

7.39 An important second category of care-oriented services are the rape crisis centres, shelter homes for victims of spouse abuse and, finally, general victim support schemes. In most western countries this kind of services were originally exclusively offered to female victims. In the eighties similar services started to become available for all victims of all types of crime (e.g. burglaries, assaults and robberies). In the UK and the Netherlands all victims of more or less serious crimes are now routinely contacted by trained volunteers and offered immediate

practical and moral support. The police is instructed to ask all relevant victims permission to give their names and addresses to the local support schemes.

The criminal justice model

7.40 Examples of provisions for crime victims within the criminal justice system are: considerate reception by the police, referral to support agencies, provisions of advice on preventive measures, the right to be notified of the outcome of the investigation or of ensuing criminal proceedings, the right to inform the court about the impact of the victimization and the right to receive restitution from the offender. In many parts of the USA victims also have the right to express an opinion on the most appropriate punishment for the offender. In most West European countries victims are not allowed to express opinions about the punishment. Instead, new procedures have been put in place to help the victim to secure restitution from the offender. In the Netherlands, for instance a new law went into action in 1995 which will improve the chances of victims to receive restitution. Under the law the criminal tribunal can subsequently sentence the offender to the payment of restitution as part of the criminal verdict. If such an order is given, it is the duty of the prosecutors to collect the money. Jointly with the new law, the minister of justice issued new detailed guidelines for the police and the prosecutors about the required treatment of victims. Both the police and the prosecutors are instructed to make a maximum effort to arrange restitution by the suspect/offender as early in the proceedings as possible.

The prevention model

7.41 The implementation of justice-oriented provisions for crime victims is sometimes hampered by a lack of motivation on the part of the relevant professions. Helping victims is often not seen as part of the core business of the police or the prosecutors.

7.42 There are important reasons why a better deal for crime victims is vital for the fight against crime. The first reason is that most crimes are brought to the attention of the police by victims or their relatives. Also the chances to arrest the offender and get a conviction are largely dependent on the information supplied by the victim. If many victims are doubtful whether reporting to the police will do them any good, the effectiveness of the police is severely

undermined. For more effective criminal investigations the cooperation of the victims is essential.

7.43 Even more important for the reduction of crime is the role of potential and actual victims in crime prevention. Criminality can be prevented by addressing the economic hardship of groups at risk to become offenders and by assisting actual offenders in their rehabilitation after their release from prison. Potential and actual victims can also make an important contribution to the prevention of crime by improving their self-protection. If potential victims are better protected fewer opportunistic crimes will be committed.

7.44 In principle all citizens living in big cities are potential victims. It is therefore justifiable for example, to provide all school children with basic information on how to protect themselves against forms of crime. This represents an example of a primary victim-oriented crime prevention strategy.

CO-ORDINATED VICTIM SUPPORT SERVICES - A COMPARATIVE OVERVIEW

United Nations

7.45 Like the rest of the world the United Nations was also far more concerned with the rights of offenders than the rights of victims. The first United Nations Congress on the Prevention of Crime and the Treatment of Offenders dealt mainly with offenders' and prisoners' rights. Only at the Seventh Congress in Milan in 1985 did victims of crime appear on the agenda. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power contains the following statement in respect of victims of crime:²²⁴

A. Victims of crime

- "1. 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of

²²⁴ United Nations 1992 Compendium of United Nations standards and norms in crime prevention and criminal justice. United Nations: New York 1992 211 ff.

whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Access to justice and fair treatment

4. Victims should be treated with compassion and respect for their dignity. they are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have required such information;
 - (b) allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
 - (c) providing proper assistance to victims throughout the legal process;
 - (d) taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (e) avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.
7. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss

suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

Compensation

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

Assistance

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

7.46 Prof C M B Naude completed a research project on victim impact statements in the criminal justice system in an international perspective and reported her findings in respect of the rights of victims of crime and legislation adopted by European countries to improve the plight of victims, in the following terms:²²⁵

²²⁵

C M B Naude “An International Perspective on Victim Participation in the Criminal Justice process with specific reference to Victim Impact Statements” Department of Criminology University of South Africa: Pretoria November 1995 56-59.

Based on research findings a number of European countries reformed their laws, developed training programmes, formulated guidelines for legal practitioners and developed various victim services. Fifteen countries provide a variety of services to victims of crime and 17 provide state compensation to the victims of crime.

To date German legislation provides the most extensive services to victims of crime in Europe. The Victim Protection Act, 1986, for example, provides for the following:

- improvement of protection of personal life of injured party and of relatives in relation to questions about personal life;
- possibility of removal of accused extended in relation to questioning of witnesses;
- possibility of excluding publicity extended;
- the injured party is allowed to participate on application at the beginning of the court proceedings;
- right to inspect court files according to provisions of the Act;
- right by law to have assistance of counsel in criminal proceedings;
- the injured party is referred to his/her authority under the Victim Protection Act;
- extension of power of the so-called accessory prosecution by injured party (Nebenkläger);
- the requirements for asserting the claim for compensation within the adhesive procedure formulated more in the victim's favour;
- further clarifications of provisions regarding court costs;
- account taken of efforts by the offender in providing redress for the victim, in relation to assessing punishment. Priority of victim's claim for compensation, over State's claim to pecuniary penalty (fine) and court costs.

The act improved the legal status of the victim in three areas: **Protection from interference by other participating parties was extended** (eg rules concerning questioning, removal of the accused); **the victim was accorded the right to obtain information and protection and the victim was granted the right to participate actively in the proceedings** by means of Nebenkläger (as an accessory to the prosecutor) and Privateklage (private prosecution in the case of minor offences).

Research by Kaiser and Kury further indicates that three quarters of German victims are in favour of compensation as a form of sanction as used in England. **As regards punishment, most victims prefer community based sentencing although seriously affected victims are more in favour of imprisonment.** Willingness to participate in extrajudicial victim-offender mediation programmes was however rather low (less than 50% of victims).

The United Kingdom's Victim's Charter (Home Office, 1993) provides information regarding support services to victims of crime, general information for victims re compensation claims to the Criminal Injuries Compensation Board, information concerning the court process and what to expect during the trial, guidelines to the police and the courts on the treatment and rights of victims.

In the Netherlands legislation based on the recommendations of the Terwee Commission enhances the position of the victim of serious violent crimes, such as

notifying the victim of all important decisions and considering the wishes of the victim regarding restitution. Restitution can also be arranged before or during the trial.

In Belgium regulations inside and outside the criminal proceedings process have been introduced enabling the victim to obtain compensation before the trial. The procedure which is known as the friendly settlement has been in force since 28 June 1984 and makes provision for the prosecution to settle a case punishable by a maximum sentence of five years without prosecution, if compensation is paid to the victim by the offender.

In Austria section 167 of the Criminal Code provides for an exemption from punishment in the case of property offences if the offender makes good to the victim, within a certain time limit, the damage suffered by the victim as a result of the crime. Section 7 of the Juvenile Justice Law (Out of Court Conflict Resolution) also provides for out of court conflict resolution in the case of juvenile offences if the victim is agreeable thereto. Victim-offender reconciliation can be instituted by the prosecutor in the following cases:

- if the offence is to be sanctioned only by a fine or
- if the offence is to be sanctioned by not more than 5 years of confinement or
- if the offence is to be sanctioned by both aforementioned punishments together and
- if the offence did not result in a person's death
- if the circumstances of the case seem sufficiently clear and settled
- if the guilt is not to be regarded as severe and
- if a punishment does not seem necessary to prevent the offender from doing wrong again.

In 1992 and out of court conflict resolution project was also started with adult offenders in four major cities in Austria (Vienna, Salzburg, Innsbruck and Eisenstadt). The process is the same as for the Juvenile Criminal Law.

Compensation orders are also an independent sanction option in Cyprus, England and Wales, Greece, Northern Ireland, Scotland and Turkey. In England, Wales and Scotland the compensation order has priority over a fine if the offender can't pay the fine and since 1988 the court must give reasons for not issuing a compensation order if an identifiable victim suffered a loss.

Compensation orders are apparently not frequently used according to Joutsen. Zauberman ascribes this to the fact that it is assumed that the person who has committed the offence has been identified which is not true for many cases; it is further accepted that identified offenders are in a position to pay but many are not solvent and even if the victim was awarded compensation in a civil action they often do not obtain payment for damages suffered.

The British Victim Protection Act provides for a witness protection programme and enables the victim to make representations about home leave and the parole of offenders. Probation officers liaise with the victim in this regard (Rock 1995).

Due to lack of legislation and funding many countries provide only informal court services to victims of crimes. In England, for example, volunteers assist victims and witnesses by showing them the Crown Courts and explaining the procedures to them without discussing the case. They are known as court or victim liaison officers and are a voluntary agency with quasi official status. The police will take vulnerable witnesses (eg children) to the Old Bailey before the trial proceedings to familiarise them with the

court environment.

Canada²²⁶

A shared responsibility

7.47 The federal government and provincial/territorial governments share the responsibility to respond to the needs and concerns of victims of crime and to articulate the victims' role in the criminal justice system. Both levels of government collaborate through the Federal Provincial Territorial Working Group on Victims of Crime. The Canadian Statement of Basic Principles of Justice for Victims of Crime, jointly endorsed by Federal, Provincial and Territorial Ministers Responsible for Justice in 1988, continues to guide the development of policies, programs and legislation.

7.48 The federal government's role focuses on criminal law, as set out in the *Criminal Code*. The provinces are primarily responsible for enforcing the law, prosecuting offences, administering justice in general, within the provinces and providing services and assistance to victims of crime. The Federal, Provincial and Territorial governments are committed to exploring approaches to improve the victim's experience in the criminal justice system. For some victims restorative approaches may have the potential to meet their needs. The movement for Restorative Justice is an attempt to engage victims, offenders and communities in the search for a more meaningful resolution to problems of crime.²²⁷

Legislation

7.49 The Criminal Code contains a number of provisions which deal with specific aspects aimed at improving the plight of victims of crime, for example, provisions for victim impact statements; a victim fine surcharge; restitution; publication bans, exclusion orders and facilitating testimony. Specific provision is also made for categories of victims, for example; provisions for sexual offence victims; a definition of consent to sexual activity; restricting the defense of honest belief in consent; protecting the personal records of sexual offence victims

²²⁶ <http://www.canada.justice.gc.ca/en/ps>.

²²⁷ The Federal/Provincial/Territorial Working Group on Restorative Justice has published a discussion paper entitled Restorative Justice in Canada: A Consultation Paper.

and other provisions of interest to and benefit for victims of crime.

7.50 A strategy which recognizes the role of both levels of government is essential for improvements to the criminal justice system when addressing the needs of victims of crime. Both federal and provincial laws address the concerns of victims of crime regarding, for example, entitlement to information; services and assistance and the victims' role in criminal proceedings. The federal Minister of Justice is responsible for enacting the criminal law which is found in the Criminal Code and applies throughout Canada. The Criminal Code includes many provisions which facilitate the participation of victims of crime. These provisions are described below.

7.51 The Solicitor General of Canada is responsible for, among other things, the Corrections and Conditional Release Act. This Act also includes provisions specifying the information which is available to crime victims about federally incarcerated inmates. The provinces and territories have also enacted victim legislation governing services and assistance and, in some jurisdictions, compensation to victims of crime.

7.52 In Canada there is no single federal or "national" "Bill of Rights" for Victims of Crime. This would not be appropriate in Canada due to the fact that the jurisdiction over the components of the criminal justice system and the responsibility for meeting the needs of victims of crime is shared by the federal government and provinces and territories. For practical and jurisdictional reasons, legislation for victims of crime in Canada must be found in the relevant federal, provincial and territorial statutes including the Criminal Code (federal) Corrections and Conditional Release Act (federal), proposed Youth Criminal Justice Act (Bill C-3, federal) and in applicable provincial and territorial Victims of Crime, Victim Services and Criminal Injuries Compensation legislation.

7.53 In 1988, Federal, Provincial and Territorial Ministers of Justice endorsed the Canadian Statement of Basic Principles of Justice for Victims of Crime. The principles have guided the development of policy and legislation for victims of crime. The principles have been reflected in provincial and territorial victim legislation, for example, as a preamble, a statement of principles, goals or rights. The provisions of the Criminal Code, referred to below, also follow these guiding principles. The Canadian Statement echoes the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime which Canada co-sponsored.

The Criminal Code

7.54 The Criminal Code requires the court to consider a victim impact statement at the time of sentencing an offender where such a statement has been prepared. The victim impact statement describes the harm done to or loss suffered by the victim of the offence. The form of the statement may be in accordance with procedures established by a victim impact statement program designated by the Lieutenant Governor in Council of the Province. Courts have accepted a variety of forms of victim impact statements regardless of whether there is a designated program. (See section 722 of the Criminal Code for details.)

7.55 Recent amendments to the Criminal Code provide that the victim may read their victim impact statement aloud at sentencing, where they wish to do so. Information from the surviving victims may also be considered in proceedings pursuant to s. 745.6, where an offender sentenced to life for murder, may apply for a reduction in the number of years before being eligible to apply for parole.

7.56 A victim surcharge is imposed in addition to any other punishment for an offender convicted or discharged of a Criminal Code offence or an offence under the Controlled Drugs and Substances Act . The revenue raised by the victim surcharge remains in the province or territory where it is imposed. The Criminal Code requires that victim fine surcharge revenue shall be used to provide assistance to victims of offences as the Lieutenant Governor in Council of the province directs. (See section 737 of the Criminal Code for details.)

7.57 The victim surcharge is 15% of any fine imposed and where no fine is imposed, the surcharge is \$50 for summary conviction offences and \$100 for indictable offence convictions. Where imposition of the surcharge would cause undue hardship, the offender may request that the sentencing judge waive the victim fine surcharge.

7.58 The majority of provincial/territorial victim services and programs are financed by surcharge revenue. The majority of provinces/territories have also enacted legislation imposing a surcharge on provincial offences, the revenue from which is used for victim programs and services. (See section 737.)

7.59 A court sentencing an offender may order, in addition to any other sentence imposed, that the offender pay restitution to the victim of the offence. The court may impose the restitution

order based on an application by the prosecutor or on its own motion. Restitution, as an additional sentence, may be ordered for readily ascertainable loss of or damage to property suffered as a result of the commission of the offence and readily ascertainable pecuniary (monetary) damages, including loss of income or support, incurred as a result of bodily harm suffered as a result of the commission of the offence. In addition, in the case of an offence causing bodily harm to the offender's spouse or child (family violence), restitution may be ordered for readily ascertainable expenses incurred by the victim as a result of moving out of the offender's household, for temporary housing, child care, food and transportation.

7.60 Where restitution is ordered as an additional sentence and the restitution is not paid within the time period specified by the court, the person to whom the restitution is to be paid (i.e. the victim/the beneficiary of the order) may file the order in any civil court in Canada. The restitution order made in the criminal proceedings will then have the same effect as a civil judgment for damages made by a civil court. The victim can enforce the order against the offender in the same manner as a civil judgment (e.g. direct the Sheriff to seize bank accounts, place liens on property, etc.). (See sections 738-741.2 of the Criminal Code.) Restitution may also be a condition of an offender's probation order, where probation is the appropriate sentence.

7.61 In criminal proceedings, while the general rule is that all proceedings against an accused shall be held in open court, the Criminal Code sets out exceptions, including those which are intended to protect the privacy of victims, for example:

- * subsection 486(2) which provides that for sexual assault offences, an application may be made for an order excluding the public;
- * subsections 486(3) and 486(4) which provide for an order prohibiting publication of the identity of sexual offence victims and certain witnesses;
- * subsection 486(4.1) which provides that a judge may make an order prohibiting the publication of the identity of a victim or witness of any offence, on application, where it is established that the order is necessary for the proper administration of justice; and
- * subsections 276.2 and 276.3 which provide for the exclusion of the public and

which restrict publication of proceedings to determine the admissibility of evidence regarding a sexual assault complainant's sexual history.

7.62 Other provisions are intended to facilitate the participation of witnesses, including;

- * subsection 486(1.2) which permits a support person to be present in court with a witness under the age of 14 years, or who has a mental or physical disability, in sexual offence proceedings;
- * subsection 486(2.1) which permits a sexual offence complainant who is under the age of 18 years or who has difficulty communicating, to provide their testimony from behind a screen or by closed circuit TV, where the judge is of the opinion that this is necessary to obtain a full and candid account. This provision has recently been expanded to cover prostitution and assault offences;
- * subsection 486(2.3) which provides that, in sexual offence proceedings, generally, a self-represented accused shall not personally cross-examine a witness under 18 years of age. The court may appoint counsel for the accused to conduct the cross-examination;
- * subsection 715.1 which permits, in proceedings relating to sexual offences, that where the victim or witness was under the age of 18 at the time the alleged offence occurred, a videotape, describing the acts complained of and made within a reasonable time after the offence, is admissible in evidence, if the victim or witness, while testifying, adopts the contents of the videotape;
- * subsection 715.2 which permits, in proceedings relating to sexual offences, that where the victim or witness has difficulty communicating due to a disability, a videotape describing the acts complained of and made within a reasonable time after the offence, is admissible in evidence, if the victim or witness, while testifying, adopts the contents of the videotape.

7.63 Particular provisions exist in regard to victims of sexual offences, for example, as a result of criminal law reform initiatives, the Criminal Code currently includes many provisions to address the concerns of child and adult victims of sexual offences including;

- * Section 273.1 provides a definition of consent for the purposes of the sexual assault offences and for greater certainty, sets out specific situations that do not constitute consent at law.
- * Subsection 273.1(1) defines consent as the voluntary agreement of the complainant to engage in the sexual activity in question. Conduct short of a voluntary agreement to engage in sexual activity does not constitute consent as a matter of law.
- * For greater certainty, subsection 273.1(2) sets out specific situations where there is no consent in law; no consent is obtained:
 - where the agreement is expressed by the words or conduct of a person other than the complainant;
 - where the complainant is incapable of consenting to the activity;
 - where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
 - where the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - where the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
- * Section 273.2 limits the scope of the defence of honest belief in consent to sexual activity by providing that the defence is not available where the accused's belief arose from the accused's self-induced intoxication, or where the accused's belief arose from the accused's recklessness or willful blindness or where the accused failed to take reasonable steps to ascertain whether the complainant was consenting.
- * Sections 276 to 276.5 of the Criminal Code govern the admission of evidence regarding a sexual assault complainant's other sexual activity. The Code makes it clear that evidence that a complainant has engaged in sexual activity is not admissible to suggest that the victim was more likely to have consented to the sexual activity which is the subject matter of the charge or that he/she is less

worthy of belief. The provisions restrict the admissibility of evidence to specific instances of sexual activity, relevant to an issue at trial and to evidence which has "significant probative value which is not substantially outweighed by the danger of prejudice to the administration of justice". The judge is required to consider a range of factors set out in the Code in making this determination. The Code also sets out the procedure to be followed and includes provisions to safeguard the victim's privacy including provisions for an in camera (closed) hearing, non-compellability of the victim and a publication ban on the proceedings. These provisions are sometimes referred to as the "rape shield" laws.

- * Sections 278.1-278.9 of the Code govern the production of personal records about victims and witnesses in sexual offence proceedings. The provisions place the onus on the accused to establish that the records sought are likely relevant to an issue at trial and require the trial judge to carefully scrutinize applications and determine production in accordance with a two-part process involving a consideration of both the accused's rights to full answer and defence and the victim's rights to privacy and equality. The procedure to be followed is also set out in the Code and includes safeguards for the victim's privacy including an in camera (closed) hearing, non-compellability of the victim at the hearing, a publication ban on the proceedings and the contents of the application, editing of the records (where ordered to be produced) to delete irrelevant personal information and the imposition of other appropriate conditions on production.
- * Section 161 - permits the court to make an order prohibiting an offender convicted of a sexual offence involving a young person (under 14) from attending at or near certain public places where children may be present or seeking, obtaining or continuing employment that involves being in a position of trust or authority towards a young person.
- * Section 810.1 - allows a person to seek a peace bond, lasting up to 12 months, if he or she fears that another person will commit a sexual offence against a child. A hearing may be held and the judge will determine whether a peace bond (recognizance) should be entered into. If the defendant fails or refuses to enter into the recognizance, the judge may sentence the defendant to jail for up to 12

months.

- * Section 264 - provides for the offence of criminal harassment (stalking). It is an offence to engage in harassing conduct, including repeatedly following a person, watching a dwelling house or place where the other person lives or carries on business or happens to be or engaging in threatening conduct knowing that this causes the person to reasonably fear for their safety or the safety of anyone know to them.

- * Section 718 - sets out the purpose of sentencing. It provides:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: ...

to provide reparations for harm done to victims or to the community; and

to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Provincial and Territorial Legislation

7.64 Legislation which addresses the services, information and other assistance, including compensation, that may help victims of crime exists in most provinces, for example -

- * Alberta - Victims of Crime Act, S.A. 1996, Chapter V-3.3;
- * British Columbia - Victims of Crime Act, SBC 1995, c. 47; Criminal Injuries Compensation Act, RSBC 1979 c.83 as amended by SBC, 1995, c. 36;
- * Manitoba - The Victim's Rights and Consequential Amendments Act SM 1998, c. 44;
- * New Brunswick - Victim's Services Act 1987, SNB 1987 CV-21 as amended by

SNB 1996, c. 36;

- * Newfoundland - Victims of Crime Services Act, RSN 1990 c. V-5;
- * Northwest Territories - Victim's of Crime Act, RSNWT 1988 c. 9;
- * Nova Scotia - Victim's Rights and Services Act, SNS 1989 c. 14;
- * Ontario - Victim's Bill of Rights, S.O. 1995 c. 6; Compensation for Victims of Crime Act, S.O. 1990 c. 24; Victim's Rights to Proceeds of Crime Act, S.O. 1994 c. 39;
- * Prince Edward Island - Victim's of Crime Act, RS PEI 1988 c. V-3.1; Victims of Family Violence Act, SPEI 1996 c. 47;
- * Quebec - Crime Victims Compensation Act, 1994 S.Q. c. 1-6;
- * Saskatchewan - Victims of Crime Act, S.S. 1995 c. 4-6.011; Victims of Domestic Violence Act, S.S. 1994 c. V-6.02; and
- * Yukon - Victim Services Act, S.Y. 1992 c. 15.

Funding

7.65 In March 2000, the Government of Canada allocated \$25 million over five years to the Department of Justice's Policy Centre for Victim Issues for federal victim-related initiatives and programs designed to improve support to victims of crime. The victims of crime strategy is intended to improve the experience of the victim in the criminal justice system and increase the confidence of victims of crime in the criminal justice system by:

- * ensuring that victims of crime and their families are aware of their role in the criminal justice system and services and assistance available to support them;
- * enhancing the Department of Justice's capacity to develop policy, legislation and other initiatives which take into consideration the perspectives of victims;
- * increasing the awareness of criminal justice personnel, allied professionals and

- the public about the needs of victims of crime, legislative provisions designed to protect them and services available to support them; and
- * developing and disseminating information about effective approaches both within Canada and internationally to respond to the needs of victims of crime.

The Fund

7.66 The fund is comprised of four components that directly support the objectives of the initiative.

Objectives Of The Fund

- * to enhance knowledge, promote developments and inform Canadians and criminal justice practitioners about the impact of victimization, the needs of victims of crime, approaches to respond to those needs and about the criminal justice system and the victim's role in that system;
- * to promote access to justice and participation in the justice system and the development of law, policies and programs through support for consultations, research, the development and dissemination of information and the development, demonstration/testing and implementation of innovative approaches, models and pilot projects regarding the delivery of services, programs and assistance to victims of crime;
- * to promote the implementation of legislative reforms designed to address the needs of victims of crime and articulate their role in the criminal justice system (including Criminal Code, Corrections and Conditional Release Act and Youth Criminal Justice Act (proposed), Young Offenders Act and provincial and territorial victim legislation including Victim of Crime Acts, compensation legislation and victims of domestic violence legislation);
- * to promote the implementation of the Canadian Statement of Basic Principles of Justice for Victims of Crime (and any renewed and/or revised Statement), the United Nations Statement of Basic Principles of Justice for Victims of Crime.
- * to contribute to increased knowledge and awareness of the impact of victimization, the available services, assistance, programs and legislation, the

special needs of particular people due to the nature of their victimization or other characteristics, the training and development of skills of victim service providers and related/allied professionals;

- * to promote and encourage community/non-governmental organization involvement in the identification of victim needs and gaps in services, and in the development and delivery of programs, services and assistance to victims in their communities;
- * to enhance the involvement of non-governmental organizations through initiatives to build capacity within organizations (including training) to better meet the needs of victims of crime, to develop networks or referral mechanisms for service delivery and to enhance the participation of non-governmental organizations in the development of policies, programs and legislation;
- * to provide direct, limited, emergency financial assistance to individual victims of crime in exceptional circumstances and to survivors of victims of homicide who incur expenses to attend early parole eligibility hearings (s. 745.6 of the *Criminal Code of Canada*);

7.67 The four components of the Fund are:

Provincial and Territorial Implementation

- * this component assists provinces and territories to implement legislation for victims of crime; in particular the provisions of the Criminal Code (e.g., victim impact statement, consideration of victim safety at bail, publication bans, restitution);
- * Applications for a contribution may be made by the provincial or territorial ministry or agency designated by the provincial/territorial Attorney General or Minister of Justice.

Innovative Pilot Projects and Activities

- * this component provides financial assistance (grants and contributions) to

governmental and non-governmental organizations to promote the objectives set out above through innovative projects, public education initiatives, enhanced assistance to victims of crime, increased awareness of and access to services and assistance, establishment of referral networks, training initiatives and other initiatives.

Northern and Rural Projects and Activities

- * this component will provide financial assistance (grants & contributions) to governmental and non-governmental organizations to contribute to the development of and expansion of victim services and assistance and to increase access to such services in northern and rural communities.

Emergency Financial Assistance

- * this component provides limited emergency financial assistance to individual victims of crime or surviving family members faced with unusual or extreme hardship due to criminal victimization where no other adequate source of financial assistance is available;
- * in addition, this component provides financial assistance to surviving family members of homicide victims to attend early parole eligibility hearings (s. 745.6) including travel, accommodation and meal allowances in accordance with prevailing Treasury Board guidelines (actual expenses up to \$5,000 for first family member and \$2,500 for an additional family member);
- * applications for emergency financial assistance must set out the expenses reasonably anticipated to be incurred and/or actual expenses incurred.
- * the limit for emergency financial assistance will be communicated to applicants.

Recipients

7.68 Funds are available to:

- * Provincial and Territorial departments and agencies designated by the Attorney General or Minister of Justice of the province and territory as responsible for the provision of services to victims of crime are eligible to apply for contribution

- funding under the Provincial and Territorial Implementation Component;
- * Any of the following may apply for grants and contribution funding under Innovative Pilots Projects and Activities and Northern and Rural component to support the objectives stated;
 - * individuals
 - * national, provincial, municipal, Aboriginal, community or professional organizations, societies or associations;
 - * Canadian educational institutions;
 - * International non-government organizations including bodies associated or affiliated with organizations of which Canada is a member, which have as their purpose victim advocacy, services, assistance or raising awareness about the impact of victimization;
 - * International governmental organizations including organizations of which Canada is a member which have as one of their purposes, victim assistance, advocacy, research or other purposes related to victim issues
 - * private sector organizations sponsoring non-profit projects;
 - * Bands, Tribal Councils and self-governing First Nations who are working to provide services and assistance to victims of crime in Aboriginal communities;
 - * community organizations, societies and associations which have voluntarily associated themselves for a non-profit purpose, which have a mandate to represent their membership or community and which interface with, or whose clients interface with, the criminal justice system and where their activities support the objectives of the fund;
 - * provincial, territorial, municipal and regional governments;
 - * individuals, who are victims of crime, are eligible to make application under the Emergency Financial Assistance Component. The definition of "victim" in s. 722 of the Code will govern; and
 - * for-profit groups and activities are not eligible for funding under the Victims Fund.

Type Of Funding

7.69 Funding is primarily class grants and contributions.

Relationship With Other Justice Initiatives

7.70 Applications for funding are regularly reviewed to determine whether there is a link to other initiatives including Youth Justice, Aboriginal Justice, Family Violence and Crime Prevention. Opportunities to share financial contributions are continually explored.

Canadian Statement of Basic Principles of Justice for Victims of Crime

7.71 The Canadian statement of basic principles of justice for victims of crimes reads:

In recognition of the United Nations Declaration of Basic Principles of Justice for Victims of Crime, Federal and Provincial Ministers Responsible for Criminal Justice agree that the following principles should guide Canadian society in promoting access to justice, fair treatment and provision of assistance for victims of crime.

1. Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system.
2. Victims should receive, through formal and informal procedures, prompt and fair redress for the harm which they have suffered.
3. Information regarding remedies and the mechanisms to obtain them should be made available to victims.
4. Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings.
5. Where appropriate, the view and concerns of victims should be ascertained and assistance provided throughout the criminal process.
6. Where the personal interests of the victim are affected, the views or concerns of the victim should be brought to the attention of the court, where appropriate and consistent with criminal law and procedure.
7. Measures should be taken when necessary to ensure the safety of victims and their families and to protect them from intimidation and retaliation.
8. Enhanced training should be made available to sensitize criminal justice personnel to the needs and concerns of victims and guidelines developed, where appropriate, for this purpose.
9. Victims should be informed of the availability of health and social services and other relevant assistance so that they might continue to receive the necessary medical, psychological and social assistance through existing programs and services.
10. Victims should report the crime and cooperate with the law enforcement authorities.

Australia

7.72 In Australia the Association Victim Support Australasia exists to advance the interests of people victimised by crime and it encourages the development of support services throughout Australia whilst striving towards a crime-free society. The Association has a number of objectives:

- * to encourage and assist the development of consistent, high quality, equitable and accessible support services for people victimised by crime throughout Australia;
- * to promote fair and equal recognition of the rights and interests of people victimised by crime;
- * to promote legislative and other reforms throughout the criminal justice system that reflect the rights and interests of people victimised by crime;
- * to promote initiatives by individuals, communities and other agencies to improve responses to people victimised by crime;
- * to consult with and foster co-operation between victim support services throughout Australia;
- * to promote education and awareness; undertake, facilitate and encourage debate and research of issues that impact upon people victimised by crime.

7.73 The functions of the Association are:

- * to act as the peak body for member crime victim services in Australasia;
- * to encourage and promote consistent, high quality standards in the delivery of services to victims of crime throughout Australia;
- * to provide opportunities for the exchange of experience. Information and resources between victim service organisations in Australia;
- * to make representations on behalf of victim support services to government regarding legislative policy and services involving victims of crime;
- * to provide information and advice to individuals and groups planning to organise support services for victims of crime where such services do not exist.;
- * to publish and distribute reports leaflets, and other literature relating to the support services required by victims of crime at a national and international level;
- * to promote public education, research, and good support practice aimed at increasing awareness of and advancing knowledge about the issues and effects of crime on the victim, their families and the community;
- * to organise conferences on issues relating to victims of crime for members and other interested parties and to liaise with organisations, professions and interested groups whose contribution could be beneficial to victims of crime.

New South Wales

7.74 Victim services in New South Wales is part of the Attorney-General's Department and it consists of the Victims Compensation Tribunal, the Victims of Crime Bureau and the Victims' Advisory Board. The three sections work together to help victims of crime in New South Wales to access services and entitlements to assist in their recovery. An additional role of the Victims Crime Bureau is to co-ordinate support to families and friends of missing people. For the purpose of this report the relevant sections of the Victims of Crime Act, 1996 are discussed in some detail.

7.75 The Victims of crime Bureau is a government initiative and was established to provide a critical link between victims of crime and service providers throughout New South Wales. The Bureau's primary objectives are:

- * to provide support and referral services to victims of crime;
- * to co-ordinate the delivery of victims support and counselling services by government and community agencies;
- * to oversee the implementation of and report on the statutory Charter of Victims Rights; and
- * to co-ordinate support services to the families and friends of missing persons.

7.76 For the purposes of the Act a victim of crime is defined as a person suffering physical and/or emotional harm and/or property loss/damage, as a direct result of an act of violence committed by another person in the course of a criminal offence. The Victims Crime Bureau provides and co-ordinate a wide range of services either directly or indirectly including the following services:

- * in conjunction with the Sydney City Mission, provide a state-wide 24 hours Victims Support Line, which offers telephone counselling, support, information and referral service to victims of crime;
- * providing information to victims of crime about support services and counselling and compensation application procedures;
- * accrediting counsellors and administering the Approved Counselling Scheme;
- * monitoring the implementation of the Charter of Victims Rights;
- * hosting an Inter-agency forum of key stake holders in victims services and conducting projects arising from the inter-agency;
- * training and educating providers of services for victims of crime and the

- community;
- * developing resource materials (brochures, information kits and posters) relating to support services for and the rights of victims of crime;
- * publishing the Victims of Crime Chronicle which is a newsletter that provides updates on the Bureau's activities and a forum for the exchange of information;
- * developing and maintaining a data base of support services for victims of crime throughout New South Wales;
- * researching and developing policy and undertaking projects on matters affecting victims of crime; and
- * providing strategic policy advice to the Attorney-General and the Premier's Office.

7.77 In addition to the Victims Crime Bureau the Act also established a Victims Advisory Board with the object to advise the Minister (Attorney-General) on policies, practices and reforms relating to victims compensation, and support services; and to consult victims of crime, the community and government support agencies on issues and policies concerning victims of crime. The Act provides for the Board to consist of up to 10 members appointed by the Minister, including 4 members representing the community; a member representing the Police; a member representing the Attorney-General's Department; and members representing other relevant Government Agencies. Victims services provides an Executive Officer for the Board and the Executive Officer provides administrative, policy research supports for the Board.

Queensland

7.78 In Queensland the Criminal Offence Victims Act, 1995, provides for a set of fundamental principles of justice that must be observed in dealings with victims of crime. The Act contains a declaration which is a way of informing victims of crime in an easily understood way of the principles they can expect will underlie the treatment given to them by public officials. The Act accordingly makes provision for certain victims rights, for example, the right to fair and dignified treatment, access to justice, guidelines to help officials to respond to victims needs, information which must be provided to victims, protection of the privacy of the victim and the return of property, protection from violence and intimidation from accused persons, consideration of the welfare of the victim, providing information during the sentencing stage of the impact of the crime on the victim, providing the victim with information about the investigation of the case and prosecution of the offender, the role of the victim as a witness in the trial, information on victim

services, and information on compensation and restitution.

Australian Capital Territory

7.79 In the Australian Capital Territory the Victims of Crime Act, 1994 contains the legislative provisions dealing with victims of crime. The Act regulates the treatment of victims of crime, in that it provides for governing principles and their observance. Most importantly the Act also deals with the creation of a post of Victims of Crime Co-ordinator and it regulates the functions and powers of the co-ordinator. In addition the Act also establishes an Office of Crime Co-ordinator.

7.80 In terms of section 7 of the Act the co-ordinator has the following functions in connection with the administration of justice:

- * to promote the governing principles relating to the treatment of victims of crime;
- * to encourage the provision of efficient and effective services for victims of crime;
- * to promote reforms to meet the needs of victims;
- * to develop educational and other programmes to promote the awareness of the needs of victims;
- * to disseminate information concerning the operation of the Act and the functions of the co-ordinator;
- * to ensure, as far as practicable, that victims receive the information and the assistance they need ;
- * to maintain a register of services available to victims;
- * to advise the Minister on matters relating to victims; and
- * any other function assigned to the co-ordinator by or under any other law of the Territory.

7.81 The co-ordinator is also entitled to be present at the hearing of a proceeding in a court in respect of an offence. He may investigate conduct in the administration of justice which he believes on reasonable grounds involves a breach of the governing principles and must report the findings of the investigation to the Minister. He has the power to do all the things necessary or convenient in connection with the performance of his functions. The co-ordinator is appointed by the Minister in writing and holds office for the period specified in the letter of appointment. He is also eligible for reappointment.

South Australia

7.82 Like in other Australian states, the treatment of victims of crime is informed by the Declaration of Principles governing the treatment of victims. Although these principles are not enforceable in criminal or civil proceedings they do not give rise to any right to damages for breach and they do not affect the conduct in criminal proceedings, public agencies and government officials are required to have regard to and give effect to the principles as far as practicable to do so and having due regard to other binding obligations. The Victims of Crime Bill, which was assented to on 15 November 2001 as Act 58 of 2001, lay down the principles which govern the treatment of victims of crime in the criminal justice system and it provides for limited rights to statutory compensation for injury suffered as a result of the commission of criminal offences.

7.83 As far as the services to victims of crime are concerned section 15 provides that the Attorney-General may establish an advisory committee to advise on practical initiatives that the government may take to ensure that victims of crime are treated with proper consideration and respect in the criminal justice system, to help victims of crime to recover from harm suffered by them, and to advance the interests of victims of crime in other ways. Members of the committee are appointed by the Attorney-General and they hold office for a term and on conditions determined by the Attorney-General. The Governor may appoint a suitable person to be the Victims of Crime Co-ordinator who has the following duties:

- * to advise the Attorney-General on marshalling available government resources so they can be applied for the benefit of victims of crime in the most efficient and effective way; and
- * to carry out other functions related to the objects of the Act assigned by the Attorney-General.

7.84 The Victims of Crime Co-ordinator is *ex officio* a member of the advisory committee and he/she holds office on a basis determined by the Governor.

7.85 The Bill also provides for the establishment of a Victims of Crime Fund. This Fund was the former Criminal Injuries Compensation Fund. The Fund consists of money provided by Parliament for the purposes of the Fund; a prescribed portion of the aggregate amount paid into General Revenue by way of fines; amounts recovered by way of levy under the Bill; amounts

recovered by the Attorney-General; and money paid into the Fund in terms of other legislation. The Attorney-General has an absolute discretion to make payments from the Fund to a Government or non-government agency for a purpose that will in the opinion of the Attorney-General assist in the prevention of crime or advance the interests of victims of crime. He also has a discretion to make other payments from the Fund for the benefit of victims of crime that will help them to recover from the effects of crime or advance their interests in other ways. Provision is made that a levy is imposed on all persons convicted of offences after the commencement of the Act and on all persons who expiate offences under expiation notices issued after commencement of the Act. The amount of the levy is fixed by regulation and the amount may vary according to a number of factors, including -

United Kingdom

7.86 In the UK Victim Support is a national and independent charity which helps people cope with the effects of crime. It is a completely independent organisation, offering a free and confidential service, irrespective of whether or not a crime has been reported, and it provides information to help victims to deal with their experiences. Victim Support aims to promote and advance the rights of victims and witnesses in all aspects of criminal justice and social policy. Victim Support offers a comprehensive service and is committed to welcoming and involving minority and disadvantaged groups throughout the organisation. It is committed to providing people affected by crime with appropriate and sufficient recognition, support and information and to ensuring that their rights are acknowledged and advanced in all aspects of criminal justice and social policy. The laws and systems affecting victims and witnesses differ across the UK and Ireland. Victim Support covers England, Wales and Northern Ireland and offers the following services:

Local Schemes:

- * Victim Support has a network of 375 local Schemes, where trained staff and volunteers provide emotional support, practical help and information to people affected by crimes ranging from burglary to the murder of a relative.
- * The National Witness Service: Victim Support's Witness Service offers emotional support and practical information about court proceedings to witnesses, victims and their families. There are Witness Services in every Crown Court centre, and

in a growing number of magistrates' courts, in England and Wales. By 2002 the aim is to be able to offer help to witnesses in all courts before, during and after the trial.

- * Victim Support line 0845 3030900: The Victim Support line is a national local number providing a point of contact for anyone who has suffered the effects of crime, regardless of whether or not the crime has been reported. The Support line's trained staff and volunteers offer emotional support, information, and a safe and confidential means of exploring what help might be available locally. Calls are charged at local rates from anywhere in the UK.
- * Victim Support's services are free and follow a nationally agreed Code of practice.

Source of funding

7.87 Victim Support National Office (66% Home Office; 34% fundraising and other income (1997/98 figures)), Local Schemes (76% Home Office, 10% Local Authority funding, 14% fundraising and other income (1997/98 figures)). All local Schemes are registered charities and are expected to raise additional income through their own efforts to supplement Home Office funding. Schemes also fundraise locally in order to provide specialist and/or additional services.

7.88 Over a million people are referred to Victim Support for help every year and many others contact us directly, whether or not they have chosen to report a crime. It is only possible for us to offer help to so many people because over 13,000 trained volunteers give freely of their time and energy to support victims of crime in their local community. The costs involved in the recruitment, training and day-to-day support we provide to this vast volunteer workforce are considerable.

7.89 As an independent charity Victim Support must raise money to carry out its vital work in every community in England and Wales. Money is raised through events, corporate partnerships, trusts and foundations, the National Lottery and sales of Christmas cards and merchandise. The Home Office also provides support through an annual grant which helps cover some of the running costs of the National Office, local Schemes, Witness Services and the Support line.

7.90 Although Victim Support is meeting the needs of so many people, there is much more that could be done if only the funds were available. Areas of work for which they urgently need funds include:

- * developing support services for children and young people who become victims of crime.
- * raising awareness of the Support line number and the help that is available, whether or not someone has reported a crime. This service is particularly important for victims of unreported crimes, such as sexual assault, domestic violence, race crime and stalking.
- * the provision of practical information to help people who become victims of racial harassment and bullying and reassurance about the feelings they may experience following a crime.
- * developing their work with Youth Offending Teams, to ensure that victims' needs are understood and respected within restorative justice programmes.
- * enhancing their training of volunteers to achieve the highest standards, consistently across the country.

How does Victim Support work?

7.90 Each year Victim Support offers help to over one million people who have been affected by crime. This help is provided through a network of local Schemes across the whole of England, Wales and Northern Ireland (there are separate organisations covering Scotland and the Republic of Ireland). Staff and volunteers within these Schemes are trained to provide emotional support, information and practical help to people who have suffered the effects of crime ranging from burglary to the murder of a relative.

7.91 Victim Support also runs the Witness Service, based in every Crown Court centre in England and Wales, and in a growing number of magistrates' courts. Staff and volunteers are trained to provide support and information about the court process to witnesses, victims and their families, before, during and after the trial. It was envisaged that by April 2002, witnesses

in any of the criminal courts in England and Wales would be able to receive help.

7.92 People affected by crime can also contact the Victim Support line - a national local telephone number. Trained staff and volunteers offer support and information to victims and witnesses of crime in complete anonymity, and can put people in touch with local Victim Support services and other relevant organisations if required. Victim Support has two primary objectives:

- * to provide support and assistance to individual victims, witnesses, their families and friends;
- * to raise public awareness and recognition of the effects of crime and promote victim's rights.
- * By striving to meet these objectives Victim Support aims to provide a comprehensive, flexible service to reduce the effects of crime.

7.93 The framework within which Victim Support operates is based on the following philosophy:

- * Free and confidential services. The services provided to victims of crime are free. Information about an individual, including whether a Scheme or Witness Service knows that person, is held in confidence.
- * The victim decides. Victim Support respects the individual's right to make their own decisions. Victim Support believes it is their role to make sure that victims and witnesses have access to services if they want them, but not to tell people what they need or what they should do. We understand that people are individuals and will react to crime differently. Victim Support helps people to regain control of their lives following crime.
- * Equal opportunities. Victim Support aims to offer a service to all sections of the community and is committed to ensuring that minority and disadvantaged groups are welcomed and involved throughout the organisation.
- * Working with other agencies. Victim Support is a completely independent organisation, but as a community-based service it has close working relationships with a wide range of other voluntary and statutory services. Victim

Support works in close co-operation with the police, the Home Office, the probation service and others within the fields of criminal justice and social welfare in order to improve policies and practices regarding victims and witnesses of crime.

- * Victim Support does not make public statements on the punishment and sentencing of offenders, except when discussing issues which directly involve the victim, for example compensation or protection.
- * All Victim Support's services are run according to a nationally maintained Code of practice. This code is continually developed to ensure optimum services and national consistency. The Home Office's standards of service for Victim Support are set out in the *Victim's charter*. Victim Support welcomes comments and suggestions about the service provided for victims and witnesses of crime. They also operate a formal complaints procedures of which details may be obtained from the National Office or from local Victim Support Schemes/Witness Services.

The Justice and Victims Unit (JVU)

7.94 This Unit is responsible for issues relating to procedures in the criminal courts, and for the policy which relates to victims of crime (including compensation for victims) and funding the Victims Support organisation. The Unit has the following areas of responsibility:

Compensation and Victims Issues

7.95 The areas of responsibility includes court compensation orders; review and oversight of the Criminal Injuries Compensation Scheme; victims of crime policy issues; Victim's Charter; administration of grants to 'Victim Support'; witness support services in the Crown and Magistrates' Courts; administration of grant to 'Support After Murder & Manslaughter'.

Prosecution Policy; Reducing Delay in the Criminal Justice System; Procedure in the Magistrates Courts

7.96 The areas of responsibility includes prosecution policy (including policy issues relating

to the relationship between the police, CPS and the courts, and the Home Office interest in the reform of the CPS); reducing delay in the criminal justice system - (i) Narey measures, including new indictable-only procedures; (ii) time limits in criminal proceedings; policy on police cautioning of adult offenders; bail in criminal proceedings; policy on criminal procedures in magistrates' courts (adults); criminal legal aid (HO interest); crediting of remand time towards sentences; TV links between courts and prisons.

Policy on Criminal Evidence and Procedure in the Crown Court and Court of Appeal (Criminal Division)

7.97 The areas of responsibility includes procedure in the Crown Court and Court of Appeal (Criminal Division); criminal evidence, including oaths; disclosure of prosecution material in criminal proceedings; Juries, including juries in fraud trials and election for jury trial; appeals, including unduly lenient sentences; procedures for vulnerable or intimidated witnesses, including implementation of 'Speaking up for Justice' and Part II of the Youth Justice and Criminal Evidence Bill; child witnesses (excluding child defendants) - evidence and procedure in criminal proceedings.

Trials Issues Group

7.98 The areas of responsibility includes joint Performance Management; Trials Issues Group; Police Prosecution File Standards; National Register of Public Service Interpreters (Home Office interest).

Criminal Cases

7.99 The areas of responsibility includes policy and casework relating to (a) compensation for wrongful conviction or charge; (b) the exercise of the Royal Prerogative of Mercy; oversight of the Criminal Cases Review Commission; casework relating to alleged wrongful conviction in the Channel Islands and Isle of Man.

PART II**CHAPTER 8****THE ROLE OF VICTIMS IN THE CRIMINAL JUSTICE SYSTEM**

8.1 The Commission considered the role of victims in the criminal justice system in the course of its investigation and made some recommendations and proposals in the issue paper dealing with restorative justice. These proposals and the comments received thereon are outlined hereafter.

SUMMARY OF PROPOSALS WHICH WERE SUBMITTED FOR COMMENT IN ISSUE PAPER 7 ON RESTORATIVE JUSTICE**VICTIM EMPOWERMENT**

8.2 Comments were invited on the proposals outlined below as well as further suggestions or proposals for the improvement of this aspect of the law.

1. IS THERE A NEED FOR LEGISLATION TO CO-ORDINATE VICTIM SUPPORT SERVICES IN SOUTH AFRICA?

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

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

(a) A Victim's Advisory Council or an office for a Victims of Crime Co-ordinator should be established by way of legislation to address the plight of victims.

(b) The Council should comprise of representatives from government agencies such as the Department of Justice, Health, Social Development, Police Services and representatives from NGOs and CBOs.

(c) Legislation should provide for a number of principles which should govern the treatment of victims. Comments are invited on the following principles:

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

custody.

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

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

8.5 Any other suggestions and further proposals for reform are invited.

2. IS THERE A NEED FOR LEGISLATION TO ADDRESS SPECIFIC NEEDS IN THE CRIMINAL JUSTICE SYSTEM?

(i) Recognition of a victim impact statement

8.6 The following proposals are submitted for comment:

- * Victim impact statements ought to be generally admissible at sentencing hearing. The purpose of such statements should be to afford a measure of the seriousness of the offence and should be spelled out in legislation.
- * Victim impact statements should only be admissible in respect of cases where they furnish the court with particulars that are not already before the court in evidence or in a pre-sentence report.
- * For the purpose of such a statement “victim” should be defined as the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injury as a result of the offence.

- * Victims should have the option to tender a statement and the right to request the prosecutor to refrain from presenting the court with details of injury.
- * Victim impact statements should be signed, or otherwise acknowledged as accurate by victims before they are received by the sentencing court.
- * Such statements in sworn form ought to be tendered by the prosecution at the sentencing process.
- * The statements ought to address the actual physical, psychological, social and financial consequences of the offence on the victim and not the question of an appropriate sentence which ought to be imposed.
- * The court should have the discretion to disallow a statement and the author should always be subject to cross-examination on the contents of the statement.

(ii) Provision should be made for victim-offender mediation

8.7 The following proposals are made:

- * Referral by the court to a mediation process should be considered when the victim and the offender wish to come to an agreement about the offender's future contact with the victim or where the parties desire some form of compensation or reconciliation.
- * Family group conferences involving the offender, the victim, the supporters of each of them and an independent mediator should be considered where appropriate.
- * Community Aid Panels should be considered in appropriate cases, in particular where the community has an interest in the outcome of the case and where the panel may be required to recommend a course of action which will involve voluntary community work, skills training or counselling.
- * Circle sentencing may be considered in order to involve persons affected by the crime as well as those who can contribute to resolving the issues involved, eg relatives, neighbours and friends.

(iii) Consultation between public prosecutors and victims

8.8 Examples of provisions for crime victims within the criminal justice system in foreign jurisdictions are: considerate reception by the police, referral to support agencies, provision of

advice on preventive measures, the right to be notified of the outcome of the investigation or of ensuing criminal proceedings, the right to inform the court about the impact of the victimization and the right to receive restitution from the offender.

8.9 Comments were invited on the following proposals:

- * Guidelines should be issued to the police and prosecutors on the treatment of victims of crime in the criminal justice process.
- * Guidelines should be developed by the Victim Advisory Council.
- * If necessary, legislation should be adopted to enforce these guidelines.

SUMMARY OF COMMENTS ON ISSUE PAPER

1. A RESTORATIVE JUSTICE APPROACH TO CRIMINAL LAW

8.10 Lawyers for Human Rights supports the move away from a retributive justice model towards more community based conflict resolution models in which the victim is restored to his or her position as a central role player in the search for solutions.

8.11 The Catholic Commission for Justice and Peace believes that a restorative justice approach towards crime has the potential of putting South Africa at the forefront of efforts to create a more humane, effective and more victim-orientated criminal justice system. The standpoint of the Catholic Church has always been that, while crime must be punished, and society be protected from criminals, retribution and revenge cannot serve the moral basis of a justice system. The aim must always be to strive for the rehabilitation of the offender and for his or her reintegration into society. The Church believes that the interests of victims must also be accorded a high priority and that a direct role for victims should be facilitated wherever possible.

8.12 The Gauteng provincial branch of the Department of Social Development and Population Development is of the view that restorative justice will bring about a more equitable balance of justice. The involvement of the community is essential and will bring about community involvement in toto. It is vital to have adequate funds for educational and other programmes to promote awareness of the needs of victims. Legal advisory services could be set up in all centres and money should be made available for free psychological counselling for all survivors

of violence. Offenders should be held more responsible for their behaviour. It is also imperative to provide training to all officials in the criminal justice system to sensitise them to the needs of victims of crime. Victim support services should start at grass roots level with pre-school children and should continue throughout the child's school career. There is a definite need for an umbrella body such as the state to monitor and compensate victims of crime.

8.12 Professor DP van der Merwe of Unisa is of the view that the main problem with the criminal justice system is one of morality or values. Criminal justice is suffering a legitimacy crisis. African criminal justice would involve the entire community, including the families of both the victim and the alleged offender. It would also involve some form of reparation or restitution to the victim. In traditional African law not all the beasts went to the chief hearing the case, part of the fine was for the benefit of the victim. A restorative approach to the criminal justice system would focus on reconciliation rather than punishment, would lead to offenders accepting responsibility for their behaviour and would lead to victim involvement in the final outcome.

8.13 The Centre for the study of Violence and Reconciliation submits that restorative justice needs to be viewed as a very wide-reaching alternative to retributive or punished-based justice which is also concerned with the offender's circumstances and needs, repairing relationships and larger issues of social justice. The need for victims to really experience justice, for offenders to be accountable and accept responsibility for their actions and for communities to examine and address the underlying causes of crime in their neighbourhoods are all integral components of a restorative vision. Unless the broader vision is clearly spelled out and understood certain areas will be ignored and those that are looked at may be addressed in terms too narrow to effect real progress.

8.14 Victim-offender reconciliation programmes, sentencing alternatives and victim compensation are all important parts of a restorative justice approach, but do not, in themselves complete a restorative approach. Goals and priorities need to be spelled out clearly, because, for example, victim-offender mediation can address a variety of issues with relation to crime. Some possibilities are that they can serve as an alternative to punishment, help reform offenders, aid victims, involve communities or administer punishment more cost effective. While it is certainly positive if programmes are able to impact in a number of areas, it needs to be realised that some goals may be contradictory. If providing opportunities for repairing relationships and achieving reconciliation is the key priority of mediation, then the success of the effort needs to be judged with regard to that, and whether or not offenders lapse into

recidivism needs to be viewed as a secondary goal. It is important to keep the values and results of programmes consistent with those of restorative justice, lest the programmes become simply another form of punishment. A possible example is of alternative sentencing options becoming just a way of reducing the workload of the courts or becoming pre-occupied with meeting administrative goals such as quick resolution of cases, and thereby ceasing to be effective avenues of community involvement in solving the problems created by crime.

8.15 In the discussion of a restorative vision it is important to include the issue of the needs and circumstances of the offenders. Offenders need to be encouraged to understand and realise the consequences of their actions, to be made accountable and, if possible, to accept responsibility. A broader view of restorative justice not only look at the criminal, but also at social and economic aspects. Restorative justice entails the community playing a larger role not only in terms of crime control but also with regard to solving problems caused by crime.

8.16 Mr PJ Jacobs, magistrate Bloemfontein, is of the view that it is the moral duty of the State and it is necessary to incorporate restorative justice into our legal system.

8.17 The SA Council for Social Work supports the introduction of a restorative justice approach to crime which will put victims central to the criminal justice system.

8.18 Jacob Raseroka and Lawrence Muzame, researchers for the National Institute for Public Interest Law and Research are of the view that the criminal justice system seems to alienate victims of crime by leaving them out of the whole process of apprehension, adjudication and sentencing. The victim has an integral part in the whole process and should be informed about proceedings of the case from its inception until sentence is passed. It is sad to note that victims as State witnesses are more often than not inadequately prepared prior to the commencement of the case. The manner in which victims are handled by police officers and other law keeping agencies is an issue that should be addressed. The criminal justice system does not provide for the offender as an important party to the whole process of sentencing which makes the system one-sided.

8.19 Counselling as a service should not only be applied to victims but also to offenders. Detention of offenders is not a solution to the crime problem despite its adoption by the criminal justice system. Detention only hardens the offender and encourages recidivism.

8.20 Hugh Wetmore urge Government to adopt an understanding of its welfare duty as follows:

Government has a welfare duty to its citizens, for which it is accountable to God. The Government is God's servant to do the citizen good. Having been delegated its authority by God, the Government should model its style of government on God's style. God handles His welfare responsibilities not by gratuitous hand-outs but by enabling mankind to work. Government must be primarily enabling rather than dispensing.

2. CO-ORDINATED VICTIM SUPPORT SERVICES

8.21 Lawyers for human rights points out that efforts at victim support services have been most prominent in the non-governmental sector and have tended to polarise around issues relating to women and children. Lack of funding has made it difficult to provide co-ordinated services. What should be recognised is that an attempt to bring about co-ordinated victim support services should build on initiatives already in operation. The State could play a co-ordinating role and should contract out victim support services where this is possible. Provision of such services is a very local function and local government should be engaged, in particular, with regard to resources. The role of prosecutors should be redefined and prosecutors need to be trained appropriately so that they do not see thorough consultation with the victim as an optional extra.

8.22 Cheryl Goodenough is of the view that there is a desperate need to regulate victim support services. Testifying in court in cases of traumatic nature often denies a complainant the right to dignity. She volunteered as a counsellor for Rape Crisis but stopped counselling after her experience with the criminal justice system because when a witness is in the witness stand that support means nothing. Witnesses are forced to answer humiliating questions to which no one objects and it makes no difference if you have a room full of support.

8.23 Lawyers for human rights support the idea of legislation to co-ordinate victim support services. Although Councils and Commissions are abound in South Africa it may be worth considering such a body. The advantage it would have is that it would force inter-sectoral co-operation and would ensure the involvement of NGOs and CBOs.

8.24 All participants at a workshop hosted by the Centre for Criminal Justice, University of Natal, agreed that there is a need for a body for victim support in South Africa. It was also agreed that this body should be constituted by the Departments of Social Development, Justice,

Health, SAPS and the NGOs which specialise in gender issues and CBOs.

8.25 Mr AM Bluhm agrees that it is the State's responsibility to make available medical, dental and other counselling and therapy services to victims of crime to help them in whatever way possible. In certain cases these victims should qualify for a State allowance, eg a disability-, children allowances in cases where the provider is dead or disabled.

8.26 The Women's Lobby supports the idea of legislation to regulate support services for and treatment of victims of crime.

8.27 The Law Society of the Cape of Good Hope supports the concept of co-ordinated victim support services and the principles identified in the issue paper in paragraph 4.6(c). As central to the treatment of victims of crime. In particular, the committee believes that victims should be informed about imminent release of accused persons against whom they have laid a charge. The committee comments that similar provision should be made in the Correctional Services Act to ensure notification to victims of the imminent release on parole of accused persons. The committee does not believe that there is a need for legislation to regulate the support and treatment of victims of crime, stating that this is an administrative matter which is better addressed by departmental directives.

8.28 Advocate Botha from the office of the Director of Public Prosecutions, Bloemfontein, agrees that at present our courts are not victim friendly and victims are afforded sufficient protection in court. Considering the workload of prosecutors it is difficult and sometimes impossible for a prosecutor to consult with witnesses a day or two before the trial.

8.29 Mr L Naidoo, member of the Criminal Law Procedure Committee of the Natal Law Society, is of the opinion that legislation to co-ordinate victim support services will go a long way in addressing the perception that the rights of law abiding citizens have been marginalised with the great emphasis which is placed on the Bill of Rights in South Africa. Legislation should provide principles for the treatment of victims of crime by way of a code of conduct with certain minimum standards by which agents of the State must abide when dealing with victims as victims fulfill an important role in the effective functioning of the criminal justice system and legislation must value the contributions of victims and thereby fostering greater participation of victims in the system.

VICTIM AND COMMUNITY PARTICIPATION IN SENTENCING

8.30 Prof de Koker, University of the Orange Free State supports the right of the victim to address the court on sentencing. It is an important measure to empower victims, but it should not create an obligation for the victim nor should it influence the court unduly.

8.31 Pagad, Kwa Zulu Natal, submits that victims should be empowered in their search for recognition through direct participation in the criminal justice system. There should be improved consultation between the victim, the police and prosecutors and legislation should recognise victim impact statements. Procedures involving victim-offender mediation should be introduced.

8.32 Cheryl Goodenough was attacked during 1996 and the complainant in an attempted murder case. As a result she had both some dealings with the criminal justice system. In her view prosecutors does not have adequate time to inform victims. Victims should be consulted before prosecutors accept pleas on lesser charges. Victims have a need to inform the court of the effects which the criminal act has had on their lives.

8.33 Advocate N Cassim is of the opinion that community panels should be part of the sentencing process in appropriate cases where the community has an interest in the outcome of the case. Victim-offender mediation is a delicate process and should be considered in those cases where the victim and the offender belong to the same family, neighbourhood or community. To this end the establishment of specific mediation or reconciliation facilities involving psychologists and members of the legal profession as facilitators should be established.

8.34 All participants at a workshop hosted by the Centre for Criminal Justice, University of Natal, agreed that community representatives should be elected whenever there is a crime committed by a member of that community and the representatives should be involved in the sentencing stage to decide how the perpetrator should be sentenced. They then have to report back to the community.

8.35 Mr PB Monareng, former Regional Court President, North West is of the view that it cannot be overstated that the community must be invited to participate in the justice process. An accused person would be properly punished if there is participation in the process by people you know and people you live with because the accused should, after all, be reintroduced into

the community after serving his or her sentence.

8.36 Jacob Raseroka and Lawrence Muzame, researchers for the National Institute for Public Interest Law and Research are of the view that community involvement in sentencing is an important element, which should be added to the criminal justice system. Family group conferencing, community youth conferences, community aid panels and circle sentencing are some forms of community involvement. Community aid panels and community youth conferences seem to be too theoretical a solution for South Africa. Family group conferences are a more workable solution for South Africa, especially with juvenile offenders. The community would know more about the offender than an outsider and hence can formulate a better plan of dealing with the offender. The community acts as watchdog and it has both reparation and retributive effects. It is submitted that community involvement would be enhanced by-

- * re-visiting the jury system;
- * re-visiting the African indigenous court system;
- * allowing the community to act as watchdog over offenders particularly where the offender is released on parole or is given a suspended sentence; and
- * the State should seek ways of promoting community policing as an essential tool in the criminal justice system.

8.37 The Women's Lobby supports the need to involve the community in the criminal justice system and the need to promote the victim's interest by helping to alleviate the secondary victimisation such as injury, loss of job and loss of victim's family. There is a need to involve the community in the criminal justice system to remove the impersonal element of the State as the punitive patriarch. However, they caution against some people's possible attitude of vengeance.

8.38 From the comments on the Commission's discussion paper on a compensation fund for victims of crime, which were discussed in chapter 6, it is clear that there is overwhelming support for the view that victims should have a better deal in the criminal justice system. There was also support for the improvement of victim services.

PART III

THE COMMISSION'S EVALUATION AND RECOMMENDATIONS

CHAPTER 9

EVALUATION - A COMPENSATION SCHEME FOR VICTIMS OF CRIME

9.1 In this chapter the Commission gives an overview of its conclusions and its evaluation after considering its initial proposals and the written comments and the comments submitted during the course of its regional workshops. In view of its initial conclusions the Commission was forced to engage in further consultation with the Office of the National Director of Public Prosecutions and the Department of Justice. The Commission therefore gives an outline of its initial conclusions and recommendations which included that legislation should provide a comprehensive package dealing with the needs for victims of crime which should include, as a minimum, the creation of a permanent structure like an Office for Victims of crime, the creation of an Advisory Council to advise government of policy and legislation, the introduction of principles governing the treatment of victims and the creation of a separate fund to facilitate the establishment of victim services. This is followed by an outline of the further consultation process and the chapter concludes with the Commission's final conclusions and recommendations.

9.2 Before embarking on further consultation the Commission considered the viability of establishing a compensation fund for victims of crime, the arguments for and against its establishment, the role of victim empowerment, the need for law reform and the rationale for improved services to victims of crime and concluded that establishing a compensation fund was not a viable option and that it should be further developed within the broader objective of improved services for victims of crime. The Commission considered the current victim empowerment initiatives like the Victim Empowerment programme within the National Crime Prevention Strategy, its effectiveness and shortcomings and concluded that without a legislative basis the VEP programme is doomed to fail. The Commission furthermore concluded that there was a need to establish a effective and co-ordinated victim services by legislative intervention. In this regard the Commission considered international examples like Canada and Australia and concluded that victim services is a government responsibility and a government Department should take care thereof.

ARGUMENTS FOR IMPLEMENTING A COMPENSATION SCHEME

Theoretical approaches

9.3 Convincing arguments for the establishment of a compensation scheme for victims of crime were developed in two discussion documents¹ produced by the South African Law Commission. Both argue for the introduction of a compensation scheme for victims of crime from a number of perspectives or theoretical approaches. These can be summarised as:

- * *Legal liability theory*: this approach is based on the assumption that the State has a legal duty to compensate victims for all damages and losses suffered as a result of the commission of an offence because the State is considered responsible for allowing the crime to be committed.
- * *Social contract theory*: this theory is founded on the philosophy of moral duty and in terms of this approach victims of violent crime have the privilege to receive compensation as opposed to the right. Compensation is granted on the grounds of sympathy, goodwill and humanitarian reasons because the State cannot be held liable for all crimes.
- * *Accountability theory*: this theory would argue that the State makes contributions available to victims of crime and, in so doing, a partnership is formed with the State in combating crime. The best analogy for understanding this approach is that of an insurance scheme whereby the population pay taxes as their assurance and the state offers compensation in return. To try and reduce pay outs the State attempts to maintain a society with minimal crime and the citizens, in turn, act responsibly to keep their tax payments to a minimum.
- * *Utilitarian theory*: this theory argues that the successes of a compensation scheme will benefit the judicial system and, therefore, assist in restoring relationships within the community. The victims know compensation is available and will, therefore, co-operate with the criminal justice system and may even get involved in combating crime.

9.4 If one explores the motivations for a compensation scheme, then aspects of each of these theories can apply. However, a sound motivation with a solid theoretical base was not evident in the literature. This section, therefore, provides a motivation for a compensation scheme based on an eclectic use of the theories outlined above, whilst providing additional

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South African Law Commission, Discussion Paper 97, Project 82; South African Law Commission, Issue Paper 7, Project 82.

considerations that strengthen the argument to set up a compensation scheme in South Africa.

* **Victim empowerment**

9.5 By far the most convincing reason for the existence of a compensation scheme in the international literature is the compassionate and moral arguments, which are most akin to social contract theory. These arguments, broadly speaking, acknowledge that victims of crime (particularly violent crime) need to be assisted in some way, especially in contexts where the State does little directly to assist them or where the perpetrators remain at large. Such arguments are commensurate with the victim empowerment approach, which stresses that those victimised by violent crime should be treated with dignity and assisted in whatever way possible. In this respect, comprehensive victim empowerment would include not only assistance through the provision of service and assistance, but, in some cases, financial compensation for losses endured.

9.6 There is evidence to show that crime has been increasing in South Africa over the last thirty years. The number of offenders apprehended, however, has not necessarily increased at the same rate. It is estimated in South Africa, for example, that one in seven murders, one in 13 reported rapes, one in 34 armed robberies, one in 50 car thefts and one in 55 car hijackings results in a conviction.² On the whole, only 5.4% of crimes reported to the police result in conviction.³ One of the results of this is that 41% of South Africans would either 'never' or 'hardly ever' trust the police to investigate a crime or catch criminals.⁴

2

H C Cawthra with G Kraak 'Annual Review: The Voluntary Sector and Development in South Africa 1997/1998' (1999) *Development Update* Johannesburg: South African National NGO Coalition & INTERFUND; Steinberg, 1999.

3

South African Law Commission, 2000, p.18.

4

Reality Check 'Reality Check Survey of the Attitudes of South Africans' *Cape Times, The Star, The Mercury, Pretoria News, Diamond Fields Advertiser and Sunday Independent* April 28 1999.

9.7 This highlights the importance of improving the rates of arrest and conviction; a process which the South African government is exploring on a number of fronts.⁵ However, it also highlights the importance of putting mechanisms in place to assist the victims whose cases will not get to court and for whom redress directly from the perpetrator is impossible.

9.8 Even where a conviction takes place, international experience suggests that emphasising compensation from the perpetrator will produce poor results. In South Africa, it has been shown that the majority of accused persons do not have the means to compensate their victims.⁶ Moreover, it has been argued that it is particularly difficult or inappropriate for accused people to be expected to pay compensation when they are imprisoned for an extended period and, consequently, have no earnings.⁷

9.9 Even in Europe, where criminal justice systems are significantly better resourced than in South Africa, payments made by offenders to victims occur in relatively few cases.⁸ This is because offenders, when apprehended, are generally poor and unable to make payments to the victim. Even in cases where victim-offender mediation has taken place, it is difficult to believe that compensation will represent more than a small proportion of the losses suffered by the injured victims or their dependants.⁹ In South Africa, it seems that compensation is more applicable where the court can suspend a sentence, but this is not possible under the current Act that defines the application of compensation orders.¹⁰ In any event the suspended sentences does nothing to foster the capacity to pay if the offender is unemployed.

5

NCPS, 1996; SALC Sentencing Qualitative Research Report, 2000

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South African Law Commission, 2000, p.74.

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South African Law Commission, 2000, p.74.

8

Greer, 1996.

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Greer, 1996.

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South African Law Commission, 2000, p.74.

9.10 Therefore, a compensation scheme for victims of crime, along with a comprehensive victim empowerment programme, could meet some of the needs of victims whose cases do not reach court or where compensation from the perpetrator seems unlikely. Simultaneously, a compensation scheme could build confidence in the criminal justice system by demonstrating that it is a system that is sensitive to the needs of victims. This could encourage victims to form a partnership with the State to combat crime and would clearly enhance reporting rates.

* **State responsibility**

9.11 One response to the arguments made above could be that the State already provides a range of social welfare benefits to victims of crime in the form of State medical facilities and legal aid (in some cases, although, mainly to offenders). Why, therefore, should crime victims be given direct financial support over and above what is offered?

9.12 Firstly, the support services available to victims of crime in South Africa are minimal.¹¹ Secondly, the criminal justice system is beleaguered with inefficiencies and the support that victims get at police stations and in some health facilities are ineffective.¹² Thirdly, state legal aid services are in disarray. Although the agency is slowly being hauled back onto a sound financial footing, the board is reportedly plagued by maladministration and owes lawyers more than R80m for work done during the past three years, resulting in many lawyers refusing to take on more cases.¹³

11

Camerer & Kotze, 1998; B Hamber 'Have No Doubt There Is Fear In The Land. An Exploration Of The Continuing Cycles Of Violence In South Africa' (1999) Jg 7, Nr 1+2 *Zeitschrift für Politische Psychologie* 113-128; NCPS, 1996; G Simpson 'Crime and Violence: The Need for Victim Support in South Africa' (1996) in *Putting Victims on the Agenda, Proceedings of a National Workshop on Victim Empowerment and Support* (Monograph Series No 7) edited by L Camerer and J Nel Pretoria: Institute for Security Studies.

12

South African Law Commission, Project 82, p.3.

13

Business Day, 20 July 2000.

9.13 Finally, the costs of crime can far exceed the type of services offered by the State, such as repairs to a home following a crime, loss of income over an extended period of time, vocational retraining and so on. Given this, it would make sense, if a State had the resources, to assist victims of crime practically with some sort of compensation.

9.14 One of the key premises on which state-funded compensation is based is that the State is under an obligation to maintain law and order, and that the commission of the crime is a result of the failure of the State to do so effectively (legal liability theory). If one approaches the argument from the point of view of State liability, the argument rapidly moves beyond the parameters of merely practical social security assistance to the victim. In this respect, compensation to the victim becomes effused by legal notions of the victim's right to embark on civil litigation against the State. Compensation for the victim of a criminal offence becomes, in the context of a State compensation scheme, a claim against the State for personal injury caused.

9.15 However, although such a claim rightfully exists against the offender, when it is the State against which the claim lies, this becomes more complex and brings the social liability theory into question. No countries that grant compensation to victims of crime accept that the reason for granting compensation is based purely on a notion of the legal liability of the State. As was recently stated by the team reviewing the criminal compensation scheme in Northern Ireland:¹⁴

Neither in the United Kingdom, nor in any other jurisdiction of which we have knowledge, does the State regard itself as a kind of surrogate offender.

9.16 Greer¹⁵ concludes that State compensation is not in general a matter of 'right' governed by recognised and entrenched legal principles - a situation very different to the rights that govern the right to claim from the offender or for the right to a social benefit.¹⁶

¹⁴

Bloomfield, Gibson & Greer, 1999, p.27.

¹⁵

1996.

¹⁶

This was also confirmed by Desmond Greer in an interview, Belfast, 18 April 2000, as well as by Sir Kenneth Bloomfield, Northern Ireland Compensation Review Team, Interview 27 April 2000.

9.17 As early as the 1960s in Great Britain, the Home Office working party, which looked into the establishment of a compensation scheme, had begun to cast doubt on the state accepting liability for injuries. The rejection of the idea of state liability in Great Britain is captured by Cane¹⁷ when he summarises the 1961 findings:

*[The idea that the State is liable] was a fallacious and dangerous doctrine', because the state could not possibly protect its citizens from attack at all times and all places, and because, in any event, if there was such a duty it would be impossible to confine it to personal injury as opposed to damage to property.*¹⁸

9.18 In a recent consultation paper produced by the British Home Office this position was reiterated:

Ever since the scheme started successive Governments have made it clear their view that the State is not liable for injuries caused to people by the acts of others. The guilty party is the offender and, in an ideal world, it should be the offender who compensates the victim' (Home Office 'Compensation for Victims of Crime: Possible Changes to the Criminal Injuries Compensation Scheme'.¹⁹

9.19 Apart from the legal issues, it is understandable from a financial perspective why the State is reluctant to admit liability and it appears that this has become the international norm. Therefore, most compensation schemes, as was noted briefly above, view compensation as a social benefit, or an act of State benevolence. As social contract theory notes, there is a moral duty on States to compensate and, in this regard, victims of violent crime receive compensation as a privilege as opposed to a right.

9.20 State compensation schemes are 'essentially a symbolic act to show their concern for victims'.²⁰ Other examples of compensation schemes have been motivated on grounds

¹⁷

1993.

¹⁸

cited in Cane, 1993, p.253.

¹⁹

Consultation Paper UK: Stationery Office Group 1999 p. 4, Section 11.

²⁰

Miers cited in L Meintjies-Van der Walt 'Towards victims' empowerment strategies in the criminal justice process' (1998) Vol 11 No 2 *South African Journal of Criminal Justice* p. 163.

of being about 'a social motive to ensure the pain and suffering of victims and distress to relatives is not increased'.²¹ But, in essence, state compensation is a form of *ex gratia* payment made as a result of State benevolence.²² An expression of public sympathy²³, or that 'governments recognise that the public feel a sense of responsibility for, and sympathy with, the innocent victims of a crime of violence'²⁴, are also frequently cited motivations. In this sense, compensation is an expression of public sympathy rather than obligation.

9.21 Furthermore, in the international context, compensation can be understood as existing on a continuum. On the one end is the so-called minimalist approach (which in reality could total up to cost the state a substantial amount of money), which is geared towards providing a basic amount to cover financial losses related to the crime. This can be called social security compensation.²⁵ Violent crime is associated with a number of costs both for the individual, as well as for the society as a whole. Using the social security argument, compensation could be considered to be an additional practical component of victim assistance with its primary function being to assist with costs associated directly with a crime, such as loss of earnings or medical expenses that extend over and above State care or welfare (such as corrective surgery or vocational retraining).

9.22 On the other end of the continuum is compensation that can be understood to be closer in nature to that of a general damages award which aims to place victims in the position they would have been in prior to the offence, to the extent that money can achieve this. This could be described as full compensation. Such an approach may extend further than a social security benefit to include other 'costs' associated with the crime. For example, pecuniary loss, physical and psychological injury, loss of amenities, pain and suffering, and

²¹

Bloomfield, Gibson & Greer, 1999, 27.

²²

Greer, 1996. Also the opinion of Sir Kenneth Bloomfield, Northern Ireland Compensation Review Team, Interview 27 April 2000.

²³Cane, 1993; L Zedner 'Victims' *The Oxford Handbook of Criminology* edited by M Maguire, R Morgan and R Reiner Oxford: Clarendon Press 1997 603-605.²⁴

Home Office, 1999.

²⁵

Greer, 1996.

moral damages. This end of the spectrum is far more difficult to implement, particularly within the context of limited state funds.

* **Restorative justice**

9.23 Providing compensation is also consistent with the restorative justice approach to criminal justice. In this sense, compensation is based on the recognition that crime is not only a wrong against society, and the State, but is more fundamentally a wrong against the victim. In the restorative justice paradigm, crime is seen as a violation of people and relationships. Crime, which can be a violation of the physical self or of property, creates the obligation to make things right and, as such, justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.²⁶

9.24 Restorative justice further implies mechanisms within the society that can ensure greater participation in the criminal justice system by victims, as well as ensure greater structured and facilitated contact between victim and offender. This allows for greater information between the victim and offender and an opening of the door to restitution (a way of making amends to the victim). Some theorists²⁷ have argued that one of the primary aims of the criminal justice system should be to compensate victims for the wrong done to them. Barnett writes:²⁸

Justice consists of the culpable offender making good the loss he has caused... Where we once saw an offence against the State, we now see an offence against the individual.

9.25 In this sense, restorative justice demands consideration of approaches such as that of offering compensation - where appropriate to victims - whilst empowering them through

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H Zehr Changing Lenses: A New Focus for Crime and Justice Ontario: Herald Press 1990 180.

²⁷

Christie, Wright, Ashworth, in Zedner, 1997.

²⁸

Barnett, 1977 in Zedner, 1997, p.287-8.

ensuring their participation in the criminal justice system.²⁹ There are two mechanisms to ensure that compensation is made to the offender, as have been touched upon earlier in this report. One to is obtain compensation directly from the offender (restitution). The other is for the state to compensate the victim. Each mechanism is premised on a different understanding of who is responsible to the victim of crime because of the practical concerns about recovering funds directly from the offender.

9.26 In general, most developed countries seek a balance between the social security approach and full compensation. Operational compensation schemes generally attempt to make payments in a manner which is broadly proportionate to the injury, or at least takes the injury into account, but few offer full and complete compensation including the acknowledgement of moral damage.

9.27 However, having said that the right to compensation is not established internationally and that, as a result, most countries favour the payment of partial rather than full compensation, it is important to acknowledge that recently some new moves and principles are being established internationally with regards to the issue of the right to compensation and the parameters of obligation with regards to granting compensation.

* **Developments in international law**

9.28 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power³⁰ calls for a greater responsiveness of judicial processes to the needs of victims, and for victims to be treated with compassion and respect for their dignity. This declaration provides that when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

- * victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

²⁹

South African Law Commission, Project 82, p.3

³⁰

UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by General Assembly Resolution 40/34 of 29 November 1985).

- * the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimisation.³¹

9.29 The declaration encourages the establishment, strengthening and expansion of national funds for compensation to victims to ensure that they receive the necessary material, medical, psychological and social assistance 'through governmental, voluntary, community-based and indigenous means'.³²

9.30 Although this declaration could in no way be evidence that a full and unqualified right to compensation exists, it does start to move the debate towards trying to establish international norms with regards to compensation. Governments, such as South Africa, that would see them themselves as trying to maintain such declarations are, therefore, being encouraged to establish victim compensation schemes and adequate victim empowerment services.

9.31 Furthermore, the right to compensation is currently being built into the legislation aimed at establishing the International Criminal Court (ICC). Although this process is aimed largely at extensive human rights violations, generally associated with political conflict and genocide, commentaries on the ICC hold much similarity with the needs of individual victims of violence. Furthermore, the issue of rights to reparation are being entrenched within the ICC statutes.

9.32 A commentator recently argued that:

Victims have a wide range of needs which must be met if the process of healing and reconciliation is to take place. They need to have the opportunity to speak the truth: to receive answers, and official acknowledgement concerning the violations. They need to be protected from further harm. They need to be involved in the judicial process. And they need compensation, restitution and rehabilitation. All these needs, now largely recognized in international law, have been translated into rights...and in order to do justice for victims, the ICC (International Criminal Court) must be empowered to address their rights and needs.³³

31

Article 12.

32

Article 14.

33

McKay, Fiona The Rome Treaty Conference Monitor, Issue 5, June 19, 1998

9.33 The Rome Statute of the International Criminal Court³⁴ provides in Article 79 for the establishment of a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims. It allows the Court to order that money and other property collected through fines or forfeiture be transferred, by order of the Court, to the trust fund.

9.34 Article 2(3) of the International Covenant on Civil and Political Rights³⁵ provides that each state party to the Covenant undertakes to ensure that any person whose rights or freedoms recognised in the Covenant are violated, shall have an effective remedy and shall have such right determined by competent judicial, administrative or legislative authority. The rights to life, not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, to security of person, and not to be subjected to arbitrary or unlawful interference with his/her privacy, family or home could all be argued to be the applicable rights. The African Charter on Human and People's Rights³⁶ provides for the right to security of person, to respect for life and integrity of person.³⁷ These rights could be argued to extend to the rights of victims of crime.

* **Difficulties in enforcing offender accountability**

9.35 But can compensation serve other ends outside of the rights and benevolence or social contract theory debates outlined above? Specifically, can compensation as a mechanism strengthen the criminal justice system? And, furthermore, can compensation actually build the restorative justice approach to criminal justice?

³⁴

Doc. A/CONF. 183/9. In terms of article 126, the Rome Statute of the International Criminal Court will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession.

³⁵

Entered into force on 23 March, 1976.

³⁶

Entered into force on 21 October 1986.

³⁷

Articles 4, 5 and 6.

9.36 In recent years, research about victims has raised questions of the purpose of the criminal justice system and the place of victims within the system. Some victim surveys indicate that victims do not always want offenders to be punished. Furthermore, the more information available to people about an individual crime, the less punitive they tend to become in their view about the punishment of the offender.³⁸ Many would welcome the opportunity for reparations.³⁹

9.37 Where the offender makes reparation, the responsibility for 'making right the wrong' is born by the offender. Reparation (restitution) in this sense is part of a positive restoration of the relationships between victim and offender which, in the restorative justice framework, is seen as crucial to the process of healing.⁴⁰ The offender is also held accountable to the victim for the offending behaviour. However, as was noted earlier, ensuring that offenders make restitution to offenders is not always possible. Therefore, most compensation schemes do not operate on a mutually exclusive basis, but look to a combination of obtaining restitution from the offender, with restitution being the preferable option.

9.38 The South African Law Commission recently recommended procedures to increase the capacity of a criminal court to order the offender to pay compensation to the victim in cases of pecuniary loss, or where damage is easily ascertainable.⁴¹ The draft bill provides that where the amount of actual damage or loss exceeds the amount of an award, the additional amount can be claimed in civil action (Section 28(3)). However, this process can only begin once the offender has been convicted of the crime. This is problematic, as was indicated earlier, because studies indicate that only 5.4% of crimes reported to the police result in successful convictions.

9.39 Thus, most victims would be excluded from the possibility of receiving compensation. Potentially a State-funded compensation scheme could make up for this deficit to help deal

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Schonteich, 2000, p.70.

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Zedner, 1997, p.603

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Zehr, 1990.

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Draft Sentencing Framework Bill, 2000, Section 28.

with the fact that, in reality, 'offenders are not always caught or even identified, and many lack the means or will to compensate their victims'.⁴² The development of compensation schemes can ensure that the initial funds are always sought from the perpetrator before other compensation benefits come into play. If this is tied to a comprehensive victim-offender mediation process (voluntary for victims), this further increases the likelihood of such restorative mechanisms being introduced. This can have the benefit of agreed restitution from the offender.

9.40 A compensation scheme, if the parameters are drawn correctly, can make provision for getting funds back from the offender and bringing them into the process, even if this initially only includes a small number of offenders. Such an approach could, at least at the level of broad principle, strengthen the development of a restorative justice approach to dealing with crime. Such an approach is also commensurate with building a human rights culture.

9.41 However, with regard to the State's responsibility towards victims of crime, recent developments in South African law seem to give further impetus to the establishment of a compensation fund. In *Carmichele v Minister of Safety and Security and Another*⁴³ the issue of delictual liability as a result of wrongful conduct by the State in a criminal case was considered. From the facts of the case it appeared that during August 1995 the appellant, a 28-year-old woman, was brutally assaulted by one C at the home of a Mrs G situated in a small and secluded village on the Cape south coast. C had previously been convicted on charges of housebreaking and indecent assault for which he had been sentenced to a fine and suspended periods of imprisonment. At the time of the attack on the appellant C was, in addition, facing a charge of rape. C had first appeared on this charge in a magistrate's court in March 1995, when he was released by the magistrate on his own recognisance on the recommendation of the investigating officer. A few days after C's release from custody G was informed of the rape and of C's previous conviction for indecent assault. She asked the police to see to it that C was kept in custody pending his trial. The officer in question discussed the matter with the public prosecutor, who in turn told G that nothing could be done unless C committed another offence. Shortly thereafter, and subsequent to a suicide

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Home Office, 1999, p.4, Section 11.

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2001 (1) SA 489 (SCA).

attempt and an interview with the prosecutor that revealed serious sexual deviance, C was rearrested and sent to a psychiatric hospital for observation. Upon his return in April 1995 he again appeared in the magistrate's court. The report from the hospital did not declare C to be a danger to society or recommend that he be kept in custody, and he was re-released by the magistrate on his own recognisance pending a decision by the Attorney-General on whether the case should be tried in the High Court or the regional court. The Attorney-General, who had been in possession of the referral documents (which reflected the seriousness of the rape and the extent of C's sexual deviance), had not instructed the prosecutor to oppose bail, with the result that C's release had not been opposed by the prosecutor. It appeared that G, C's mother, and the appellant had for several months and on various occasions before the attack on the appellant requested the police and the prosecutor to ensure that C was detained in custody pending his trial, but to no avail. After the attack on her the appellant brought a delictual action in a Provincial Division for damages against the two respondents (the second respondent being the Minister of Justice) for the injuries she had sustained. The appellant's case was that the members of the police as well as the public prosecutor in the town in which the assault had taken place had owed her a legal duty to act in order to prevent C from causing her harm and that they had negligently failed to comply therewith. The High Court held that there was no evidence to support a finding that the said duty had existed and that the police and public prosecutors had acted wrongfully.

9.42 In an appeal the Supreme Court of Appeal held that the legal duty contended for was one owed to the appellant to ensure that C was remanded in custody pending his trial on the rape charge and to ensure that he was rearrested when complaints about his behaviour were made to the police and prosecuting authorities in June and August 1995, and that the duty to rearrest was limited to the prosecutors. The Court furthermore held that the existence of a legal duty to avoid or prevent loss was a conclusion of law that depended upon a consideration of all the circumstances of each particular case and on the interplay of many factors. The issue, in essence, was one of reasonableness, determined with reference to the legal perceptions of the community as assessed by the Court. The Court held, further, that the essential enquiry was, first, whether the alleged legal duty was owed by the police and prosecutors in regard to C's release in April 1995 and, secondly, whether the prosecutors had owed the appellant a legal duty to have secured his rearrest following the complaints in June and August 1995. With regard to the April release, this had obviously been the magistrate's decision, so that the legal duty contended for had to be confined to a duty on the part of the police to provide the prosecutor with full information and a duty on the

part of the prosecutor to oppose bail and to give the court full information relevant to C's remand.

9.43 The Court held that since the prosecutor had been in possession of all the information relevant to C's detention or release in April 1995, there had been nothing further required of the police and that consequently no legal duty was owed by them relative to C's release on that date. In addition the Court held that there was obviously no absolute duty on prosecutors to oppose bail in all cases. A prosecutor had a public duty to oppose bail in appropriate cases but a breach of this duty did not necessarily constitute a legally actionable omission at the instance of any individual member of the public. Whether such a duty existed depended on what was reasonable, having regard to all the facts and circumstances. It also depended on whether the claimant stood in a special relationship to the defendant that would distinguish him or her from any other member. Given that C had had only one previous conviction which did not involve physical harm; that he had been referred for observation and that the psychiatric report neither declared him to be a danger to society nor recommended that he be kept in custody; that the Attorney-General had not seen fit to instruct the prosecutor to oppose bail; and that a contemporaneous circular from the Attorney-General had instructed prosecutors to assume for the time being that awaiting trial accused had the right to be released and that if the State chose to oppose release it would bear the onus of proving that it would be contrary to the interest of justice, it could not be said that it had been unreasonable for the prosecutor to have opposed C's release. For this reason the prosecutor had not owed the appellant a legal duty either to oppose bail or to ensure his subsequent rearrest. The Court also found that there was another reason why the circumstances of the present case were not capable of establishing the legal duty contended for: no special relationship was established between the prosecutors and the appellant. It was well established that there had to be some relationship between the person who owed the legal duty and the person to whom the duty was owed, the breach of which would expose the latter to a risk of harm in consequence of an omission that was different in its incidence from the general risk of harm to all members of the public. In the absence of evidence that the appellant was at any distinctive risk, the fact that the attack occurred in a secluded village where she had been a visitor was not sufficient to establish the special relationship contended for. The mere fact that complaints and requests for C's rearrest were made to the prosecutors was also insufficient to establish a special relationship. The Court concluded that there was insufficient evidence upon which the Court a quo could reasonably

have concluded that the duty contended for had existed. It had thus correctly granted absolution from the instance. The appellant then appealed to the Constitutional Court.

9.44 In *Carmichele v Minister of Safety and Security*⁴⁴ the Constitutional Court considered the constitutional obligation on the courts to develop the common law to promote the spirit, purport and objects of the Bill of Rights. The specific issue was whether the High Court and the Supreme Court of Appeal ought to have broadened the concept of "wrongfulness" in the law of delict in the light of the State's constitutional duty to safeguard the rights of women.

9.45 The applicant sued the two Ministers concerned for damages resulting from a brutal attack on her by a man who was awaiting trial for having attempted to rape another woman. Despite his history of sexual violence, the police and prosecutor had recommended his release without bail. In the High Court the applicant alleged that this had been an omission by the police and the prosecutor. She also relied on the duties imposed on the police by the interim Constitution and on the State under the rights to life, equality, dignity, freedom and security of the person and privacy. The High Court dismissed the claim at the close of the applicant's case, finding that she had not established that the police or the prosecutor had wrongfully failed to fulfil a legal duty owed specifically to her. The applicant appealed to the Supreme Court of Appeal (SCA), which held that the police and prosecution had no legal duty of care towards the applicant and could not as a matter of law be liable for damages to her.

9.46 In a unanimous decision by Justices Ackermann and Goldstone, the Constitutional Court granted the application for leave to appeal and upheld the appeal. The Court held that, although the major engine for law reform should be the legislature, courts are under a general duty to develop the common law when it deviates from the spirit, purport and objects of the Bill of Rights. In this case the constitutional aspects had unfortunately not been raised before either the High Court or the SCA. This did not, however, affect the obligation on those courts to develop the common law if in this case it was appropriate to do so.

9.47 The Constitutional Court considered the potential liability of both police and prosecutors. As to the police, it held that the State is obliged by the Constitution and

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international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. It is important that women be free from the threat of sexual violence. In the particular circumstances of the present case the police recommendation for the assailant's release could therefore amount to wrongful conduct giving rise to liability for the consequences. Similarly, the Court held that prosecutors, who are under a general duty to place before a court any information relevant to the refusal or grant of bail, might reasonably be held liable for negligently failing to fulfil that duty. The Court also referred to the complex issue of causation in this case.

9.48 As to the order to be made in light of these findings, the Court was at a disadvantage in the absence of judgments on these constitutional issues by the High Court and the SCA. But the case has already passed through three courts and the interests of justice demand that it be brought to a head without delay. In view of the constitutional obligations on the police and prosecutors, the argument of the appellant has sufficient merit to place the respondents on their defence. The appeal was upheld and the matter referred back to the High Court. The effect of the order was to have the case re-opened in the trial court on the basis that the appellant has made out a case in law for the Ministers to meet. The Ministers would then be given the opportunity to lead evidence as to whether or not on the facts they should be held liable for damages.

9.49 Following this judgment the matter was referred back to the High Court.⁴⁵ In May 2002 the Cape High Court ruled that the departments of Justice and Safety and Security were liable for an attack on Carmichele which left her with a fractured skull, broken arm and deep knife wound in the chest in August 1995. She was booked off work for seven months after the incident. Her assailant, Francois Coetzee, had previous convictions for assault, housebreaking and indecent assault and was awaiting trial for the alleged rape of a 16-year-old girl. The court found that the state had been negligent and failed in its legal duty to protect Coetzee against the risk of violence. Carmichele had sought damages of R177 000 when the case started seven years ago. The High Court ordered that the two departments pay the amount and cover all her legal costs.

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"Carmichele's determination won case" news24.com 15 May 2002 Cape Town. See <http://www.news24.com/News24/South/Africa/WesternCape/0,1113-2-7-830-1185111.00.html>.

9.50 Reports, including psychological and physical evaluations, would now be drawn up to determine whether the damages amount should be revised. The case was at first dismissed by the High Court, and Carmichele also lost an appeal in the Supreme Court. The case then went to the Constitutional Court, which ordered the High Court to hear the case.

9.51 The matter was finally reconsidered by the Supreme Court of Appeal⁴⁶ where the court considered the liability of the State for negligence of police and prosecutors for a failure to oppose bail and the accused thereafter attempted to murder the plaintiff. The Supreme Court of Appeal considered the issue of negligence and noted that the test for determining negligence was that enunciated in *Kruger v Coetzee*.⁴⁷

“For the purposes of liability culpa arises if –

- (a) a diligens paterfamilias in the position of the defendant–
 - (i) would foresee the reasonable possibility of his conduct injuring another . . . and causing him . . . loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.”

9.52 The court noted that it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue. It is probably so that there can be no universally applicable formula which will prove to be appropriate in every case.⁴⁸

And that:

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The Minister of Safety and Security and the Minister of Justice and Alix Jean Carmichele, 14 November 2003 in case No 533/02.

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1966 (2) SA 428 (A) at 430E-F.

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Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and another [2000] 1 All SA 128 (A); 2000 (1) SA 827 (SCA) para 21-22.

'it has been recognised that while the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable'.⁴⁹

Further

'In considering this question [what was reasonably foreseeable], one must guard against what Williamson JA called "the insidious subconscious influence of ex post facto knowledge" (in *S v Mini* 1963 (3) SA 188 (A) at 196E-F). Negligence is not established by showing merely that the occurrence happened (unless the case is one where *res ipsa loquitur*), or by showing after it happened how it could have been prevented. The *diligens paterfamilias* does not have 'prophetic foresight'. (*S v Burger* (supra at 879D).)

9.53 The Supreme Court of Appeal held that the police officer and the prosecutor were negligent in not opposing bail having regard to the knowledge they had and that "the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part.⁵⁰ The court a quo found that the loss or damage was not too remote and since this finding was not attacked on appeal the Supreme court of Appeal had no problem in confirming the finding.

* **Compensation claims could benefit criminal justice system**

9.54 Provisions stipulated within most compensation schemes demand that the crime is reported timeously and that the victim co-operates with the police. This could result in greater reporting of crime and co-operation with the police as compensation is not generally available within the international context without such basic conditions being met. In essence, it is in the victim's financial interest to co-operate with the police in much the same way that those who are insured are required to report crime to get the benefits of their insurance since crimes for which insurance exists are reported more frequently than uninsured crimes. It should follow that if the likelihood of compensation exists, victims will be encouraged to report crime.

⁴⁹ *Ibid* para 22.

⁵⁰ *South African Law Journal* 1990 (1) 680 (1) 700.

9.55 These arguments can broadly be considered to be part of utilitarian theory and doing justice after the commission of crimes, which argues that the successes of a compensation scheme will benefit the judicial system and, therefore, assist in restoring relationships within the community. Furthermore, because victims know compensation is available if they co-operate with the criminal justice system, they may even get involved in combating crime.

9.56 Zedner⁵¹ indicates that some have suggested that compensation essentially constitutes a 'sweetener' in relation to the State's reliance on victims. In those countries where it is provided, compensation is usually made conditional on victims giving their full co-operation to the process of investigation and prosecution (where this occurs) of the alleged offender.

9.57 For example, by offering compensation, the state can increase the legitimacy of the criminal justice system as a whole. Greater legitimacy will, in turn, result in more co-operation and reporting, strengthening the criminal justice system by keeping victims involved, and so on. Convictions may also increase in number as more cases will be finalised in court. Furthermore, it also can create a greater sense of citizen and state cohesion (accountability theory), generating feelings that a partnership with the state exists between the state and its citizens in combating crime.

9.58 In this sense, it could be argued that a compensation system could substantially contribute to the transformation of South African society. Such a system could draw people whose lives are lived outside of the net cast by the modern criminal justice system into the system - a system which is built on respect for due process and other's rights. If this is correct, such a compensation scheme could become an important tool in the democratisation of South African society and in the expansion of the sphere of rights to encompass the numerous victims of crime who today live without the protections afforded by the Bill of Rights.

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Role of compensation in reducing the impacts of crime

9.59 As was shown in *Chapter Two*, crime, and particularly violent crime, has a range of negative impacts and costs for the victim. A compensation scheme could provide individuals with some funds to offset the initial impact of the crime through providing them with a 'safety net'. As such, compensation serves a social function by preventing a gross decline in the economic circumstances of individuals and their immediate families.⁵² This ensures that the individual is not disadvantaged by the crime, which can cause incremental disadvantage over time, creating additional burdens on the State, family and individual.

9.60 Compensation, in this sense, should not be understood as a reward, but rather monetary assistance which can aid people in dealing with the impact of a violent crime, and with some of the costs associated with a crime (from the social security perspective). Any compensation would be seen as the last resort once other avenues have been exhausted, such as private insurance, i.e., the principle of subsidiarity. It is arguable that early intervention by way of compensation and assistance to victims of crime could save the State money in the long run. Similarly, citizens who are assisted regain their status as active members of society more quickly and can begin contributing to their own well-being and that of others sooner than would otherwise be the case.

*** Dealing with trauma**

9.61 Compensation can also help, amongst other strategies, to address the trauma following violent victimisation. Psychologically speaking, paying compensation can play an important role in processes of opening space for bereavement, addressing trauma and ritualising symbolic closure.⁵³ Compensation can acknowledge and recognise the individuals' suffering and tell them that their society takes their suffering seriously. Self-

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Bloomfield, Gibson & Greer, 1999, p.27.

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B Hamber and R Wilson, R 'Symbolic Closure through Memory, Reparation and Revenge in Post-conflict Societies (Paper presented at the Traumatic Stress in South Africa Conference, Parktonian Hotel, Johannesburg, South Africa) 27-29 January 1999.

blame, although generally unfounded, is also common among survivors of violence and can be debilitating for many individuals as they feel that they were to blame for what happened to them. Compensation can serve as a symbolic but important way of saying that the victim was not responsible for what happened. Compensation can make it clear that others were to blame and that the victim was innocent.

9.62 Compensation can serve as a focal point in the grieving process, and this can aid recovery by allowing individuals to focus exclusively on their grief symbolically through compensation. Victims of crime generally turn to the criminal justice system or community/traditional justice processes as a context in which they externalise their grief, loss and anger, and seek to come to terms with it. Compensation, not merely as a practical help, but as a symbol can mark the point of moving onto a new phase and represent individuals' mastery over the past crime. What is more, a compensation scheme raises the public consciousness about the difficulties faced by victims of crime and the moral responsibility of assisting those in need. It also gives the victims a practical sense of community support and recognition of the plight of victims of violence.

*** Breaking the cycle of violence against women**

9.63 Compensation can also contribute to breaking the cycles of violence that ravage South Africa. In the domestic situation, for example, women often cannot leave an abusive home owing to financial dependence. A compensation scheme for women who are victimised violently can assist them by making some funds available allowing them not only to treat their injuries, but also to leave the home. The idea of making some funds available could be said to be consistent with the idea that women who are encouraged to put money aside whilst in abusive relationships have more likelihood of getting out of such

relationships.⁵⁴ A compensation scheme could provide such money, albeit on a limited scale.

9.64 Furthermore, most compensation schemes will only compensate people in the domestic situation if they are prepared to press charges against the offender. This, with the support of the money one could gain through compensation, could assist women to get out of abusive relationships. It could also increase the prosecution rate of offenders for domestic violence, which is currently very low.

9.65 However, this in no way suggests that providing compensation would be a miraculous solution to the ubiquitous problem of domestic violence. Many women withdraw charges against their abusive partners not merely because they remain financially dependent. Some will not prosecute out of fear of the partner's reactions to an investigation and trial. Other reasons can include pressure from family members, withdrawal of long-term financial resources in the event of the partner's imprisonment, or hope that the partner will fulfil promises to reform. In the face of these complexities, victim compensation may provide only a limited incentive for leaving abusive relationships, pressing charges and going to court. Therefore, like most arguments in the victim empowerment arena, compensation is likely to work well only in so far as such a scheme exists within a context of a broader victim empowerment programme and recognises the special needs of women victims of violence.

* **Breaking the cycle of revenge violence**

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J Campbell *Identification and Intervention with Women Victims of Aggression in the Health Care System* Paper presented at Prevention and Control of Aggression and the Impact on its Victims Conference, University Of Valencia, Spain July 9 – 14 2000.

9.66 Morris⁵⁵ asserts that victims of criminal violence, if untreated, are at risk of perpetrating acts of retributive violence, or for displacing their aggression within the familial context. Some victims of violence in South Africa have begun committing violent acts themselves. These actions are often associated with vigilantism and self-administered 'justice'.⁵⁶ Summary justice carried out by community members is a frequently preferred alternative to the criminal justice system.⁵⁷

9.67 Increasing reports of this type of community and individual action against suspected criminals has been reported.⁵⁸ A nation-wide survey by Market Research Africa in 1997 indicated considerable support for vigilantism among South Africans; one fifth of black respondents believe that it was 'sometimes right for a vigilante group to physically hurt a suspected criminal'.⁵⁹ It is likely that these results would not differ fundamentally in the White community - particularly given the widespread support for the reintroduction of capital punishment.

⁵⁵

1987.

⁵⁶

NCPS, 1996.

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It appears, at least on the surface, to be quicker and a more direct method of dealing with crime (cf D Bruce and J Komane 'Taxis, Cops and Vigilantes: Police Attitudes towards Street Justice' 1999 No 17 Spring *Crime and Conflict* also at website: <http://www.wits.ac.za/csvr/papdb&jk.htm>; Hamber, 1999; M Shaw 'Dangerous Years: Whites Perceive Crime As The Greatest Threat To SA, And There Is Evidence That Blacks Are Coming Round To This View' *Finance Week* 9 January 1997.

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Cape Times 'Crowd Demolish Alleged Rapists' Shack' January 30 1997; *Citizen* 'Witnesses Silent On Lynch-Mob Killings' January 12 1999; *Sowetan* 'Man Stoned to Death' January 15 1999; *Weekly Mail & Guardian* 'Police Worried About The Rise In Mob Action' February 14-20 1997a; *Weekly Mail & Guardian* '2000 Take Mob Action Over Crime' February 14-20 1997b.

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M Schönteich 'Vigilantes: When The Judicial System Fails...' 1999 No 20 *Frontiers of Freedom, Second Quarter* 18-23

9.68 The National Crime Prevention Strategy⁶⁰ argues that victim empowerment can result in decreased crime if victims are treated and supported. Compensation can add to the support of victims, thus decreasing their general sense of dissatisfaction with the criminal justice that may lead victims to be involved in vigilante action. At very least it would help prevent the public perception that the criminal justice system does little for victims of crime.

9.69 In addition to these arguments, the compensation of victims is a means of obtaining the co-operation of victims in the criminal justice process, which is vital to an effective criminal justice system. Without the co-operation of the victim in reporting crime, in furnishing evidence, in identifying the offender, and in acting as witness in court, most crime and criminals would remain unknown and go unpunished.⁶¹

ARGUMENTS AGAINST IMPLEMENTING A COMPENSATION SCHEME

*** State responsibility and cost-benefit analysis**

9.70 It is difficult to dispute the moral and compassionate arguments for the establishment of a compensation scheme for victims of crime. Seemingly, people have been innocently wronged and where this has had enormous personal implications, it would, on humanitarian grounds, make sense to try to compensate these individuals in one way or another.

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1996.

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Zedner, 1997.

9.71 However, according to Cane⁶², the real question is not whether these individuals should be compensated or not, but rather why the State should compensate them over and above the benefits available to other citizens. Cane⁶³ asks why government should select yet another group of unfortunates for special treatment? Is the justification that the State does little for victims of crime sufficient to argue for increased benefits for a minority of crime victims at the expense of the generality? The answer is not simple, especially in a context where there are competing needs for such basic services as water, sanitation and electrification.

9.72 Clearly, as was argued above, crime (and particularly violent crime) has a range of personal impacts on the individual that would not be addressed by social security benefits. Further, the cost implications of violent crime to the state, certainly in South Africa, are enormous in terms of the loss of productive human resources and other costs such as providing health care for victims.

9.73 However, this argument could also be made to motivate or justify other issues urgently requiring funding and could be taken as an imperative to limiting the extent of State responsibility in this regard. Even within the field of victim empowerment, it could be argued that, with limited resources, other aspects of improving the lot of victims, or perhaps the criminal justice system as a whole, should be prioritised over and above compensation. The debate then becomes one about what issues need to be prioritised and how State responsibility can be prioritised and strategically limited. The decision whether a compensation scheme is set up instead of another social service programme becomes one based on a cost-benefit analysis to the society and the State.

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1993, p.253.

⁶³

1993.

* **Competing priorities**

9.74 Another way of looking at such arguments is to say that there are other parts of the criminal justice system that could be prioritised and bolstered *in lieu* of compensation. A good example of this is the issue of witness fees. As Zedner⁶⁴ indicates, participation by the victim in the criminal justice process entails further costs in terms of the 'time, energy and stress of assisting the police with their investigation, and for a few at least, the trauma of giving evidence as a witness in court'.⁶⁵ This applies not only to victims but also to witnesses generally.⁶⁶ In particular, it applies to the minority of witnesses (and victims) who are required to give evidence in court.

9.75 Some system of offering financial assistance to witnesses does exist in South Africa in that there is provision for the payment of witness fees. However, there appears to be little attention given to policy development on this issue. There have been no analyses conducted on questions concerning how effectively the system for payment of witness fees is operating or how it is structured. It may, for example, be a more appropriate area to consider, at least in the short term, than establishing an extensive victim compensation scheme.

9.76 It could be argued that the issue of witness fees (in a country with limited resources) could be considered part of the issue of compensation, even though it applies to witnesses, and not just victims who are witnesses. Here the compensation is not intended to off-set the costs for the victim of the act of victimisation, but rather to off-set the costs to the victim, or other witnesses, of lending their assistance to the criminal justice process.

⁶⁴

1997

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p. 604.

⁶⁶

Cf. Bruce, Newham & Reddy, 1999.

9.77 Following this argument, witness fees could be used as an incentive for co-operation with the criminal justice system where it extends to attending court and giving evidence. Rather, the proposal is that witness fees should be optimised so as to minimise financial and other disincentives to participation as a witness in the criminal justice process. Witness fees can be used not only to motivate, but also to compensate witnesses for losses associated with providing assistance to the criminal justice process.

9.78 Of course, like most arguments in the difficult area of criminal compensation, there are complexities. As suggested in a recent Law Commission discussion paper,⁶⁷ one implication of the Constitution for the system of witness fees would appear to be that witness fees should be paid equally to prosecution and defense witnesses. Also, would witnesses found to be untrustworthy be compensated for their time and co-operation with the courts? Furthermore, there is a wide disparity between levels of income in South Africa. It is debatable whether it is realistic to aim to compensate persons for time spent, or loss of income relating to, co-operation with the criminal justice process at anything other than a minimal rate.

9.79 Seeking to improve the system of paying witness fees is also not likely to be free from complexities of an administrative nature, then again nor would a compensation scheme or any other system of providing state funds. Another difficulty is that the central issue that motivates many other compensation schemes, namely that offenders are not always caught or identified, and, therefore, very few victims benefit from the potential of a civil claim could apply equally to witnesses, who will come to court only if a trial is held.

9.80 Witnesses make up a minority of those interacting with the criminal justice system; witnesses who are also victims make up an even smaller number. To expect that bringing them into the system will significantly alter the face of the criminal justice system and reduce victimisation is unrealistic. However, what is being suggested is that if one accepts the

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limited resource arguments mitigating against a compensation scheme, there may be other ways that minimal funds can be used to bolster aspects of the criminal justice system or victim empowerment.

9.81 There are other potential areas where resources could be directed apart from or in addition to a compensation scheme. For example, additional financial support to trauma units to ensure that victims of crime receive adequate medical attention could be provided. The Disability Grant Programme could be supplemented so that those disabled by crime are sufficiently supported. Finally, emergency medical care for rape survivors, including the provision of anti-retroviral medication, could be considered.

9.82 Clearly, therefore, the decision in a country such as South Africa to set up a compensation scheme would need to be seen in a context of competing needs and priorities. Even if we accepted, in principle, that the harm and losses that people suffer as a result of crime are unfair and that victims therefore have a 'right' to compensation, this right itself would need to be balanced against others in a context of limited resources. If this is accepted, then a 'right' that needs to be recognised to be of greater standing than the right to compensation is the right of South Africans not to be exposed to victimisation. Using this line of reasoning, it would follow that without prioritising the latter we can never hope to begin to engage effectively with the former issue of compensation.

9.83 Therefore, it is clear, that above all else, the major arguments against a compensation scheme are of a pragmatic and fiscal nature. It is such a fact that Greer⁶⁸ concludes, after reviewing the compensation schemes across Europe, that: 'State compensation tends to be governed by pragmatic considerations, of which the most

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1996.

important appears to be the priority which the States are prepared to give victim compensation in terms of the allocation of public funds'.⁶⁹

* **Impacts on criminal justice system debatable**

9.84 The arguments made earlier about the impact of a compensation scheme in developing a more effective criminal justice system are also debatable. There are claims that compensation schemes do not improve the reporting of crime).⁷⁰ This research was generated over twenty years ago and in contexts fundamentally different to that of South Africa, which may suggest that it is not applicable. However, there is also no current research that specifically suggests that compensation schemes succeed in encouraging people to participate in the criminal justice system, or that reporting rates rise substantially after their introduction.

9.85 What we do know, however, is that countries that have relatively effective criminal justice systems, also tend to be the countries with compensation schemes and a reasonable supply of resources. Whether countries with relatively effective criminal justice systems (and resources to make them such) create conditions conducive to developing compensation schemes, or whether having active compensation schemes has steadily helped build the criminal justice system, or both, remains a moot point which is unsubstantiated in the international literature or research.

9.86 Other arguments raised in the previous section focused on the ability of a compensation scheme to help improve the legitimacy of the criminal justice system. Or put

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⁷⁰ p.682

Cf. Doener et al., 1976, Doerner, 1978 & Shapland, 1981, cited in South African Law Commission, undated.

in another way, one of the key motivations for the introduction of victim compensation in South Africa is a concern (sometimes identified primarily as a public 'perception') that the current South African constitution effectively upholds the rights of offenders (arrested, accused and convicted persons), but has nothing to say about rights of victims of crime. Victim compensation could, or so the argument goes, be seen as a way of affirming victims' 'rights' and offsetting this situation.

9.87 A counter argument to this would be that in the South African context, any victim compensation scheme that is introduced is unlikely to be able holistically to redress the negative perceptions of the criminal justice system. It is unlikely that a compensation scheme alone will contribute substantially to building the legitimacy of the criminal justice system or the Constitution. Clearly, compensation alone would not be enough and could easily add to frustrations and disappointments. Equally, though, it would be absurd to think that providing compensation would have no positive impact on victims' perceptions of the State's willingness to take care of their needs.

9.88 Improving the effectiveness of the criminal justice process and other crime prevention measures holds out the potential for reducing levels of victimisation. The alternative is that levels of criminality remain high and may rise. Thus the potential demand for compensation would remain at current levels (or increase) and our society would remain with limited capacity to make compensatory payments. This approach would say that what is paramount in our society is the optimum prevention of criminality and thus of victimisation. If this can be achieved, one of the benefits may be that whatever measures are developed to support and empower victims need to be provided to a smaller number of people.

9.89 Thus, in relation to compensation, improving the effectiveness of the criminal justice process and other societal mechanisms that contribute to reducing crime holds out the potential that, at some point in the future where levels of victimisation are far lower, a compensation system of greater scope and significance might become more viable.

CONCLUSION

9.90 There has been a gap between the making of policy and its implementation in South Africa. This has been specifically observed in the victim empowerment arena and in the implementation of the NCPS.⁷¹ As such, the idea of setting up compensation schemes in line with international practice will need to be guided by the pragmatics of the exercise, as much as by the principles. In this sense, compensation should be understood as an additional and complementary programme to broader victim empowerment in South Africa.

9.91 There will be an inevitable balancing and prioritising between the establishment of a compensation scheme and the funding of additional victim empowerment services. Given competing needs and priorities in the context of limited financial resources, the likelihood of developing a compensation scheme may seem remote in South Africa. However, it would be inappropriate to overlook the possible positive effects that the institution of such a scheme may have. It is, therefore, necessary to reflect on different options for a compensation scheme and consider how these could be implemented, in part, in full, or incrementally. Policy is generally developed incrementally and is a process rather than a specific outcome. In fact, it is usually 'messy and evolutionary'.⁷²

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G Simpson and J Rauch 'Reflections on the First Year of the National Crime Prevention Strategy' in *Between Unity and Diversity: Essays in Nation Building in Post Apartheid South Africa* edited by G Maharaj Cape Town: David Philip 1999

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C Juma and N Clark 'Policy Research In Sub-Saharan Africa: An Exploration' (1995) *Public Administration and Development* ,Vol. 15, 121-137. Some of the thoughts on policy making in countries in transition are extracted from Brocklehurst, Stott, Hamber & Robinson (2000).

9.92 The particular difficulty that is faced in the South African context is that there exist multiple priorities and demands on the State. Extreme pressure to deliver can often override the incremental steps that may be needed to develop an extensive compensation scheme. None of the competing demands on the State will disappear in the short-term. It makes sense that the highest priorities within the criminal justice system should be attended to first, but exactly what these are remains a matter of interpretation and debate. What is clear, however, is that the criminal justice system will remain dependent on the co-operation of victims in order to secure its on-going efficacy and legitimacy. On the other hand, the needs of victims are not going to disappear in the short-term, no matter what criminal justice reforms are undertaken. Priorities in respect of reforming the criminal justice system and adequately addressing the status of victims within such a system will, therefore, remain inter-linked and mutually dependent.

9.93 Criminal justice reform takes place in an integrated context. The persistence of victims' negative perceptions and experiences of the criminal justice system, as well as the fact that their needs are not met, will undermine the legitimacy of the system and, in so doing, erode strides made in other areas of reform. Paying compensation will not bring back the loved ones of murder victims, but equally, catching and apprehending the criminals will not offset the costs associated with the loss of a breadwinner - without either, trust in the criminal justice system remains undermined. In this context, the idea of compensating victims of crime can easily hold its own next to a range of other needs in the criminal justice arena. At the very least, compensation has to be seen as a complementary component of victim support that is vital to ensuring the efficacy of the whole criminal justice system.

VICTIM EMPOWERMENT

9.94 The impact of crime on its victims in terms of trauma and secondary victimisation - ie unsympathetic or inappropriate responses which actually worsen its effects - is highly significant. It is furthermore exacerbated by several factors that are inherently South African.

These relate particularly to the police and other agents of the criminal justice system, which were previously regarded as victimising institutions by the majority of South African citizens.⁷³

9.95 Victims of crime have certain emotional and practical needs, including trauma counselling, advice and referral, information on court procedure, and compensation. If these needs are not urgently addressed, and the victim's position in the criminal justice system is not drastically reformed, it will further contribute to legitimacy crisis of the criminal justice system in South Africa.⁷⁴

9.96 In countries abroad victims of crime find themselves in a much better position than in South Africa. In those countries victim support systems offer services necessary for support in the form of programmes aimed at giving emotional support, practical aid and promotion of the rights of victims of crime. In South Africa there are limited support services for particular categories of victims only and at present there is no single organisation representing the victim or promoting their rights. This situation is, however, changing dramatically in South Africa.

9.97 At the end of August 1996 a national workshop on victim support and empowerment was held at the World Trade Centre. Focussing on the victims of crime and their needs, rather than offender-based strategies to combat crime, the meeting brought together relevant stake holders ranging from service providers around rape and trauma counselling, researchers, police, government and the media, for the first time to consider issues around victims of crime. At the workshop consensus was reached that it was premature to establish

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L Camerer "A victim movement for South Africa" 31.

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L Camerer "A victim movement for South Africa" 31.

a national co-ordinating body around victim support, but an interim steering committee was elected to carry the process forward.

9.98 The South African Police Services also embarked on their own Victim Support Programme, the scope of which includes the training of police officials to provide support to victims of crime, liaison with other Government Departments and NGO's to co-ordinate counselling and support services to victims of crime, violence, crime prevention, the establishment of comfort rooms at police stations and victim support centres and the setting up of a referral system and resource directory.

9.99 A victim empowerment programme is also a national programme within the NCPS. Recognition of the role and rights of victims of crime are vital in addressing the effects of crime and at the same time creating crime resistant communities. This programme is therefore aimed at making the criminal justice process more victim friendly and minimising the negative effects of crime on its victims. The empowerment of crime victims is aimed at creating a greater role for victims in the criminal justice process as well as providing protection against repeat victimisation. The lead agency of this programme is the Department of Social Development supported by the Departments of Health, Safety and Security, Justice and Local Health Authorities and service groups. The Law Commission is also a stake holder in this programme since the project committee on sentencing embarked on an investigation to review legislation pertaining to victims of crime as part of its investigation into all aspects related to sentencing, which is the subject matter of this report.

THE RATIONALE FOR IMPROVED TREATMENT OF VICTIMS IN THE CRIMINAL JUSTICE SYSTEM

9.100 In their interactions with authorities people want to be treated in a polite and considerate manner. In this respect, victims are not different from other people, including offenders. Interest and consideration are important for victims in their interaction with the

police and the public prosecution. Victims want authorities to recognise their position and their interest in the case. When authorities show an interest in the victim and consider his/her wishes, they profit from an increase in victims' satisfaction and support for them.

9.101 However, in their contact with legal authorities, victims are confronted with a system which largely neglects their interests. They are often not taken seriously and are excluded from the criminal justice process. Victimization shatters the individual's belief that the world is caring and that the self is worthy. Reactions from the police and the prosecution can affect how the victim rebuilds his/her view of society. Furthermore, failure to recognise the position of the victim augments victim disillusionment with the world they live in and has a negative impact on their satisfaction and support for legal authorities.⁷⁵ Therefore, how legal authorities treat victims affects the quality of the relationship between victims and the criminal justice system.

9.102 Although much has been done in recent times to improve the plight of victims in South Africa, limited and unco-ordinated services are at present being provided to victims of crime.

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

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

9.104 The status of the crime victim in the South African Criminal Justice System is very low compared to that of the offender, although a number of initiatives to improve their status have already been taken. The sentiment regarding the position of victims of crime in Canada in 1976, reflected in a quotation by Middleton, is also true for South Africa⁷⁶:

the victim of crime has been described as the Cinderella of the criminal law. The victim has been largely neglected while attention has focussed primarily on the offender. One concomitant of this has been the decline of the role of restitution in the criminal process. Although it was the dominant feature of the early criminal law, restitution has fallen largely into disuse as the state has undertaken the primary task of prosecuting criminal cases.

9.105 It is not only in relation to the question of restitution that the position of victims has been adversely affected. From a procedural point of view their position is, perhaps, even less enviable. From the position, in ancient Germanic law, of being *dominis litis*, with the sole right of instituting prosecution in their own interest, the victim's status in South Africa today, has been so reduced that they are virtually no more than witnesses with minimal rights to restitution in respect of loss or damage to property.⁷⁷ The crime victim is at the beg and call of the State as

the State may compel the victim to testify and may institute a prosecution in respect of offences committed against them, without their consent and even against their interests. If the Director of Public Prosecutions refuses to prosecute an offender the victim may institute a criminal prosecution in his own name and even then the aim of the prosecution is the protection of the public interest.

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Middleton A J "Legal reform and the implication for victimization" in: W J Schurink; I Snyman & W F Krugel (eds) *Victimization: nature and trends*. Pretoria: HSRC 1992 at 575.

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Middleton A J "Legal reform and the implication for victimization" in: W J Schurink; I Snyman & W F Krugel (eds) *Victimization: nature and trends*. Pretoria: HSRC 1992 at 575.

9.106 In Middleton's contemplation on legal reform and the implication for victimisation he states that the quality of direct contact between victims and the courts is very important and that the victims are the clients and should be treated as such. The fact that the victims are, in the South African legal system not formally parties to the litigation, adversely affects their position.⁷⁸ According to Van der Merwe⁷⁹ the emphasis is mainly on the individual offender, and society is relevant only in the indirect sense that it is ultimately society which is to be protected by the punishment of the offender. No consideration is given by Van der Merwe in his book on sentencing on incorporating the victim in some way or another, into the sentencing process. The criminal justice system has, up to now, largely ignored the needs of the crime victims under the pretext that they have access to civil remedies and that the State does not involve itself with civil matters. The fact of the matter is that most crime victims are poor and ignorant of the law. According to Coetzer⁸⁰ these civil remedies have no practical value for the average crime victim.

9.107 Middleton identifies the reason for the unwillingness of the law enforcement agencies to allocate a similar status to the crime victim as they give to the offender, as ... "one more of attitude, rather than an identifiable defect in the system".⁸¹ Coetzer is of the opinion that, even though the State may technically focus only on the punishment of offences, the victim

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Middleton A J "Legal reform and the implication for victimization" in: W J Schurink; I Snyman & W F Krugel (eds) *Victimization: nature and trends*. Pretoria: HSRC 1992 at 581.

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Van der Merwe D *Sentencing* Pretoria: Juta 1991 at 3-12.

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Coetzer J P J "Die slagoffers van misdaad; 'n verwaarloosde groep" 1994 *Consultus* April 28.

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Middleton A J "Legal reform and the implication for victimization" in: W J Schurink; I Snyman & W F Krugel (eds) *Victimization: nature and trends*. Pretoria: HSRC 1992 at 581.

may not be left to his own fate.⁸² In various other countries, like the USA, Britain and Australia, it is accepted that the State may not detach itself from the crime victim.

THE NEED FOR LAW REFORM

9.108 In recent decades the criminal justice system has been a significant focus for social reformers in many parts of the world. While resulting action has largely involved the constitution, structure and jurisdiction of existing institutions of government, there have also been innovations in the way that disputes are handled. For example, there was a move to establish neighbourhood justice centres in some countries from the 1970's. A further community-related development was the concept of victim-offender reconciliation which originated in Canada in 1974. These alternative programmes arose for a variety of reasons, including the belief that the legal system had become too complex, that community needs were not being met and that the control of disputes was more appropriately placed with communities rather than "the centralised organs of the state".

9.109 The notion of community has appealed as a social ideal to a range of disciplines across the centuries. It has attained even greater significance in the second half of the 20th century and has formed the platform for social policy development across a broad spectrum. During the 1980's there was also a resurgence of communitarian ideas including that being part of a community or society entails both entitlements and obligations, and that the rights of the individual should not be at the expense of responsibility to the community. The development of informal processes for conflict resolution, including restorative justice programmes, can therefore be seen within this wider context. While their aims and emphases vary, programmes involving victim-offender meetings are now operating in more than 250 locations throughout the world. From the outline above it is clear that the criminal

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Coetzer J P J "Die slagoffers van misdaad; 'n verwaarloosde groep" 1994 *Consultus* April at 28.

justice system in South Africa is failing victims of crime and that law reform in this regard is needed urgently.

EVALUATION - VICTIM EMPOWERMENT

9.110 In its discussion documents the Commission concluded that present support systems for victims of crime and violence in South Africa seem to be limited, fragmented, uncoordinated, reactive in nature and, therefore, ineffective.⁸³ This finding is mirrored by the final report of the Truth and Reconciliation Commission, which notes that 'victims of crime are the most neglected and disempowered of the role-players in the legal system. They are not being adequately served by the criminal justice system for a number of reasons'.⁸⁴ These reasons, according to the TRC Final Report, are:

- * the absence of a professional, motivated and appropriately staffed national police service;
- * the inability of the prosecutorial system to prosecute effectively and ensure criminal convictions in a manner that will change the current perception of criminals and potential criminals that their wrongdoing is unlikely to be detected and punished;
- * the inability of the Department of Correctional Services to carry out its role of effectively incarcerating awaiting-trial and convicted prisoners.

9.111 Furthermore, the TRC, in its recommendations, proposes that the feasibility of establishing a serious crimes compensation fund, as exists in countries like Australia, be

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South African Law Commission, Project 82, p.3.

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TRC *Truth and Reconciliation Commission Report of South Africa* Cape Town: Juta 1998.

examined.⁸⁵ It goes on to recommend that a code of conduct for prosecutors be established. This code should facilitate the assisting and empowering of victims by, amongst other things, informing them of their right to compensation under section 300 of the Criminal Procedure Act.

9.112 The need to develop effective victim services in South Africa clearly remains a priority. International research⁸⁶ has indicated that the proper management of victims and witnesses leads to increased success in police investigations and enhanced public confidence in the criminal justice system. It is believed⁸⁷ that empowering victims may contribute to reducing secondary victimisation, repeat victimisation and vigilante violence. It may also help to break the cycle of violence. Compensation for victims of crime, although not a service in the true sense of the word, at least in the developed world, is considered a vital component of the overall package offered to victims.

9.113 Within the South African context, however, the extent to which compensation, in a context of limited resources, should be emphasised over and above the need for other victim support measures, is a complex and fraught debate. Often the rationale behind the setting up of a compensation scheme is, in itself, weak and unsubstantiated. Even in the United Kingdom, a country with a long-standing compensation programme, the discussions which led up to the establishment of a compensation scheme revealed an extraordinary amount of intellectual confusion.⁸⁸ This gap means that developing a motivation for the establishment

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⁸⁶ TRC Final Report, Volume 5, Chapter 8, 50.

⁸⁷ D Bruce, G Newham and S Reddy *The Police, Victims and the Criminal Justice Process*. Johannesburg: Centre for the Study of Violence and Reconciliation 1999; L Camerer and S Kotze *Special Report on Victim Empowerment in South Africa*. Pretoria: Institute of Security Studies & Department of Welfare 1998.

⁸⁸ NCPS, 1996, p.19.

P Cane 'Compensation for Criminal Injuries' in *Atiyah's Accidents, Compensation and the Law* 250 – 269 edited by P Cane. London: Butterworths 1993.

of a VCS in SA remains incomplete, and must be completed if legislation is to be drafted, since no law should be passed without its objectives being clearly defined and costed.⁸⁹

9.114 While there are potentially numerous motivations for the introduction of a system of victim compensation, the most common underlying motivation appears to be that it would be a means of doing justice to victims. Most developed nations consider compensation a morally justifiable practice, and a vital component of their criminal justice system and victim assistance services.

9.115 However, on reviewing the implementation of victim compensation systems in other countries, it is immediately evident that most are extremely expensive and complex undertakings. Given the high levels of criminal victimisation in South Africa, any system aimed at financially compensating victims of crime could prove to be an unaffordable endeavour. For example, the compensation scheme in the United Kingdom (which provides compensation to about 80 000 people a year) costs the government roughly £200 million (about R2000 million) per annum.

9.116 Efficient administration is also central to most compensation schemes around the world which rely on large government or quasi-government units or departments, as well as the co-operation of the police and health services. Given the current infra-structural situation in South Africa's public service, it is likely that the establishment of a compensation scheme could be hampered by the lack of effective inter-sectoral co-operation and co-ordination, as well as by the underdeveloped administrative systems in some government departments.

9.117 Furthermore, the establishment of a compensation scheme could depend on creating a substantially new administrative infrastructure and staff complement. To date, for example, the processing of some 18 000 Truth and Reconciliation Commission urgent

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interim reparations claims has proved to be an incredibly difficult and protracted process. Such inefficiencies, which have also been seen in the government's processing of pension claims, suggest that there may be little realistic prospect for setting up a new bureaucracy with the purpose of compensating thousands of potential victims.

9.118 Compensation schemes also rely on effective co-operation with the police, with the reporting and recording of crime as prerequisites to any compensation process. Crime reporting rates in South Africa are low and police efficiency to verify the exact nature of a crime (this is essential to deciding who gets compensation and the degree to which the person was victimised) is questionable in many areas.

9.119 Fraud is also an area requiring careful consideration. The problem of the potential abuse of a compensation scheme by those applying for compensation, as well as by officials working in the scheme, is a concern. These problems are common in countries that have compensation schemes. The risk of abuse of the system, however, can be minimised by legislation that bases the eligibility for compensation on strict criteria and by providing checks and balances in the administrative system.

9.120 In contemplating a victim compensation scheme in South Africa, careful thought needs to go into explaining why victims of crime should be given priority over other people in need. Financial pay outs for suffering and financial losses resulting from a rape or violent robbery make moral sense, but these become difficult to justify in a context of limited resources, where poverty alleviation, combatting Aids and providing employment all demand increased resourcing.

9.121 Thus, in order to consider adequately whether South Africa should set up a compensation scheme, a number of key questions need to be answered. These include first of all the financial viability of a compensation scheme and secondly the question as to how a compensation scheme could be integrated with current victim empowerment initiatives. A

compensation fund can be extremely expensive and a complex undertaking. The Commission has given careful consideration to the parameters of a compensation scheme and its possible cost implications. This included consideration of:

- the administration of the scheme;
- the administrative infrastructure needed;
- prerequisites for an efficient scheme;
- dangers inherent in a compensation scheme and possibilities to reduce the risks, eg. fraud;
- a robust motivation for the establishment of a scheme to offset the affordability and practical concerns that may argue against its establishment; and
- the competing demands on financial resources and the need to prioritise.

9.122 The Commission came to the conclusion that it would be a mistake to presume that compensation, even if the motivations are substantiated significantly, could meet all the needs of victims. The Commission carefully considered the comments received on the proposals in the issue paper as well as in the discussion paper. Although there seemed to be substantial support for the creation of a compensation fund there was also a realisation of the difficulties that the creation of a compensation fund would face. These were outlined above. However, in the Commission's view, two particular problems forces the conclusion that a compensation fund is at this stage not a viable option, namely, the affordability of the fund in the current financial climate and the absence of prerequisites necessary for the effective and efficient administration of the fund. The Commission therefore concludes that a compensation scheme should rather be seen as an additional component of a comprehensive victim empowerment programme.

9.123 The research done by the Commission revealed that by defining the exclusions quite tightly, the amount needed for a fully-fledged compensation scheme for victims of violent

crime could be as much as R2.3 billion per year. The Commission is therefore of the view that a fully-fledged compensation scheme for victims of crime in South Africa is not financially viable in the short-term.

9.124 The Commission also considered the possibility of incrementally developing a compensation scheme. Given the excessive expense of implementing a comprehensive compensation scheme for victims of crime in the short-term, the discussion paper proposed that a number of targeted areas for compensation should be piloted. The discussion paper expressed the view that these should focus on those disabled by violent crime, rape survivors and the dependants of crime victims (particularly orphaned children) as these were considered victim groups of high priority.

9.125 Although there was much support for this view in the written comments as well as the comments during the Commission's consultation phase (which included hosting five regional workshops) the reality of the lack of funds, the problem of justifying a limitation of eligibility for payments from the fund, the problems relating to the administration of the fund and the problems with regard to the risks of fraud discussed above, forces the Commission to conclude that it is not a viable option in the short term either. The Commission is of the view that a victim compensation fund should be looked at against the broader background of providing improved services and access to the criminal justice system to victims of crime. At the same time the Commission is of the view that the establishment of a compensation fund should not be abandoned but developed over time as a long term project within the broader objective of improved services for victims of crime.

9.126 The current VEP programme is one of the key components of the National Crime Prevention Strategy (NCPS National Crime Prevention Strategy).⁹⁰ The NCPS advocates a

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Document produced by an Inter-Departmental Strategy Team consisting of the Departments of Correctional Services, Defence, Intelligence, Safety and Security Justice and Welfare May 1996).

victim-centred approach to combating and preventing crime and violence. Within this broadly restorative justice strategy it is argued that victim empowerment and support can make an important contribution to crime prevention. VEP emphasises crime as a social issue rather than a security issue. The ultimate purpose of the programme, as captured in the VEP mission statement, is ***to provide a caring and supportive service to victims of crime that is accessible, timeous and thorough, thus contributing to a sense of empowerment and an environment conducive to peaceful communities.***

9.127 Effective victim empowerment would mean that services for victims of crime would be:

- * available, accessible, thorough and professional;
- * rendered in an empowering, respectful and supportive manner;
- * co-ordinated and integrated effectively;
- * efficient in providing all the necessary information on available services to victims; and
- * efficient in providing information on the progress of relevant criminal investigation and information on procedures and processes to victims;

9.128 Currently, the programme is co-ordinated and implemented by the Department of Social Development together with an inter-departmental and inter-sectoral Victim Empowerment Management Team, which consists of the Departments of Social Development, Health, Correctional Services, Justice, Education and the South African Police Service, relevant NGOs and provincial coordinators. The programme, however, does not have an effective legislative basis and is hampered by budget allocations. In addition the Commission questions the justification for locating the VEP programme in the Department of Social Services. While the Department can take responsibility for the development of services to victims of crime, it cannot take full responsibility for an improved deal for victims of crime in the criminal justice system. Victims of crime are connected to the criminal justice process and they do not think of themselves as clients of the Department of Social Development. Secondly, in foreign jurisdictions either the Department of Justice or the prosecution takes responsibility for victim services. Therefore, in the Commission's view,

building on the VEP programme alone is not the solution to the problem. Appropriate legislative provisions should be developed to strengthen existing provisions to ensure a better deal for victims of crime. Ideally, like in foreign jurisdictions, the Department of Justice or the National Director of Public Prosecutions should take responsibility for victims.

9.129 The VEP programme is currently run on a part time basis, it focuses on victim support services and its only legislative basis is the Probation Services Act. Without an effective legislative basis, a guaranteed budget allocation and devoted officials employed in a full time capacity, an improved deal for victims of crime will not materialise. In the Commission's view the current VEP programme lacks the ability to implement and enforce decisions and take the process forward in an aggressive manner. The slow progress in improved services over the last few years is proof of the VEP programmes' inability to make a difference in the lives of victims of crime.

9.130 Since the inception of the VEP, the number of available services for victims has increased. The Department of Social Development has developed national projects aimed at achieving the objectives of the VEP. These include the following:

- * guidelines for voluntarism in victim empowerment;
- * expansion and/or duplication of a one-stop services project including domestic violence projects;
- * research and co-ordination;
- * undertaking victim of crime surveys;
- * programmes which prevent and respond to violence against women;
- * programmes for perpetrators of violence;
- * programmes for establishing shelters for abused women and children;
- * training social workers and lay-counsellors in the implementation of the Domestic Violence Act;
- * developing a resource directory on domestic violence for referral purposes;
- * programmes which prevent and respond to rape and sexual offences;
- * integration of victim-empowerment, economic and HIV/Aids programme; and
- * establishing trauma response units.

9.131 At provincial level, the Department of Social Development is partially funding various NGOs and CBOs that are implementing the VEP. In some provinces they have appointed

Project Managers to oversee the functioning of these funded projects. Furthermore, the Department of Safety and Security has been involved in training its police in trauma management and victim-empowerment. A number of police stations have opened Trauma Centres to assist victims of various crimes. The Department of Health has also taken an initiative in training the primary health care practitioners in victim empowerment and trauma management in different provinces. In addition, the Department of Justice has made legal provisions to counteract domestic violence in rural communities.

9.132 Besides these government-driven initiatives, there are various NGOs and CBOs which are providing services to victims of various crimes and some of these have been involved in training and providing expertise to the projects initiated by the government. A number of trauma clinics exist across the country and various primary level health care professionals have been trained by NGOs to provide frontline assistance. Research has shown that partnerships, between NGOs, community stakeholders, community police forums, government departments and others, are considered crucial to improved support for victims.⁹¹

9.133 The Commission is of the view that the conclusion is inevitable that the efforts of the VEP team still lacks the ability to deal effectively with all the issues relating to victims of crime. It is clear from the list of projects listed above that the programme focuses on support services and particular categories of victims are targeted and does not comprehensively deal with all the needs of victims. Without an effective legislative basis, support services will continue to be unco-ordinated, fragmented and reactive in nature. Unless a holistic view is taken of the problems relating to victims and there is legislative intervention, it will take years before all the needs of victims of crime are addressed effectively. Taking everything into account, the South African legal system is still geared to the protection of the rights of the offender while very few rights are accorded to victims of crime. The development of a Victim

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Independent Projects Trust 'No Excuses: Implementing the Victim Empowerment Programme' (2000) No 20 (Winter) *Crime and Conflict* 12-15.

Charter by the Department of Justice is an attempt to address this problem. The Commission is, however, of the view that implementation of the Charter will remain a problem unless some Department or Office takes responsibility for its implementation. It is difficult to see how the VEP programme team, comprising of representatives of different government Departments, NGO's and CBO's, will be able to ensure successful implementation. The planning and establishment of support services for victims of crime and violence are often not community-driven and happen on an *ad hoc* basis which results in difficulties.

9.134 In the Commission's view an evaluation of the projects listed above shows that victim services do not sufficiently cater for the diversity of the population and certain services are over-utilized, for example, services that focus on women and children, while others tend to be inaccessible as regards their location and service fees or are poorly marketed and therefor not used. There is also a lack of effective long term planning and unawareness of the plight of victims and the services available to them. Many victims go unsupported, remain traumatised, become victims again or even turn to crime and violence themselves.⁹²

9.135 The Commission is of the view that in South Africa the treatment of victims and services provided to them should be placed on a firm footing. In this regard we can learn from foreign jurisdictions. The Commission is of the view that the way in which victims are dealt with in Canada and Australia is of particular importance for South Africa. These developments have been discussed in some detail in chapter 7 and the important parts are repeated for the purpose of this report.

9.136 In Canada the federal government and provincial/territorial governments share the responsibility to respond to the needs and concerns of victims of crime and to articulate the

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Juan Nel "The South African Police Service Victim Support Programme Initiative: The Way Forward" Paper presented at the 1996 International Crime Conference: Crime and Justice in the 90's hosted by CRIMSA/IDASA 3-5 July 1996 Pretoria at 19-20.

victims' role in the criminal justice system. Both levels of government collaborate through the Federal Provincial Territorial Working Group on Victims of Crime. The Canadian Statement of Basic Principles of Justice for Victims of Crime, jointly endorsed by Federal, Provincial and Territorial Ministers Responsible for Justice in 1988, continues to guide the development of policies, programs and legislation. The federal government's role focuses on criminal law, as set out in the *Criminal Code*. The provinces are primarily responsible for enforcing the law, prosecuting offences, administering justice in general, within the provinces and providing services and assistance to victims of crime. The Federal, Provincial and Territorial governments are committed to exploring approaches to improve the victim's experience in the criminal justice system.

9.137 In March 2000, the Government of Canada allocated \$25 million over five years to the Department of Justice's Policy Centre for Victim Issues for federal victim-related initiatives and programs designed to improve support to victims of crime. The victims of crime strategy is intended to improve the experience of the victim in the criminal justice system and increase the confidence of victims of crime in the criminal justice system by, for example, ensuring that victims of crime and their families are aware of their role in the criminal justice system and services and assistance available to support them; enhancing the Department of Justice's capacity to develop policy, legislation and other initiatives which take into consideration the perspectives of victims; increasing the awareness of criminal justice personnel, allied professionals and the public about the needs of victims of crime, legislative provisions designed to protect them and services available to support them; and developing and disseminating information about effective approaches both within Canada and internationally to respond to the needs of victims of crime.

9.138 The Fund is comprised of four components that directly support the objectives of the initiative. are:

- * to enhance knowledge, promote developments and inform Canadians and criminal justice practitioners about the impact of victimization, the needs of victims of crime, approaches to respond to those needs and about the criminal justice system and the victim's role in that system;
- * to promote access to justice and participation in the justice system and the development of law, policies and programs through support for consultations, research, the development and dissemination of information and the development, demonstration/testing and implementation of innovative approaches, models and pilot projects regarding the delivery of services, programs and assistance to victims of crime;
- * to promote the implementation of legislative reforms designed to address the needs of victims of crime and articulate their role in the criminal justice system;
- * to promote the implementation of the Canadian Statement of Basic Principles of Justice for Victims of Crime and to promote the United Nations Statement of Basic Principles of Justice for Victims of Crime;
- * to contribute to increased knowledge and awareness of the impact of victimization, the available services, assistance, programs and legislation, the special needs of particular people due to the nature of their victimization or other characteristics, the training and development of skills of victim service providers and related/allied professionals;
- * to promote and encourage community/non-governmental organization involvement in the identification of victim needs and gaps in services and in the development and delivery of programs, services and assistance to victims in their communities; and
- * to enhance the involvement of non-governmental organizations through initiatives to build capacity within organizations (including training) to better meet the needs of victims of crime.

9.139 Funds are available to Provincial and Territorial departments and agencies designated by the Attorney General or Minister of Justice of the province and territory responsible for the provision of services to victims of crime. Any of a number of persons or institutions may apply for grants and contributions from the Fund including individuals; national, provincial, municipal, Aboriginal, community or professional organizations, societies or associations; Canadian educational institutions; international non-government organizations including bodies associated or affiliated with organizations of which Canada is a member, which have as their purpose victim advocacy, services, assistance or raising awareness about the impact of victimization; international governmental organizations including organizations of which Canada is a member which have as one of their purposes, victim assistance, advocacy, research or other purposes related to victim issues and private sector organizations sponsoring non-profit projects.

9.140 In recognition of the United Nations Declaration of Basic Principles of Justice for Victims of Crime, the Canadian Federal and Provincial Ministers Responsible for Criminal Justice agreed that the following principles should guide Canadian society in promoting access to justice, fair treatment and provision of assistance for victims of crime.

1. Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system.
2. Victims should receive, through formal and informal procedures, prompt and fair redress for the harm which they have suffered.
3. Information regarding remedies and the mechanisms to obtain them should be made available to victims.

4. Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings.
5. Where appropriate, the view and concerns of victims should be ascertained and assistance provided throughout the criminal process.
6. Where the personal interests of the victim are affected, the views or concerns of the victim should be brought to the attention of the court, where appropriate and consistent with criminal law and procedure.
7. Measures should be taken when necessary to ensure the safety of victims and their families and to protect them from intimidation and retaliation.
8. Enhanced training should be made available to sensitize criminal justice personnel to the needs and concerns of victims and guidelines developed, where appropriate, for this purpose.
9. Victims should be informed of the availability of health and social services and other relevant assistance so that they might continue to receive the necessary medical, psychological and social assistance through existing programs and services.
10. Victims should report the crime and cooperate with the law enforcement authorities.

9.141 In Australia the Association for Victim Support Australasia exists to advance the interests of people victimised by crime and it encourages the development of support services throughout Australia whilst striving towards a crime-free society. The Association has a number of objectives, including to encourage and assist the development of consistent, high quality, equitable and accessible support services for people victimised by crime throughout Australia; to promote fair and equal recognition of the rights and interests of people victimised by crime; to promote legislative and other reforms throughout the criminal justice system that reflect the rights and interests of people victimised by crime; to promote initiatives by individuals, communities and other agencies to improve responses to people victimised by crime; to consult with and foster co-operation between victim support services throughout Australia; to promote education and awareness; undertake, facilitate and encourage debate and research of issues that impact upon people victimised by crime.

9.142 The functions of the Association are to act as the peak body for member crime victim services in Australasia; to encourage and promote consistent, high quality standards in the delivery of services to victims of crime throughout Australia; to provide opportunities for the exchange of experience, information and resources between victim service organisations in Australia; to make representations on behalf of victim support services to government regarding legislative policy and services involving victims of crime; to provide information and advice to individuals and groups planning to organise support services for victims of crime where such services do not exist; to publish and distribute reports leaflets, and other literature relating to the support services required by victims of crime at a national and international level; to promote public education, research, and good support practices aimed at increasing awareness of and advancing knowledge about the issues and effects of crime on the victim, their families and the community; to organise conferences on issues relating to victims of crime for members and other interested parties and to liaise with organisations, professions and interested groups whose contribution could be beneficial to victims of crime.

9.143 Victim services in New South Wales is part of the Attorney-General's Department and it consists of the Victims Compensation Tribunal, the Victims of Crime Bureau and the Victims' Advisory Board. The three sections work together to help victims of crime in New South Wales to access services and entitlements to assist in their recovery. An additional role of the Victims Crime Bureau is to co-ordinate support to families and friends of missing people.

9.144 The Victims of crime Bureau is a government initiative and was established to provide a critical link between victims of crime and service providers throughout New South Wales. The Bureau's primary objectives are to provide support and referral services to victims of crime; to co-ordinate the delivery of victims support and counselling services by government and community agencies; to oversee the implementation of and report on the

statutory Charter of Victims Rights; and to co-ordinate support services to the families and friends of missing persons.

9.145 The Victims Crime Bureau provides and co-ordinates a wide range of services either directly or indirectly including a state-wide 24 hours Victims Support Line which offers telephone counselling, support, information and referral service to victims of crime; provides information to victims of crime about support services and counselling and compensation application procedures; accredits counsellors and administers the Approved Counselling Scheme; monitors the implementation of the Charter of Victims Rights; hosts an inter-agency forum of key stake holders in victims services and conducts projects arising from the inter-agency; trains and educates providers of services for victims of crime and the community; develops resource materials (brochures, information kits and posters) relating to support services for and the rights of victims of crime; publishes the Victims of Crime Chronicle which is a newsletter that provides updates on the Bureau's activities and a forum for the exchange of information; develops and maintains a data base of support services for victims of crime throughout New South Wales; undertakes research projects and develops policy on matters affecting victims of crime; and provides strategic policy advice to the Attorney-General and the Premier's Office.

9.146 In addition to the Victims Crime Bureau the Act also established a Victims Advisory Board with the object to advise the Minister (Attorney-General) on policies, practices and reforms relating to victim compensation and support services and to consult victims of crime, the community and government support agencies on issues and policies concerning victims of crime. The Act provides for the Board to consist of up to 10 members appointed by the Minister, including 4 members representing the community; a member representing the Police; a member representing the Attorney-General's Department; and members representing other relevant Government Agencies. Victims services provides an Executive Officer for the Board and the Executive Officer provides administrative and policy research support for the Board.

THE COMMISSION'S CONCLUSIONS AND INITIAL RECOMMENDATIONS

9.147 As stated above in South Africa the Probation Services Act, 11 of 1986, provides some legislative basis for the treatment of victims of crime. Section 3 provides that the Minister may, in respect of different categories of persons, establish or cause to be established programmes which are aimed at-

- (a) the prevention of crime;
- (b) the performance of community service;
- (c) information to and the treatment of offenders and other persons;
- (d) the care and treatment of the victims of crime;
- (a)e the observation, treatment and supervision of persons who have been released from a prison or a reform school, and who are probationers or who have been placed in the custody of any person in terms of any law;
- (a)f the rendering of assistance to the families of persons detained in a prison or reform school and the families of persons referred to in paragraph (e);
- (g) the establishment, financing and registration of shelters;
- (h) the compensating of victims of crime;
- (i) the adaptation of persons referred to in paragraph (e) to the community and their families; and
- (j)

generally, matters which the Minister considers

necessary or expedient for the combatting of crime.

9.148 The Commission was of the view that these provisions are insufficient to deal comprehensively with the needs of victims of crime and proposes that it should be supplemented. A comprehensive strategy which recognizes the role of government is essential for improvements to the criminal justice system when addressing the needs of victims of crime. The Commission therefore concluded that legislation should be adopted to provide a comprehensive package deal when dealing with the needs of victims of crime. In this regard the Commission was of the view that the legislation should, as a minimum, provide for:

- (a) the creation of a permanent structure, like an office for Victims of Crime within government structures, to take care of the needs of victims on a permanent basis;
- (b) the creation of a permanent body or institution (like an Advisory Council) to advise government on policy issues and legislative amendments to meet the needs of victims of crime;
- (c) the introduction of legislative of principles to guide the treatment of victims of crime; and
- (d) the creation of a dedicated fund to facilitate and develop the establishment of victim services.

The above principles are supported by all commentators to the Commission's discussion documents.

9.149 In view of the history of the treatment of victims of crime in South Africa outlined in this report the Commission is convinced that government and not the private sector, should take on the responsibility for victims of crime and should take the lead in providing services for and setting the standards for the treatment of victims of crime in the criminal justice system. There is no doubt that the private sector should play an important part in the

process, but, in view of our history and in particular in view of the unco-ordinated nature of the current provision of services legislative intervention is called for.

9.150 In the Commission's view there are two possibilities to consider for locating victim services within government structures. These are to create an Office for Victims of Crime within the existing structures of the National Director of Public Prosecutions or within the structure of the Department of Justice and Constitutional Development. These two options are outlined and discussed below. In order to achieve the goal of providing effective victim services the Commission concluded that legislation should provide for:

1. An outline of the governing principles for the treatment of Victims of Crime.

It is recommended that legislation include the following guiding principles for the treatment of victims of crime which are based on the Canadian statement of basic principles of justice for victims of crimes and the United Nations Declaration of Basic Principles of Justice for Victims of Crime,

In recognition of the United Nations Declaration of Basic Principles of Justice for Victims of Crime, it is agreed that the following principles should guide South African society in promoting access to justice, fair treatment and provision of assistance for victims of crime:

- (a) Victims must be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system.
- (b) Victims must receive, through formal and informal procedures, prompt and fair redress for the harm which they have suffered.

- (c) Information regarding remedies and the mechanisms to obtain them must be made available to victims.
 - (d) Information must be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings.
 - (e) Where appropriate, the view and concerns of victims must be ascertained and assistance provided throughout the criminal process.
 - (f) Where the personal interests of the victim are affected, the views or concerns of the victim must be brought to the attention of the court where appropriate and consistent with the Criminal Procedure Act.
 - (g) Measures must be taken when necessary to ensure the safety of victims and their families and to protect them from intimidation and retaliation.
 - (h) Enhanced training must be made available to sensitize criminal justice personnel to the needs and concerns of victims and guidelines developed, where appropriate, for this purpose.
 - (i) Victims must be informed of the availability of health and social services and other relevant assistance so that they might continue to receive the necessary medical, psychological and social assistance through existing programs and services.
 - (j) Victims must be encouraged to report the crime and cooperate with the law enforcement authorities.
2. The creation of an Office for Victims of Crime within the Office of the National Director of Public Prosecutions as established in terms of section 5 of the National Prosecuting Authority Act, 32 of 1998.

The Commission concluded that an Office for Victims of crime should be created within the Office of the National Director of Public Prosecutions. In the

Commission's view the Office of the National Director is the most appropriate to locate the Office for victims. At present there is an existing infrastructure which could be used and prosecutors have a special responsibility towards victims. Although it could be argued that it is equally appropriate to locate this responsibility in the Department of Justice it is submitted that the Department does not have an existing infrastructure which could be used for this purpose. Using the regional offices is an option but it will mean that the services would be removed from victims. If the responsibility is given to the Department it would be controlled from the National Office or regional offices which would also mean that direct contact with victims would be limited. A counter argument for locating the Office with the National Director of Public Prosecutions is that it may detract from its primary function of prosecuting. In addition such a responsibility would extend to victims in general and it is not limited to those instances where prosecutions are instituted. The question therefore arises whether the Office of the National Director is the appropriate one for this purpose. The Commission is, however, of the view that the alternative would be to create a complete new infrastructure which would be costly to implement. The Commission therefore concluded that the Office be created within the Office of the National Director of Public Prosecutions and that, in order to provide a better deal for victims of crime, the functions of the Office for Victims of Crime should be to:

- (a) develop and provide support services for victims of crime which includes:
 - (i) developing and providing effective support services for victims of crime throughout the country;
 - (ii) performing the administrative duties relating to the development and provision of support services for victims of crime;

- (iii) coordinating the delivery of victim support and counselling services by government and community agencies;
 - (iv) establishing and administering a victim support service in the criminal courts; and
 - (v) dealing with issues relating to procedures in the criminal courts;
- (b) oversee the implementation of the Victim Charter and report on its implementation which includes receiving complaints from victims of crime about alleged breaches of the Victim Charter and resolving the complaints;
- (c) promote awareness of the needs of victims of crime which includes:
 - (i) developing and coordinating educational and other programmes to promote an awareness of the needs of victims;
 - (ii) disseminating information concerning the operation of the Office in terms of relevant legislation; and
 - (iii) ensuring, as far as practicable, that victims receive the information and the assistance they need;
- (d) develop standards and provide training for providers of services which includes:
 - (i) developing uniform and quality standards for providers of services to victims of crime; and
 - (ii) training and educating providers of services to victims of crime and the community;
- (e) provide information on matters affecting victims which includes:

- (i) keeping statistics and conducting surveys relating to the incidence of victimization and developing resource materials, brochures, information kits and posters relating to support services for and the rights of victims of crime;
 - (ii) developing and maintaining a data base of support services for victims of crime throughout the country;
 - (iii) publishing a newsletter reflecting the activities of the Office for Victims of Crime; and
 - (iv) providing a forum for the exchange of information on matters affecting victims by hosting an annual national conference;
- (f) do research and develop policy on and undertake projects relating to matters affecting victims of crime which includes providing strategic policy advice to the National Director of Public Prosecutions and any other organ of state, body or institution dealing with matters affecting victims;
- (g) administer the Fund for Victims of Crime which includes assisting victims of crime in recovering from harm suffered by them and advancing the interests of victims of crime in other ways;
- (h) ensure the implementation of decisions and recommendations of the Victim Council and relevant legislation passed by Parliament; and
- (i) perform any other function assigned to the Office for Victims of Crime by or under any other law.

3. Creating an appropriate structure for the execution of the functions of the Office for

Victims of Crime

The Commission concluded that provision should be made for -

- * the appointment of administrative staff in the Office for Victims of Crime;
- * the appointment of a head of the Office for Victims of Crime who must carry out his or her functions subject to the control and directions of the Victim Advisory Council;
- * empowering the head of the Office for Victims of Crime to be assisted in the exercise of his or her powers and the performance of his or her duties by -
 - prosecutors;
 - officers of any Department of State seconded to the Office for Victims of Crime in terms of laws governing the public service;
 - persons in the service of any public body or other body who are by arrangement with the body concerned seconded to the service of the Office; and
 - any other person whose services are obtained by the head of the Office for Victims of Crime for the purpose of a particular matter.

4. The creation of a Fund for Victims of Crime.

The Commission concluded that a Fund for Victims of Crime should be established with the objective of:

- (a) establishing, develop and coordinate services for victims of crime;
- (b) promoting the implementation of the Victim Charter of Rights;
- (c) enhancing knowledge, promoting developments and informing the public and criminal justice practitioners about the impact of victimization, the needs of victims of crime, approaches to respond to those needs and about the criminal justice system and the victim's role in the system;
- (d) promoting access to justice and victim participation in the justice system and developing the law, policies and programmes through consultation, research, developing and disseminating information and developing, testing and implementation of innovative approaches, models and pilot projects regarding the delivery of services, programmes and assistance to victims of crime;
- (f) promoting legislative reforms designed to address the needs of victims of crime and articulate their role in the criminal justice system;
- (g) promoting the implementation of the Basic Principles of Justice for Victims of Crime;
- (h) contributing to increased knowledge and awareness of the impact of victimization, the available services, assistance programs and existing legislation;
- (i) providing training for and the development of skills of victim service providers and related professionals;
- (j) promoting and encouraging community involvement in the

identification of victim needs and problem areas in the development and delivery of programmes, services and assistance to victims in their communities;

- (k) enhancing the involvement of non-governmental organizations through initiatives to build capacity within organizations to better meet the needs of victims of crime;
- (l) developing networks or referral mechanisms for service delivery and enhancing the participation of non-governmental organizations in the development of policies, programs and legislation;
- (m) providing direct, limited, emergency financial assistance to individual victims of crime in exceptional circumstances; and
- (n) administering the Fund.

5. The sources of the Fund.

The Commission concluded that the Fund be sourced from:

- (a) any property or moneys paid into or allocated to the Fund in terms of any legislation; and
- (b) domestic and foreign grants;

The following moneys must be paid into the Fund -

- (a) a percentage determined by the Minister by proclamation in the Gazette of all

- finances imposed and recovered by a court in respect of the offences determined by the Minister by proclamation in the Government Gazette: Provided that the Minister may, by proclamation in the *Government Gazette*, exclude fines recovered in respect of certain offences; and
- (b) an amount appropriated annually by Parliament.

6. The establishment of a Victim Council.

Legislation should outline the functions of the Victim Council, which should include:

- * to advise the Minister on policies and administrative arrangements relating to the office and branches of the Office for Victims of Crime, the powers, functions and duties of the Director of the Office, the required support services and the extent of compensation needed for victims of crime;
- * to advise the Minister on practical initiatives that government must take to ensure that victims of crime are treated with proper consideration and respect in the criminal justice system;
- * to advise the Minister on matters relating to victims of crime including policy relating to the creation of a compensation

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- * to direct the work of the Director of the Office for Victims of Crime;
- * to make recommendations to the Minister in respect of the annual budget of the Fund;
- * to promote legislative, administrative or other reforms, including the amendment of the Victim Charter, to meet the needs of victims of crime; to designate State and Provincial departments, law enforcement agencies, institutions and organisations as responsible for the provision of services to victims of crime; to review regulations issued in terms of legislation; and
- * to consult victims of crime, community victim support groups and Government

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6. The composition of the Victim Council

The Council should comprise representatives from government agencies such as the Departments of Justice, Health, Social Development, Police Services and community based representatives from NGOs and CBOs.

FURTHER CONSULTATION

9.151 In view of its conclusions outlined above and in particular in view of its conclusion that the Office for Victims of Crime should be located within the structures of the National Prosecuting Authority the Commission concluded that additional consultation with the Office of the National Director of Public Prosecutions and the Department of Justice was necessary. A formal meeting was arranged with the National Director of Public Prosecutions and members of his staff, to discuss its provisional conclusions and recommendations. The meeting was held on 7 March 2003. At this meeting the National Director of Public Prosecutions indicated his support for the establishment of an Office for Victims of Crime but could not commit himself to support the creation of the Office within the

structure of his Office before consulting with relevant role players on his establishments. It was therefore agreed that further consultation was necessary. In this regard the National Director was provided with copies of the Commission's provisional conclusions and the draft Bill prepared in support thereof with the request to make it available to all interested parties and role players on its establishment for their comment.

9.152 The further consultation undertaken by the Commission therefore relates to the location of the structures necessary for giving effect to the Commission's proposals for a comprehensive package deal for victims of crime. In this regard there are two options to consider, namely the location of the Office for Victims of Crime within the structure of the National Prosecuting Authority and secondly to locate the Office within the Department of Justice. These two options and the comments provided by the Prosecuting Authority and the Department are outlined separately below.

OPTION 1 - CREATING THE OFFICE FOR VICTIMS OF CRIME IN THE STRUCTURES OF THE NATIONAL PROSECUTING AUTHORITY

9.153 In view of the importance of the input of the National Director of Public Prosecutions for the Committee's initial conclusions the comment submitted is quoted in full and the Commission's evaluation of the comments is given under each heading. The Commission's draft Bill was submitted to all the Directors of Public Prosecutions and Unit Heads within the NPA for their comment. Thereafter the Bill and a summary of the comments received from the various commentators were submitted to the NPA's Executive Committee for consideration.

COMMENT BY NATIONAL PROSECUTING AUTHORITY

1. Principle matters

- (a) Clause 8(1) provides for the establishment of an Office for Victims of Crime in

the Office of the National Director. In principle the NPA supports the establishment of a Victim Council and an Office for Victims of Crime. The primary issue is whether the implementation and management and including the financial and budgetary management, control and responsibility and the coordination of responsibilities outlined in the Bill, ought to be carried out by the Office of the National Director and by an Office within the Office of the National Director. The NPA holds the view that the above proposal should not be supported for the following reasons:

- (i) If one looks at the core constitutional function of the prosecuting authority and the peculiar and particular nature of the same, it is and has always been and will always be absolutely imperative that the National Director and prosecution staff are not involved in any activities outside that core function or which are not sufficiently directly and necessarily connected therewith in order to minimize the risk of the vital integrity of this office and its professional staff being endangered or compromised. It is submitted that this requirement renders it inappropriate for the National Director and professional staff of the NPA to be involved in any way with financial powers, duties and responsibilities as those outlined in the Bill.
- (ii) The concept of a victim compensation scheme is in line with the National Crime Prevention Strategy and thus needs to be integrated with the criminal justice reform. It must therefore be seen to be a complementary component of victim support which is vital for ensuring the efficacy of the whole criminal justice system. Our current Victim Empowerment Program is co-ordinated and implemented by the Department of Social Development. However, the proposed Office is to address all victims in general and is not limited to those instances where prosecutions are instituted. The Office of the National Director's primary function is prosecution. By having this office set up in the Office of the National Director may detract from its primary function.
- (iii) Statistically, the number of charges laid at a Police station far outweighs the number of dockets sent to court. Thus, the small number of victims passing through the court system does not warrant this Compensation Fund being established within the office of the National Director. Furthermore, as emphasized by the Commission in its report, in the majority of incidents of crime, perpetrators are never identified or are not identified with sufficient certainty for the purposes of prosecution. This means that in the majority of such incidents interaction between the victims of crime and government agencies

begins and ends with the South African Police Service. Interaction between victims of crime and the prosecution authority in the majority of cases and in the ordinary course is therefore, and as a consequence of the above, necessarily excluded.

COMMISSION'S EVALUATION

9.154 It appears that the National Prosecuting Authority supports the Commission's principle recommendations which include that:

- (a) a compensation fund for victims of crime not be established at present, but that its establishment be considered within the broader context of improved services for victims of crime as provided for in the proposed legislation on improved services for victims;
- (b) legislation be introduced to put the treatment of victims of crime on a firm footing and that the legislation provide for -
 - (i) the governing principles for the treatment of Victims of Crime as outlined in paragraph 9.135(1);
 - (ii) the creation of an Office for Victims of Crime performing the powers and functions outlined in paragraph 9.135(2) and the creation of an appropriate structure for the execution of the functions of the Office for Victims of Crime as outlined in paragraph 9.135(3);
 - (iii) the creation of a Victim Council to advise government on policy, legislation and administrative arrangements concerning the Office of Victims of Crime as outlined in paragraph 9.135(6) and the composition of the Victim Council as outlined in paragraph 135.(7); and
 - (iv) the creation of a fund for Victims of Crime with the objectives outlined in paragraph 9.135(4) and the sources of the fund as outlined in paragraph 9.135(5).

9.155 The question which remains to be answered relates to the question where the Office for Victims of Crime should be located. The Commission is of the view that victim services should be under government control. This conclusion is supported by the NPA. Despite the objections in principle raised by the National Director of Public Prosecutions the Commission is of the view that the existing structure of the National Director of Public Prosecutions is the most appropriate place to locate the Office for Victims of Crime. The Commission is of the view that apart from the objections in principle, the other objections raised in the comment of the National Director, which inter alia relate to the practical functioning of the Office, budgetary control, line functions and the relationship between the Office for Victims of Crime and the National Director, can be addressed if the principle of where the Office for Victims of Crime should be located is settled.

9.156 The Commission is of the view that the proposed Office for Victims of Crime can be created within the structures of the National Prosecuting Authority on the same basis as the Office for Witness Protection established in terms of the Witness Protection Act, 112 of 1998. The provisions of the Witness Protection Act informed the committee when developing its proposals. Whereas the Office of the Director: Witness Protection was created within the Department of Justice, the committee initially recommended that the Office for Victims of Crime be created within the structures of the National Director of Public Prosecutions. Apart from this variation the committee's recommendations as to the functioning the Office for Victims was based on the provisions of the Witness Protection Act. The Office for Witness Protection is established within the Department of Justice and the Act provides for the establishment of sub offices or branch offices by notice in the Gazette. The Office is headed by the Director: Witness Protection, who exercises his or her duties subject to the directions of the Minister of Justice. Provision is furthermore made for the appointment of a Deputy-Director and the Office is staffed by officers designated by the Department for this purpose, witness protection officers security officers, officers seconded to the Office by other State Departments, persons in the service of any public body or institution who render a service in respect of any matter provided for by the Act and any person whose services are

obtained by the Director.

9.157 In order to achieve the objectives of the Witness Protection Act, the Director is responsible for the protection of witnesses and related persons, must carry out the administrative duties relating to the protection of witnesses, may enter into agreements to make use of the services of persons, bodies, and institutions in terms of which the Office will make use of the facilities or equipment belonging to or under their control and regarding any matter for the purpose of giving effect to the provisions of the Act. Powers conferred upon the Director in terms of the Act may be delegated to any persons in the Office for Witness Protection. All Departments of State is required to render assistance to the Office which are necessary for the performance and carrying out of the powers, functions and duties conferred upon or assigned to or imposed upon the Director. The Act also contains detailed provisions on the protection, application for protection and discharge from protection of witnesses.

9.158 The Act also contains provisions concerning financing of the Office. The Director may, for example, receive donations, bequests and contributions for witness protection from any source for the purpose of giving effect to the provisions of the Act and the Director-General of the Department must be notified of such contributions. The Director may use such contributions subject to the conditions imposed by the donor.

9.159 It should be pointed out that the committee's recommendation for locating the Office for Victims of Crime within the structure of the Prosecuting Authority originated from the provisions of the Witness Protection Act and the practical functioning of that Office. Although the Director Witness Protection functions under the control of the Department of Justice in terms of the Act, in practice the Office is located under the authority of the National Prosecuting Authority. Whereas it is true that in terms of the committee's proposals the National Director of Public Prosecutions will have to deal with all victims and not only those where a suspect has been identified or arrested, the proposed functions of the branch-offices

is such that the head of the sub-offices' main duties will be of a co-ordinating nature. The sub-offices will be staffed by representatives of all role players dealing with victims and will not necessarily have to be a representative of the National Prosecuting Authority. Furthermore, in terms of the proposal the main organisational and control function is placed under the authority of the National Prosecuting Authority whereas the actual performance of the services will not necessarily have to be done by the Prosecuting Authority. It will be a shared responsibility while the major role to be played by the Prosecuting Authority will be the management function. In addition the prosecuting authority is in the Commission's view the most suitably equipped to deal with victims. For this purpose it is pointed out that within the prosecution services specialised units have been established to take care of the needs of particular categories of victims, for example, the units dealing with rape victims and children as victims. By using existing structures such as the offices of the prosecution in the courts as the contact point for victim services the Commission is of the view that it will meet the need to bring the services for victims to ground level and secondly it will enforce the special relationship which already exist between the prosecution and the victims because both are an integral part of the criminal justice process. Placing responsibility for victims under the prosecuting authority is a natural extension of the service rendered by the prosecution in the interests of society. The Commission is therefore not convinced that the proposal should be rejected on this ground alone.

COMMENT BY NATIONAL PROSECUTING AUTHORITY

- (iv) In terms of the draft Bill the Office for Victims of Crime will fall under the National Director, as does the Director and Deputy Director of Public Prosecutions. However, in terms of clauses 7(1)(d) and 9(2), the Victims Council (whose members are to be appointed by the Minister) directs the work of the Director. In terms of section 22(1) of the National Prosecuting Authority Act, 1998(Act 32 of 1998(NPA Act), the National Director, as head of the prosecuting authority, should have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority by the Constitution, this Act or any other Law. The implication thereof is that the National Director is in control of a Deputy National Director, a Director and a

Deputy Director. However, in terms of the draft Bill the control of powers over the Deputy National Director and a Deputy Director is placed in the hands of the Minister (as well as the Victims Council). Therefore, the National Director will have no authority over such Deputy National Director in respect of the exercise and performance of his or her powers, duties and functions relating to the Office for Victims of Crime. The NPA is of the view that this would interfere with the independence of the NPA.

- (v) In the final instance we wish to point out that managing the proposed Office will entail a massive task and the NPA, with its limited resources and accommodation, does not have the capacity to perform this task.

COMMISSION'S EVALUATION

9.160 The concern raised in the comments in this regard are valid and the committee is of the view that it could be addressed to amend or delete the proposed enabling provisions.

COMMENT BY NATIONAL PROSECUTING AUTHORITY

- (b) Clause 9(1) provides that the Minister must, subject to the laws governing the public service and the NPA Act, appoint a **Deputy National Director of Public Prosecutions** (DNDPP) as head of the Victims of Crime Office. The NPA is of the view that the Office should be headed by a manager, not a lawyer. By requiring a DNDPP as the head of the Office, we are seriously limiting our ability to find the right person for the job. In this regard one must also keep in mind that in terms of section 12 of the NPA Act, a maximum of four Deputy National Directors may be appointed to the Office of the National Director. The President had already appointed four Deputy National Directors. To assign these extra duties pertaining to the Victims of Crime Office to one of these Deputies, may impose a too heavy burden on that Deputy National Director.

COMMISSION'S EVALUATION

9.161 This concern also appears to be valid and can be addressed by deleting the requirement that the Director for the Office for Victims of Crime should be a Deputy National

Director of Public Prosecutions.

COMMENT BY NATIONAL PROSECUTING AUTHORITY

- (c) In terms of clause 9(10) the National Director must provide adequate financial and logistical support for the Victim Advisory Council, the Director and the branch offices of the Office. The NPA is of the view that one cannot propose such controversial legislation unless a sound and comprehensive costing exercise has been done. The Bill should provide that Treasury must provide adequate financial support. This provision will also have a major impact upon the already complicated administrative and accountability arrangements within the NPA.
- (d) In terms of clause 16(1) the National Director must receive all money payable to or for the benefit of the Fund in terms of the proposed Act, and he is also charged with the responsibility of accounting for all money received and the utilization thereof. The National Director cannot be responsible for this task. It is the duty of the Chief Executive Officer who is also the Accounting Officer of the NPA.

COMMISSION'S EVALUATION

9.162 The Commission does not support the view that the proposal is too far reaching in that

it cannot be implemented. In practise and in terms of the Public Finance Management Act all heads of government Departments is the accounting officer for their budget allocations and control thereof and the proposal does not change anything in this regard. To require the National Director to provide logistical and financial support for the Office and its branch offices is in the Commission's view a much less expensive proposal than to create complete new structures. If the offices and furniture in court buildings are used and the office staffed with staff members already in the employment of the State it may well be that the proposal has minimal additional financial implications. In addition it is not the function of the Law Commission to cost proposals before a recommendation for law reform are made. This would be the responsibility of the Department of Justice when considering the promotion and

implementation of the proposed legislation.

COMMENT BY NATIONAL PROSECUTING AUTHORITY

2. Technical comments

- (a) Clause 4(1) of the Bill proposes the establishment of a **Victim Council**. In terms of clause 4(9) of the Bill a member of the Council, other than a member who is not in the service of the State, may receive such allowances as may be determined by the Director-General in consultation with the **Minister of State Expenditure**. The Bill should refer to the **Minister of Finance**. Furthermore, it is proposed that clause 4 be amended to provide that the Director of the proposed Office for Victims of Crime should serve on the council ex-officio. It is illogical that the minister should appoint them.

COMMISSION'S EVALUATION

9.163 The Commission is in agreement with the proposal and recommend the amendments as proposed.

COMMENT BY NATIONAL PROSECUTING AUTHORITY

- (b) Clause 8(1) provides for the establishment of an Office for Victims of Crime in the Office of the National Director. In terms of clause 8(2)(a) to (c) the Minister may, after consultation with the National Director, by notice in the *Gazette*, establish branch offices in any defined area and may for this purpose make any administrative or other arrangements deemed necessary for the purpose of the administration of this Act; abolish any branch office or incorporate it with any other such office, and may for this purpose make necessary administrative or other arrangements; and amend or withdraw a notice issued in terms of this subsection. The NPA holds the view that this level of detail is not needed in the Bill and that one should not over-legislate on matters such as structure. This is something between the Minister and the Office and notices and gazettes are not needed just to alter structures, since it creates an administrative and management nightmare. The NPA recommends the

deletion of the entire clause 8(2). The same argument applies to clause 9(4).

COMMISSION'S EVALUATION

9.164 The Commission does not agree with the comment in that it is necessary to establish branch offices and it is necessary for victims to be informed of where the branch offices would be. Initially, when the Bill is implemented, it may be that an incremental approach is followed and that branch offices are not established in all centres. It may well be that branch offices are required in areas where there is no magistrates office or at police stations and for this purpose it is necessary to formalise the structure, just as was done with regard to the branch offices established in terms of the Witness Protection Act.

COMMENT BY NATIONAL PROSECUTING AUTHORITY

- (c) In terms of clause 15(6) an accounting officer appointed or designated under clause 15(5) must be charged with the responsibility of accounting for all money allocated under subclause (2), the acquisition, receipt, custody and disposal of all property so allocated and all payments made by him or her in respect of the purpose for which the allocation had been made. The NPA holds the view that the Bill must be more specific on this matter.
- (d) Clause 3 of the Bill contains a detailed list of principles without assigning responsibility for enforcing them. In such loose form, the principles will become grounds for disgruntled applicants to launch proceedings against the state (and possibly other) agencies for an alleged non-compliance. It is suggested that the principles be inserted in clause 10 as part of the powers, duties and functions of the Director, in a form that obliges the Director to strive to promote the principles.

COMMISSION'S EVALUATION

9.165 As to paragraph (c) above the Commission does agree with the comment. The proposed Clause (section 15) outlines in detail the purposes for which the money can be allocated and it provides that if money or property is to be allocated to a law enforcement agency, State Department or an institution or organisation, it must be indicated for what purpose the money is to be used and all particulars of such allocation must also be tabled in Parliament. It also provides that the receiving institution must have an accounting officer, the Victim Council may issue guidelines as to the manner of book keeping and accounting for the money received.

In addition it provides for the auditing of the book keeping by the Auditor General. In general the Commission is of the view that sufficient measures are put into place to prevent fraud and corruption. However, the Commission is satisfied that if a provision is added in terms of which it is provided that the provisions of the Public Finance Management Act and Departmental financial instructions would be applicable to such allocations it would put the matter beyond doubt.

COMMENT BY NATIONAL PROSECUTING AUTHORITY

- (e) If the proposed legislation is enacted without stringent regulations, as well as guidelines, the Fund could be abused. Therefore, it is recommended that legislation must be put in place to alleviate corruption and to administer the Fund in a just manner. The Compensation Fund must also be seen to run concurrently with our current victims' empowerment initiatives.
- (f) The following aspects need to be addressed in the legislation:
 - (i) How does one define a victim of crime? Are the criteria that every person who lays a charge with SAPS qualifies as a victim of crime? Who is to determine that the charge was indeed a true charge, or one laid purely for the purposes of obtaining compensation? The opinion is held that every charge should be investigated to make sure that a crime has indeed been committed, and that there is a *prima facie* case. Where a perpetrator has been identified, some further criteria must be added, namely, whether there is a chance of a successful prosecution.

- (ii) In terms of the Bill the definition of a "**victim of crime**" is extremely wide and vague and can encompass just about any act or omission that is in violation of the South African Criminal laws. In terms of clause 2 of the Bill the provisions are applicable to all victims of crime, without any discrimination. The opinion is held that this is so wide.
- (iii) In terms of clause 15(2) of the Bill a Director may pay compensation to "**specific individual victims of crime**". The Bill does not define who "**specific individuals**" are. Furthermore, in terms of clause 15(2)(m) the Director may provide emergency financial assistance to individual victims of crime in "**exceptional circumstances**". Once again, there is no definition as to what the expression "**exceptional circumstances**" means.
- (iv) Which victims are eligible for compensation? If a person is a victim of e.g. hijacking, theft of motor vehicle, housebreaking, malicious injury to property etc. and they have an insurance policy covering any loss or damage, do they also qualify to be compensated by this Fund? Furthermore, can a person who has a medical aid scheme also be compensated by the Fund if his or her medical aid pays for treatment or psychological counselling?
- (v) How do you ascertain damages and loss? How does one ascertain the amount of compensation to be paid out for emotional trauma, mental or physical injury, economic loss or impairment of fundamental rights.
- (vi) Is there to be a full or partial payment of compensation? Will the compensation always be monetary, or will there be also other services provided?

In conclusion therefore, the NPA supports the establishment of a Victim Council and an Office for Victims of Crime, but does not support the proposal that such Office be located within the NPA. It is recommended that the Project Committee should rather consider the establishment of an independent Compensation Fund for Victims similar to the Road Accident Fund established in terms of the Road Accident Fund Act, 1996(Act No.56 of 1996).

COMMISSION'S EVALUATION

9.166 The Commission agrees that steps should be taken to prevent abuse of the Fund. In this regard the proposed legislation (use of money from the Fund) contains strict compliance with the Public Finance Management Act, Act 1 of 1999 as well the rules governing the public service. The Commission is of the view that if compliance with the Department of Justice Financial Instructions is added sufficient provision is made to prevent abuse of the Fund. In addition the comments of the National Director does not take into account that the main recommendation is not that a Fund should be created for compensation of victims of crime, but that a Fund is created to be used for the provision of services to victims of crime. It should be noted that the Fund referred to is not called a Compensation Fund but a "Fund for Victims of Crime". In this regard the proposed legislation contains a detailed provision (section 15(2)) as to the services for which and circumstances under which the Fund could be used. There is also a recommendation that money from the Fund could be used for providing direct, limited, emergency financial assistance to individual victims of crime in exceptional circumstances. It, however, does not refer to compensation. The purpose of the provision is to provide financial assistance where the required services cannot be provided by the Office and a delay would have a severe impact on the victim, for example irreparable harm or suffering would result if no support or service is provided. It is true that the proposed legislation does not provide for guidelines as to the amount of assistance, a definition of victim for this purpose and eligibility requirements. The problems referred to by the National Director of Public Prosecutions are precisely those associated with the establishment of a compensation fund and which have been considered by the Commission at length when evaluating the establishment of a compensation fund. The Commission's conclusion was that a Fund for compensation should not be recommended, but that the development thereof should be considered by the Victim Council who, in terms of the proposed legislation (section 7(1)(c)) must "advise the Minister on matters relating to victims of crime including policy relating to the creation of a compensation fund for victims of crime."

9.167 The Commission is, however, persuaded that the legislation should provide some

guidance on the circumstances under which direct financial assistance could be provided to victims. In this regard the Commission is of the view that the recommendation should be qualified by requiring that the -

The Director should, upon submission of evidence in support of the application, be satisfied that:

- (1) the person is:
 - (a) a bona fide victim as defined in the Act;
 - (b) that he or she has suffered harm, including physical or mental injury, emotional suffering, economic loss or the impairment of fundamental rights through an act or omission that is a crime in terms of the criminal law;
- (2) no appropriate service or support can be rendered immediately to the person by the Director or its Offices, or any other institution, medical aid scheme or insurance agency from whom he or she is entitled to assistance;
- (3) without financial assistance, a delay in providing a service, assistance or support to the person would cause him or her to suffer irreparable harm or suffering; and
- (4) the financial assistance which is provided is the minimum necessary to prevent irreparable harm or suffering.

THE COMMISSION'S RECOMMENDATION

9.168 The Commission is of the view that victim services should be under government control. Despite the objections in principle raised by the National Director of Public Prosecutions the project committee is of the view that the existing structure of the National Director of Public Prosecutions is the most appropriate place to locate the Office for Victims of Crime. The Commission is of the view that apart from the objections in principle, the other objections raised in the comment of the National Director, which inter alia relate to the practical functioning of the Office, budgetary control, line functions and the relationship between the Office for Victims of Crime and the National Director, can be addressed if the

principle of where the Office for Victims of Crime should be located is settled. The Commission is of the view that the proposed Office for Victims of Crime can be created within the structures of the National Prosecuting Authority on the same basis as the Office for Witness Protection established in terms of the Witness Protection Act, 112 of 1998. The provisions of the Witness Protection Act informed the committee when developing its proposals. Whereas the Office of the Director: Witness Protection was created within the Department of Justice, the Commission recommended that the Office for Victims of Crime be created in the structure of the National Director of Public Prosecutions. Apart from this variation the Commission's recommendations as to the functioning the Office for Victims was borrowed from the provisions of the Witness Protection Act. The Office for Witness Protection is established within the Department of Justice and the Act provides for the establishment of sub offices or branch offices by notice in the Gazette. The Office is headed by the Director: Witness Protection, who exercises his or her duties subject to the directions of the Minister of Justice. Provision is furthermore made for the appointment of a Deputy-Director and the Office is staffed by officers designated by the Department for this purpose, witness protection officers security officers, officers seconded to the Office by other State Departments, persons in the service of any public body or institution who render a service in respect of any matter provided for by the Act and any person whose services are obtained by the Director.

9.169 In order to achieve the objectives of the Act the Director is responsible for the protection of witnesses and related persons, must carry out the administrative duties relating to the protection of witnesses, may enter into agreements to make use of the services of persons, bodies, and institutions in terms of which the Office will make use of the facilities or equipment belonging to or under their control and regarding any matter for the purpose of giving effect to the provisions of the Act. Powers conferred upon the Director in terms of the Act may be delegated to any persons in the Office for Witness Protection. All Departments of State is required to render assistance to the Office which are necessary for the performance and carrying out of the powers, functions and duties conferred upon or

assigned to or imposed upon the Director. The Act also contains detailed provisions on the protection, application for protection and discharge from protection of witnesses.

9.170 The Act also contains provisions concerning financing of the Office. The Director may receive donations, bequests and contributions for witness protection from any source for the purpose of giving effect to the provisions of the Act and the Director-General of the Department must be notified of such contributions. The Director may use such contributions subject to the conditions imposed by the donor.

9.171 The Commission recommends the legislation outlined in Annexure A to create an Office for Victims of Crime in the structures of the National Prosecuting Authority.

OPTION 2 - CREATING AND OFFICE FOR VICTIMS OF CRIME WITHIN THE DEPARTMENT OF JUSTICE

9.172 The Commission also provided copies of its draft recommendations and Bill to the Department of Justice and Constitutional Development for comment. The Business Unit Court Services were requested to comment on the draft proposals and in particular the proposals relating to the location of the Office for Victims of Crime and the powers and functions of the Director and its staff members. The Department was requested to comment on the possibility of locating the Office for Victims of Crime within the structure of the Business Unit Court Services.

9.173 The Department is currently busy with a restructuring phase and in the process a number of business units have been created. In particular the Business Unit Court Services is also in a restructuring phase which entail the creation of court support centres where it is intended to centralise support services to the courts. In view of these developments the Committee was of the view that the Department of Justice is a viable alternative for the location of the Office for Victims of Crime. The comments of the Department are outlined

hereafter.

COMMENTS BY THE DEPARTMENT OF JUSTICE

9.173 The restructuring in the Business Unit Court Services is known as Project *Re Aga Boswa*. *Re Aga Boswa* seeks to overhaul the current court services delivery model with a view of eliminating inefficiencies, duplications and fragmented approach to service delivery, thereby instilling a new culture of service excellence based on *Batho Pele* principles. Central to *Re Aga Boswa* is the implementation of a Decentralised Court Services Delivery Model, which will build adequate capacity at the court level. This will inevitably result in changes in the management structure of Court Services Business Unit and the management of courts in the country.

9.174 The new Decentralized Council Services Delivery Model reflects a major policy shift from a centralised and regionalised court support services to a decentralised model, which ensures that decision-making, and budget accountability is devolved to the courts as the core service delivery points. The reconfiguration of the court services organizational structures will inevitably lead to the gradual restructuring of the operating structures at Regional Offices, a process which will take two years to complete, as well as the re-engineering of the entire court support services processes which led to the redefinition of the roles of all administrative court functionaries.

9.175 The re-engineered processes has led to the introduction of a new court management structure in the place of the judicial-led court administration to enhance judicial independence and to ensure that judicial officers and prosecutors are relieved of administrative burdens enabling them to focus on their judicial and prosecutorial responsibilities respectively. This restructuring process ensures the incremental appointment of Court Managers, the redefinition of the roles of Registrars and the extension of the Registrar's dispensation to lower courts to perform specialised functions relating

quasi-judicial and case flow management, the improvement and professionalisation of court interpretation services.

9.176 The restructuring programme has been successfully piloted in KwaZulu Natal and the roll out to Gauteng and Western Cape provinces was scheduled to commence during mid October 2003. The following organizational and management changes have been introduced in KwaZulu Natal with effect from 01 September 2003:

The seventy-five courts in the province have been clustered into 11 administration clusters and a Court Manager has been appointed for each cluster. The administration clusters are aligned to the judicial clusters and a Court Manager has been appointed for every judicial cluster/sub cluster Head to provide administrative support services to the respective courts. Schedule 1 provides the particulars of Court Managers and the clusters for which they have been appointed.

The eleven Court Managers have received written delegations to execute the authority and functions duly delegated to them by the Minister and the Director-General and they have been exposed to necessary training programmes to empower them to exercise the delegations.

The Court Managers are responsible for the provision and management of all support services including court facilities, financial and human resources falling within their area of competence and report to the Heads of Courts. Senior Court Managers who will be stationed in the offices of the Judges Presidents will, in addition to managing the high courts themselves, have an added responsibility of providing guidance and leadership to the other Court Managers within the province, hence their grading will be at Director level. All Court Managers have a line of financial accountability to the Director-General as the Chief Executive Officer of the Department, via the Managing Director of Court Services.

The Senior Court Manager reports to the General Manager: Court Performance at National Office. Pending the appointment of such General Manager, the reporting shall be direct to the Managing Director: Court Services. Only matters relating to transactions in respect of Human Resources, Finance and Procurement need to be submitted to the Court Services Support Centre Manager at the address formerly used by the Regional Office. All matters and correspondence relating to the courts within KwaZulu Natal and which would have been dealt with by the Regional Office must hence forth be forwarded to the Office of the Senior Court Manager.

Court Services Support Centres (CSSC) will provide repetitive transaction services in respect Human Resources, Finance, Procurement and Information Technology (IT) to all falling within the area of competence of the CSSC concerned.

9.177 The management of courts in other provinces will remain under the management of Regional Offices until such time the *Re Aga Boswa* project has been rolled-out to the provinces concerned. In the interim transitional arrangements have been effected at the Gauteng, North West and Northern Cape Regional offices with effect from 01 September 2003. The increasing workload in Court Services has necessitated some transitional changes in the management of crucial projects being implemented by Court Services and Schedule 2 contains the assigned management responsibilities in respect of each project.

9.178 The Department in principle support the creation of an Office for Victims of Crime as well as the powers and functions outlined in the draft Bill. In addition, in terms of the *Re Aga Boswa* Project, the Business Unit Court Services have been divided into different programmes. Within the structure of the projects and programme provision is made for Specialised Services and the promotion of the rights of vulnerable groups. The Business Unit Court Services has indicated that it would be able to integrate the proposed Office for Victims of Crime under the programme structure relating to the promotion and the protection

of vulnerable groups.

9.179 The Department also supports the Committee's view that the creation of a Compensation Fund for Victims of Crime is currently not a viable option but that its development should be considered supplementary to the development of victim support services. Within the proposed Office for Victims of Crime the Department would be able to address the issues of secondary victimisation as well as the implementation of the Charter for Victims Rights.

THE COMMISSION'S CONCLUSION AND RECOMMENDATION

9.180 The Department of Justice is the Commission's alternative choice for the location of the Office for Victims of Crime. The Commission holds the view that currently the Department may not have the capacity to effectively implement the proposals. However, in view of the conclusion that victim services should be under government control and in view of international precedent, the Commission is of the view that locating the Office for Victims of Crime within the Department of Justice is the only other viable alternative. In view of the positive response to the Commission's proposals and in view of the response by the National Director of Public Prosecutions outlined above the Commission is of the view that should option 1 outlined above be rejected, the proposed Office for Victims of Crime should be located in the Department of Justice. The Commission therefore recommends that the legislation outlined in Annexure B be introduced to give effect to this recommendation.

REPUBLIC OF SOUTH AFRICA

VICTIMS OF CRIME BILL

(As introduced)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B -2004]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP SLAGOFFERS VAN MISDAAD

(Soos ingedien)

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W -2004]

Victims of Crime Bill, 2004

To define principles for the treatment of victims of crime; to establish a Victims' Advisory Council; to establish an Office for Victims of Crime; to establish a Fund to assist victims of crime; and to provide for matters incidental thereto.

Preamble

WHEREAS the United Nations, in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, urges all States to enact appropriate legislation to empower victims of crime;

AND WHEREAS the Republic of South Africa has, since 1994, become an integral and accepted member of the community of nations and is committed to bring justice to victims of crime, to empower victims of crime and to ensure effective support and services to victims of crime in South Africa.

AND WHEREAS many victims of crime go unsupported, remain traumatised, become victims again or turn to crime and violence themselves;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa as follows: -

Definitions

(1) In this Act, unless the context indicates otherwise -

“Council” means the Victims' Advisory Council.

“Director-General” means Director-General of the Department of Justice and Constitutional Development.

“Director” means Director of the Office for Victims of Crime appointed in terms of section 7.

“Fund” means the Fund for Victims of Crime established by section 11.

“Organs of state” means organs of state as defined in section 239 of the Constitution.

“Office” means the Office for Victims of Crime established by section 6.

“Member” means a member of the Council, including the Chairperson of the Council.

“Minister” means the member responsible for the administration of Justice.

“Victims’ Charter” means the SA Victims’ Charter of Rights.

“Victim of crime” means a person who has directly suffered harm from the commission of a crime against that person.

- (2) The provisions of schedule 1 to this Act should at all times be taken into consideration in the application of the provisions of this Act.

2. Establishment of Victims’ Advisory Council

- (1) There is a Victims’ Advisory Council.
- (2) The Council consists of not more than 15 members appointed by the Minister, including:
- (a) the Director of the Office for Victims of Crime, who must be a member of the National Prosecuting Authority, on the recommendation of the National Director of Public Prosecutions;
 - (b) two members representing non-governmental organisations operating in the field of victim empowerment;
 - (c) four members representing the general community;
 - (d) a member representing the SA Police Services on the recommendation of the Commissioner of Police;
 - (e) a member representing the Department of Justice and Constitutional Development on the recommendation of the Director-General;
 - (f) a member representing the Department of Social Development on the recommendation of the Director-General of the Department of Social

Development;

- (g) a member representing the Department of Correctional Services on the recommendation of the Commissioner of Correctional Services;
 - (h) a member representing the Department of Health on the recommendation of the Director-General of the Department of Health.
- (3) The Minister must appoint the Chairperson of the Council from its members.
 - (4) Members of the Council are appointed for a period of five years and are eligible for reappointment when their periods of office have expired.
 - (5) The Minister may remove a member from the Council only on grounds of misconduct, incapacity or incompetence.
 - (6) The Minister must replace any member of the Council who ceases to hold the official position that qualifies him or her in terms of subsection (2) for membership of the Council.
 - (7) The Minister may, from time to time, appoint a person to be the deputy of a member, and the Minister may revoke any such appointment.
 - (8) In the absence of a member, the member's deputy may:
 - (a) if available, act in the place of the member, and
 - (b) while so acting, fulfill the functions of the member.
 - (9) A member, other than a member who is not in the service of the State, may receive such allowances as may be determined by the Director-General in consultation with the Minister of Finance.

3. Procedural matters

- (1) The procedure for the calling of meetings of the Council and for the conduct of those meetings is determined by the Council subject to the provisions of this Act.

- (2) The Council must at least have two meetings annually and must meet at the request of a majority of the members.
- (3) The quorum for a meeting of the Council is a majority of the members appointed to the Council.
- (4) The Chairperson or, in his or her absence, a member elected to chair the meeting by the members present, is to preside at a meeting of the Council.
- (5) The person presiding has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.
- (6) A decision supported by a majority of the votes cast at a meeting of the Council at which a quorum is present is the decision of the Council.

4. Working committee

- (1) The Council may, if it deems it necessary for the proper performance of its functions, establish a working committee, consisting of such members of the Council as the Council may designate.
- (2) The Council designates the chairperson and, if the Council deems it necessary, the vice-chairperson of the working committee.
- (3)
 - (a) The working committee, subject to the directions of the Council, performs those functions of the Council assigned to it by the Council.
 - (b) Unless revoked by the Council any function so performed by the working committee is deemed to have been performed by the Council.
- (4) The Council may at any time dissolve the working committee.

5. Functions of the Council

- (1) The Council has the following functions:

- (a) to advise the Minister on policies and administrative arrangements relating to the office and branches of the Office for Victims of Crime, the powers, functions and duties of the Director, and the support services and the extent thereof needed for victims of crime;
 - (b) to advise the Minister on initiatives that government should take to ensure that victims of crime are treated with proper consideration and respect in the criminal justice system;
 - (c) to advise the Minister on any matter relating to victims of crime including policy relating to the creation of a compensation fund for victims of crime;
 - (d) to advise the Director on any matter necessary for the effective implementation of the provisions of this Act;
 - (e) to make recommendations to the Director in respect of the annual budget of the Fund;
 - (f) to promote legislative, administrative or other reforms, including the amendment of the Victims' Charter, to meet the needs of victims of crime;
 - (g) to advise the Minister on the designation of organs of state, private organisations, institutions and agencies as responsible for the provision of services and the rendering of support and assistance to victims of crime;
 - (h) to review regulations issued in terms of section 16(1); and
 - (i) to consult victims of crime, community victim support groups and Government agencies on issues and policies concerning victims of crime.
- (2) Any advice given to the Minister may be given either at the request of the Minister or on the initiative of the Council.

6. Establishment of an Office for Victims of Crime

- (1) There is an Office for Victims of Crime within the National Prosecuting Authority as established in terms of the National Prosecuting Authority Act, Act 32 of 1998.
- (2) The Minister may, after consultation with the Director, by notice in the *Gazette* -

- (a) establish a branch office of the Office in any defined area and may for this purpose make any administrative or other arrangements deemed necessary for the purpose of the administration of this Act;
 - (b) abolish any branch office or incorporate it with any other such office, and may for this purpose make necessary administrative or other arrangements; and
 - (c) amend or withdraw a notice issued in terms of this subsection.
- (3) The Minister may, on advice of the Council, and after consultation with relevant members of the cabinet and members of the provincial Executive Councils, by notice in the *Gazette*, designate organs of state, private organisations, institutions and agencies as responsible for the provision of services and the rendering of support and assistance to victims of crime.

7. Director and other officers of Office

- (1) The Minister must, on recommendation of the National Director of Public Prosecutions and subject to the laws governing the public service, appoint persons, who must be members of the National Prosecuting Authority, to the offices of Director and Deputy Director: Office for Victims of Crime.
- (2) The Director and Deputy Director may exercise any power and must perform or carry out any functions and duties conferred upon, assigned to or imposed upon them, subject to the control and directions of the National Director of Public Prosecutions.
- (3) The Director must, subject to the laws governing the public service, appoint for each branch office established in terms of section 6(2) a person as head of the office.
- (4) The Director must be assisted by the staff necessary for the proper performance of the Office's functions, including-
- (a) officers of the Department of Justice and Constitutional Development

- designated for this purpose by the Director-General;
- (b) prosecutors designated for this purpose by the National Director of Public Prosecutions;
 - (c) officers of any Department of State seconded to the Office in terms of the laws governing the public service;
 - (d) persons in the service of any public body or other body who are by arrangement with the body concerned seconded to the service of the Office;
 - (e) any other person whose services are obtained by the Director for the purpose of a particular matter.
- (5) The Director may enter into agreements to make use of the services of persons, bodies, institutions or organisations.
- (6) Notwithstanding any other law, any officer or prosecutor in the service of the Office in terms of paragraphs (a), (b) or (c) of subsection (4) or person seconded to the service of the Office in terms of paragraphs (c) or (d) of subsection (4) or any person whose services have been obtained in terms of paragraph (e) of subsection (4) or subsection (5), may exercise the powers and must perform the duties conferred upon, assigned or imposed upon him or her from time to time by the Director and must, in the exercise, performance or carrying out of such powers, functions or duties, act in terms of the laws applicable to the office.
- (7) Any person referred to in paragraphs (c) or (d) of subsection (4) or any person whose services have been obtained in terms of paragraph (e) of subsection (4) or subsection (5) who is not subject to the laws governing the public service, is entitled to such remuneration, including allowances for travelling and subsistence expenses incurred by him or her in the exercise, performance or carrying out of powers, functions and duties conferred upon, assigned to or imposed upon him or her by the Director, as the Minister in consultation with the Minister of Finance may determine.
- (8) The Director may make an arrangement with any organ of state or enter into an agreement with any person, private organisation, institution or agency-

- (a) in terms of which the Office is authorised to make use of the facilities or equipment belonging to or under control of such organ of state, person, organisation, institution or agency;
 - (b) in order to obtain information or documents that may be required to achieve the objectives of this Act; and
 - (c) regarding any matter for the purpose of giving effect to the provisions of this Act.
- (9) The National Director for Public Prosecutions must provide adequate administrative, financial and logistical support for the Council, the Director and the branch offices of the Office.
- (10) All organs of state, private organisations, institutions or agencies must render such assistance as may be reasonably required in the exercise, performance or carrying out of the powers, functions and duties conferred upon, assigned to or imposed upon the Director by or under this Act.

8. Duties of the Director

- (1) In order to achieve the objectives of the Act the Director must:
- (a) promote and enforce the principles for the treatment of victims of crime as referred to in schedule 1.
 - (b) develop and provide support services for victims of crime which includes:
 - (i) developing and providing effective support services for victims of crime throughout the country;
 - (ii) regulating the procedure and determining the manner in which the provisions of this Act must be carried out by any branch office referred to in section 6(2);
 - (iii) performing the administrative duties relating to the development and provision of support services for victims of crime;
 - (iv) coordinating the delivery of support and counselling services for victims of crime by government and community agencies;

- (v) establishing and administering a support service for victims of crime in the criminal courts; and
 - (vi) dealing with issues relating to procedures in the criminal courts;
- (c) oversee the implementation of the Victims' Charter and report on its implementation which includes receiving complaints from victims of crime about alleged breaches of the Victims' Charter and resolving the complaints;
- (d) promote awareness of the needs of victims of crime which includes:
- (i) developing and coordinating educational and other programmes to promote an awareness of the needs of victims of crime;
 - (ii) disseminating information concerning the operation of this Act and other relevant legislation and the functions of the Director; and
 - (iii) ensuring, as far as practicable, that victims of crime receive the information and the assistance they need;
- (e) develop standards and provide training for providers of services which includes:
- (i) developing uniform and quality standards for providers of services to victims of crime; and
 - (ii) training and educating providers of services to victims of crime and the community;
- (f) provide information on matters affecting victims of crime which includes:
- (i) keeping statistics and conducting surveys relating to the incidence of victimization and developing resource materials relating to support services for and the rights of victims of crime;
 - (ii) developing and maintaining a data base of support services for victims of crime throughout the country;
 - (iii) publishing a newsletter reflecting the activities of the Office; and

- (iv) providing a forum for the exchange of information on matters affecting victims of crime by hosting an annual national conference;
- (g) do research, develop policy and undertake projects relating to matters affecting victims of crime which includes providing strategic policy advice to the Minister and any other organ of state, body or institution dealing with matters affecting victims of crime;
- (h) administer the Fund for victims of crime established by section 11;
- (i) ensure the implementation of decisions of the Council which are necessary for the effective implementation of the provisions of this Act;
- (j) implement legislation passed by Parliament which are relevant to the empowerment of victims of crime; and
- (k) perform any other function assigned to the Office by or under any other law.

9. Delegation of powers

- (1) The Director may, subject to his or her control and directions, delegate any of the powers and assign any of the functions and duties conferred upon, assigned to or imposed upon him or her by or under this Act, to any officer employed in the office.
- (2) The Director may revoke any delegation of power, assignment of functions or conferment or duties in terms of subsection (1) and any decision made under it and exercise the power or perform the duty him or herself.

10. Report to Parliament

- (1) The Director must, in the annual report of the National Director of Public Prosecutions to Parliament, include a report providing an overview of-
 - (a) the work performed by the office and branches of the office;
 - (b) the work performed by the Director; and
 - (c) legislative and other reform initiatives undertaken by the Council and designated organs of state, private organisations, institutions and agencies as responsible for the provision of services to victims of crime.

- (2) The Council must provide the Director with all information necessary to complete the report to Parliament in terms of subsection (1) and may, at any time, make a special report to the Director for presentation to Parliament on any matter arising in connection with the exercise of its functions.

11. Establishment of Fund for the assistance victims of crime

There is a Fund for the assistance victims of crime.

12. Finances of Fund

- (1) The Fund consists of-
 - (a) moneys paid into or allocated to the Fund in terms of any other Act;
 - (b) domestic and foreign grants;
 - (d) donations or bequests; and
 - (c) moneys paid into the Fund in terms of this Act.

- (2) The following moneys shall be paid into the Fund -
 - (a) a percentage determined by the Minister by proclamation in the *Government Gazette* of all fines imposed and recovered by a court following a conviction of an offence or the payment of an admission of guilt: Provided that the Minister may, by proclamation, exclude fines recovered in respect of certain offences; and
 - (b) an amount appropriated annually by Parliament.

13. Application of the Fund

- (1) Subject to the provisions of this Act, the Fund is under the control of the Director and its moneys must be applied by the Director subject to the provisions of this Act, the Public Finance Management Act (Act 1 of 1999), the financial directives governing the public service, and the financial directives of the National Director of Public Prosecutions.

- (2) The Director may, in order to achieve one or more of the objectives listed in paragraphs (a) to (h), utilise or allocate amounts of money allocated to or standing to the credit of the Fund to organs of state, private organisations, institutions and agencies with the objective of -
 - (a) developing, establishing and coordinating the delivery of services to and assistance programmes for victims of crime;
 - (b) promoting access to justice for victims of crime and participation by victims of crime in the criminal justice system;
 - (c) developing legislation, policies, programmes and projects regarding the delivery of services to and assistance programmes for victims of crime;
 - (d) promoting the participation of communities and non-governmental organizations in the development of legislation, policies, programmes and projects regarding the delivery of services to and assistance programmes for victims of crime;
 - (e) promoting the implementation of the Victims' Charter of Rights;
 - (f) creating awareness of and providing information to victims of crime and criminal justice practitioners regarding the impact of victimization and new developments relating to services to and assistance programmes for victims of crime and existing as well as new legislation;
 - (g) developing and implementing appropriate mechanisms and procedures to refer victims of crime to relevant organs of state, private organisations, institutions and agencies providing services to and assistance programmes for victims of crime;
 - (h) providing training for and developing the skills of persons, organisations, institutions and agencies providing services to and assistance for victims

of crime.

- (3) Whenever the Director allocates moneys in terms of subsection (2) to an organ of state, a private organisation, institution or agency, he or she must indicate the purpose for which that moneys is to be utilised to the relevant organ of state or private organisation, institution or agency.
- (4) Moneys allocated in terms of subsection (2) may not be utilised for any other purpose than that specified in terms of paragraphs (a) to (h) of subsection (2) and must be accounted for in accordance with and subject to the provisions of the Public Finance Management Act, Act 1 of 1999, the financial directives governing the public service and the financial directives governing the National Director of Public Prosecutions.
- (5) No allocation of property or money may be made under subsection (2) to a private organisation, institution or agency unless an accounting officer for that organisation, institution or agency is appointed or designated for such organisation, institution or agency.
- (6) An accounting officer appointed or designated under subsection (5) must be charged with the responsibility of accounting for all money allocated under subsection (2) and all payments made by him or her in respect of the purpose for which the allocation had been made.
- (7) The Director may, after consultation with Treasury and the Auditor-General, in such manner as it deems necessary, issue guidelines to accounting officers appointed or designated under subsection (5) in connection with the systems of book-keeping and accounting to be followed by them.
- (8) Accounting by an organ of state and private organisations, institutions or agencies for moneys allocated to it from the Fund under subsection (2) must be done separately from accounting for money received from any other source.
- (9) The Auditor-General must audit the books of accounts and accounting and financial statements kept in terms of subsection (8) of each organ of state and

private organisation, institution or agency to money had been allocated under subsection (1) in respect of that allocation, and the provisions of the Auditor-General Act, 1989 (Act 52 of 1989), apply in respect of any such audit.

- (10) The Auditor-General must submit a copy of the report on an audit done in terms of subsection (9) to the Director.

14. Accounting

- (1) The National Director of Public Prosecutions is the accounting officer for the Office and must provide for a budget for the Office.
- (2) The Director is the accounting officer for the Fund.
- (3) The Director receives all money payable to or for the benefit of the Fund in terms of this Act, and is charged with the responsibility of accounting for all money received and the utilization thereof.
- (4) The Director must keep such accounts, including an account with a bank contemplated in the Banks Act, 1990 (Act 94 of 1990), and records as are necessary for the exercise of proper control over the Fund, and must prepare yearly balance sheets made up to the last day of the financial year, showing in all necessary detail the assets and liabilities and the revenue and expenditure of the Fund.
- (5) The Director must annually prepare a budget for the Council and the Fund for consideration by the Council and, upon approval by the Council, submit the budget to the Minister for approval.

15. Applications for assistance from the Fund

- (1)
 - (a) Organs of state, private organisations, institutions and agencies designated by the Minister as responsible for the provision of services to and assistance for victims of crime; and
 - (b) in respect of emergency cases, a victim of crime -

may apply in writing to the Director for the allocation of money from the Fund.

- (2) An application for money contemplated in subsection (1) must provide -
 - (a) particulars of the name, composition, goals and objectives of the organ of state, private organisation institution or agency;
 - (b) a copy of the constitution, statute or other instrument establishing and regulating the applicant;
 - (c) a list of current office-bearers, in the case of any non-governmental applicant;
 - (d) full particulars of the purpose for which the money is to be used;
 - (e) full particulars of the person who will be responsible for managing the money and written proof of his or her authority to receive and manage such money;
 - (f) full particulars of the time frame within which the money will be used; and
 - (g) any information requested by the Director which is necessary to give effect to the provisions of this Act.
- (3) Money may be allocated in terms of subsection (1) subject to a written agreement between the Director and the applicant and the agreement must give effect to the provisions of this Act and outline the conditions of the allocation.
- (4) The Director may, if money is available in the Fund, provide emergency financial assistance to a victim of crime by allocating money to him or her on written application and upon submission of evidence in support of the application which satisfies the Director that:
 - (a) he or she is:
 - (i) a victim of crime;
 - (ii) he or she has directly suffered harm through an act or omission that is a crime in terms of the criminal law;
 - (b) no appropriate service or support or assistance can immediately be rendered to him or her by the Director or the Office, or any other institution, medical aid scheme or insurance agency from whom he or she is entitled to assistance;

- (c) without financial assistance, a delay in providing a service, assistance or support would cause him or her to suffer irreparable harm; and
- (d) the financial assistance which is provided is the minimum necessary to prevent irreparable harm.

16. Regulations

- (1) The Minister, after consulting the Council, may make, repeal and amend regulations concerning -
 - (a) any matter that may be prescribed in terms of this Act;
 - (b) any other matter which is necessary or expedient to prescribe to promote the objectives of this Act;
 - (c) the assistance to be rendered or functions to be performed by any organ of state, person, private organisation, institution or agency for the purpose of giving effect to the provisions of this Act; and
 - (d) the powers, functions and duties of officers of the Office and branches of the Office.
- (2) Regulations issued in terms of subsection (1) must be reviewed by the Council at such intervals as the Council deems appropriate.

18. Short title and commencement

This Act is called the Victims of Crime Act, 2004, and takes effect on a date fixed by the President by notice in the *Gazette*.

SCHEDULE 1**Guiding principles to be considered in the application of this Act in respect of the treatment of victims of crime**

In recognition of the United Nations Declaration of Basic Principles of Justice for Victims of Crime, the following principles must be considered in the application of the provisions of this Act in promoting access to justice, fair treatment and assistance to victims of crime:

- (a) Victims of crime should be treated with courtesy, compassion and with respect for their dignity and privacy.
- (b) Victims of crime should receive, through formal and informal procedures, such prompt and fair redress as is reasonably possible in the circumstances for the harm which they have suffered.
- (c) Information regarding remedies and the mechanisms to obtain them should be made available to victims of crime.
- (d) Information should be made available to victims of crime about their participation in criminal proceedings and the scheduling, progress and outcome of the proceedings.
- (e) Where appropriate, the views and concerns of victims of crime should be ascertained and assistance provided throughout the criminal process.
- (f) Where the personal interests of the victim of crime are affected, the views or concerns of the victim should be brought to the attention of the court where appropriate and consistent with the Criminal Procedure Act.
- (g) Measures should be taken when necessary to promote the safety of victims of crime and their families and to protect them from intimidation and retaliation.
- (h) Enhanced training should be made available to acquaint criminal justice personnel with the needs and concerns of victims of crime and guidelines developed, where appropriate, for this purpose.
- (i) Victims of crime should be informed of the availability of health and social services and other relevant assistance to ensure that they receive the necessary medical, psychological and social assistance through existing programmes and services.
- (j) Victims of crime should be encouraged to report the crime and cooperate with the law enforcement authorities.

REPUBLIC OF SOUTH AFRICA

VICTIMS OF CRIME BILL

(As introduced)

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B -2004]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP SLAGOFFERS VAN MISDAAD

(Soos ingedien)

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W -2004]

Victims of Crime Bill, 2004

To define principles for the treatment of victims of crime; to establish a Victims' Advisory Council; to establish an Office for Victims of Crime; to establish a Fund to assist victims of crime; and to provide for matters incidental thereto.

Preamble

WHEREAS the United Nations, in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, urges all States to enact appropriate legislation to empower victims of crime;

AND WHEREAS the Republic of South Africa has, since 1994, become an integral and accepted member of the community of nations and is committed to bring justice to victims of crime, to empower victims of crime and to ensure effective support and services to victims of crime in South Africa.

AND WHEREAS many victims of crime go unsupported, remain traumatised, become victims again or turn to crime and violence themselves;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa as follows: -

Definitions

(1) In this Act, unless the context indicates otherwise -

“Council” means the Victims' Advisory Council.

“Director-General” means Director-General of the Department of Justice and Constitutional Development.

“Director” means Director of the Office for Victims of Crime appointed in terms of section 7.

“Fund” means the Fund for Victims of Crime established by section 11.

“Organs of state” means organs of state as defined in section 239 of the Constitution.

“Office” means the Office for Victims of Crime established by section 6.

“Member” means a member of the Council, including the Chairperson of the Council.

“Minister” means the member responsible for the administration of Justice.

“Victims’ Charter” means the SA Victims’ Charter of Rights.

“Victim of crime” means a person who has directly suffered harm from the commission of a crime against that person.

- (2) The provisions of schedule 1 to this Act should at all times be taken into consideration in the application of the provisions of this Act.

2. Establishment of Victims’ Advisory Council

- (1) There is a Victims’ Advisory Council.
- (2) The Council consists of not more than 15 members appointed by the Minister, including:
- (a) the Director of the Office for Victims of Crime, who must be a member of the Department of Justice and Constitutional Development, on the recommendation of the Director-General;
 - (b) two members representing non-governmental organisations operating in the field of victim empowerment;
 - (c) four members representing the general community;
 - (d) a member representing the SA Police Services on the recommendation of the Commissioner of Police;
 - (e) a member representing the Department of Justice and Constitutional Development on the recommendation of the Director-General;
 - (f) a member representing the Department of Social Development on the recommendation of the Director-General of the Department of Social

Development;

- (g) a member representing the Department of Correctional Services on the recommendation of the Commissioner of Correctional Services;
 - (h) a member representing the Department of Health on the recommendation of the Director-General of the Department of Health.
- (3) The Minister must appoint the Chairperson of the Council from its members.
- (4) Members of the Council are appointed for a period of five years and are eligible for reappointment when their periods of office have expired.
- (5) The Minister may remove a member from the Council only on grounds of misconduct, incapacity or incompetence.
- (6) The Minister must replace any member of the Council who ceases to hold the official position that qualifies him or her in terms of subsection (2) for membership of the Council.
- (7) The Minister may, from time to time, appoint a person to be the deputy of a member, and the Minister may revoke any such appointment.
- (8) In the absence of a member, the member's deputy may:
- (a) if available, act in the place of the member, and
 - (b) while so acting, fulfill the functions of the member.
- (9) A member, other than a member who is not in the service of the State, may receive such allowances as may be determined by the Director-General in consultation with the Minister of Finance.

3. Procedural matters

- (1) The procedure for the calling of meetings of the Council and for the conduct of those meetings is determined by the Council subject to the provisions of this Act.

- (2) The Council must at least have two meetings annually and must meet at the request of a majority of the members.
- (3) The quorum for a meeting of the Council is a majority of the members appointed to the Council.
- (4) The Chairperson or, in his or her absence, a member elected to chair the meeting by the members present, is to preside at a meeting of the Council.
- (5) The person presiding has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.
- (6) A decision supported by a majority of the votes cast at a meeting of the Council at which a quorum is present is the decision of the Council.

4. Working committee

- (1) The Council may, if it deems it necessary for the proper performance of its functions, establish a working committee, consisting of such members of the Council as the Council may designate.
- (2) The Council designates the chairperson and, if the Council deems it necessary, the vice-chairperson of the working committee.
- (3)
 - (a) The working committee, subject to the directions of the Council, performs those functions of the Council assigned to it by the Council.
 - (b) Unless revoked by the Council any function so performed by the working committee is deemed to have been performed by the Council.
- (4) The Council may at any time dissolve the working committee.

5. Functions of the Council

- (1) The Council has the following functions:

- (a) to advise the Minister on policies and administrative arrangements relating to the office and branches of the Office for Victims of Crime, the powers, functions and duties of the Director, and the support services and the extent thereof needed for victims of crime;
 - (b) to advise the Minister on initiatives that government should take to ensure that victims of crime are treated with proper consideration and respect in the criminal justice system;
 - (c) to advise the Minister on any matter relating to victims of crime including policy relating to the creation of a compensation fund for victims of crime;
 - (d) to advise the Director on any matter necessary for the effective implementation of the provisions of this Act;
 - (e) to make recommendations to the Director in respect of the annual budget of the Fund;
 - (f) to promote legislative, administrative or other reforms, including the amendment of the Victims' Charter, to meet the needs of victims of crime;
 - (g) to advise the Minister on the designation of organs of state, private organisations, institutions and agencies as responsible for the provision of services and the rendering of support and assistance to victims of crime;
 - (h) to review regulations issued in terms of section 16(1); and
 - (i) to consult victims of crime, community victim support groups and Government agencies on issues and policies concerning victims of crime.
- (2) Any advice given to the Minister may be given either at the request of the Minister or on the initiative of the Council.

6. Establishment of an Office for Victims of Crime

- (1) There is an Office for Victims of Crime within the Department of Justice and Constitutional Development.
- (2) The Minister may, after consultation with the Director, by notice in the *Gazette* -

- (a) establish a branch office of the Office in any defined area and may for this purpose make any administrative or other arrangements deemed necessary for the purpose of the administration of this Act;
 - (b) abolish any branch office or incorporate it with any other such office, and may for this purpose make necessary administrative or other arrangements; and
 - (c) amend or withdraw a notice issued in terms of this subsection.
- (3) The Minister may, on advice of the Council, and after consultation with relevant members of the cabinet and members of the provincial Executive Councils, by notice in the *Gazette*, designate organs of state, private organisations, institutions and agencies as responsible for the provision of services and the rendering of support and assistance to victims of crime.

7. Director and other officers of Office

- (1) The Minister must, on recommendation of the Director-General and subject to the laws governing the public service, appoint persons, who must be members of the Department of Justice and Constitutional Development, to the offices of Director and Deputy Director: Office for Victims of Crime.
- (2) The Director and Deputy Director may exercise any power and must perform or carry out any functions and duties conferred upon, assigned to or imposed upon them, subject to the control and directions of the Director-General.
- (3) The Director must, subject to the laws governing the public service, appoint for each branch office established in terms of section 6(2) a person as head of the office.
- (4) The Director must be assisted by the staff necessary for the proper performance of the Office's functions, including-
- (a) officers of the Department of Justice and Constitutional Development designated for this purpose by the Director-General;

- (b) prosecutors designated for this purpose by the National Director of Public Prosecutions;
 - (c) officers of any Department of State seconded to the Office in terms of the laws governing the public service;
 - (d) persons in the service of any public body or other body who are by arrangement with the body concerned seconded to the service of the Office;
 - (e) any other person whose services are obtained by the Director for the purpose of a particular matter.
- (5) The Director may enter into agreements to make use of the services of persons, bodies, institutions or organisations.
- (6) Notwithstanding any other law, any officer or prosecutor in the service of the Office in terms of paragraphs (a), (b) or (c) of subsection (4) or person seconded to the service of the Office in terms of paragraphs (c) or (d) of subsection (4) or any person whose services have been obtained in terms of paragraph (e) of subsection (4) or subsection (5), may exercise the powers and must perform the duties conferred upon, assigned or imposed upon him or her from time to time by the Director and must, in the exercise, performance or carrying out of such powers, functions or duties, act in terms of the laws applicable to the office.
- (7) Any person referred to in paragraphs (c) or (d) of subsection (4) or any person whose services have been obtained in terms of paragraph (e) of subsection (4) or subsection (5) who is not subject to the laws governing the public service, is entitled to such remuneration, including allowances for travelling and subsistence expenses incurred by him or her in the exercise, performance or carrying out of powers, functions and duties conferred upon, assigned to or imposed upon him or her by the Director, as the Minister in consultation with the Minister of Finance may determine.
- (8) The Director may make an arrangement with any organ of state or enter into an agreement with any person, private organisation, institution or agency -
- (a) in terms of which the Office is authorised to make use of the facilities or

- equipment belonging to or under control of such organ of state, person, organisation, institution or agency;
- (b) in order to obtain information or documents that may be required to achieve the objectives of this Act; and
 - (c) regarding any matter for the purpose of giving effect to the provisions of this Act.
- (9) The Director-General must provide adequate administrative, financial and logistical support for the Council, the Director and the branch offices of the Office.
- (10) All organs of state, private organisations, institutions or agencies must render such assistance as may be reasonably required in the exercise, performance or carrying out of the powers, functions and duties conferred upon, assigned to or imposed upon the Director by or under this Act.

8. Duties of the Director

- (1) In order to achieve the objectives of the Act the Director must:
- (a) promote and enforce the principles for the treatment of victims of crime as referred to in schedule 1.
 - (b) develop and provide support services for victims of crime which includes:
 - (i) developing and providing effective support services for victims of crime throughout the country;
 - (ii) regulating the procedure and determining the manner in which the provisions of this Act must be carried out by any branch office referred to in section 6(2);
 - (iii) performing the administrative duties relating to the development and provision of support services for victims of crime;
 - (iv) coordinating the delivery of support and counselling services for victims of crime by government and community agencies;
 - (v) establishing and administering a support service for victims of

- crime in the criminal courts; and
- (vi) dealing with issues relating to procedures in the criminal courts;
- (c) oversee the implementation of the Victims' Charter and report on its implementation which includes receiving complaints from victims of crime about alleged breaches of the Victims' Charter and resolving the complaints;
- (d) promote awareness of the needs of victims of crime which includes:
 - (i) developing and coordinating educational and other programmes to promote an awareness of the needs of victims of crime;
 - (ii) disseminating information concerning the operation of this Act and other relevant legislation and the functions of the Director; and
 - (iii) ensuring, as far as practicable, that victims of crime receive the information and the assistance they need;
- (e) develop standards and provide training for providers of services which includes:
 - (i) developing uniform and quality standards for providers of services to victims of crime; and
 - (ii) training and educating providers of services to victims of crime and the community;
- (f) provide information on matters affecting victims of crime which includes:
 - (i) keeping statistics and conducting surveys relating to the incidence of victimization and developing resource materials relating to support services for and the rights of victims of crime;
 - (ii) developing and maintaining a data base of support services for victims of crime throughout the country;
 - (iii) publishing a newsletter reflecting the activities of the Office; and
 - (iv) providing a forum for the exchange of information on matters

affecting victims of crime by hosting an annual national conference;

- (g) do research, develop policy and undertake projects relating to matters affecting victims of crime which includes providing strategic policy advice to the Minister and any other organ of state, body or institution dealing with matters affecting victims of crime;
- (h) administer the Fund for victims of crime established by section 11;
- (i) ensure the implementation of decisions of the Council which are necessary for the effective implementation of the provisions of this Act;
- (j) implement legislation passed by Parliament which are relevant to the empowerment of victims of crime; and
- (k) perform any other function assigned to the Office by or under any other law.

9. Delegation of powers

- (1) The Director may, subject to his or her control and directions, delegate any of the powers and assign any of the functions and duties conferred upon, assigned to or imposed upon him or her by or under this Act, to any officer employed in the office.
- (2) The Director may revoke any delegation of power, assignment of functions or conferment or duties in terms of subsection (1) and any decision made under it and exercise the power or perform the duty him or herself.

10. Report to Parliament

- (1) The Director must, in the annual report of the Department of Justice and Constitutional Development to Parliament, include a report providing an overview of-

- (a) the work performed by the office and branches of the office;
 - (b) the work performed by the Director; and
 - (c) legislative and other reform initiatives undertaken by the Council and designated organs of state, private organisations, institutions and agencies as responsible for the provision of services to victims of crime.
- (2) The Council must provide the Director with all information necessary to complete the report to Parliament in terms of subsection (1) and may, at any time, make a special report to the Director for presentation to Parliament on any matter arising in connection with the exercise of its functions.

11. Establishment of Fund for the assistance victims of crime

There is a Fund for the assistance victims of crime.

12. Finances of Fund

- (1) The Fund consists of-
- (a) moneys paid into or allocated to the Fund in terms of any other Act;
 - (b) domestic and foreign grants;
 - (d) donations or bequests; and
 - (c) moneys paid into the Fund in terms of this Act.
- (2) The following moneys shall be paid into the Fund -
- (a) a percentage determined by the Minister by proclamation in the *Government Gazette* of all fines imposed and recovered by a court following a conviction of an offence or the payment of an admission of guilt: Provided that the Minister may, by proclamation, exclude fines recovered in respect of certain offences; and
 - (b) an amount appropriated annually by Parliament.

13. Application of the Fund

- (1) Subject to the provisions of this Act, the Fund is under the control of the Director and its moneys must be applied by the Director subject to the provisions of this Act, the Public Finance Management Act (Act 1 of 1999), the financial directives governing the public service, and the financial directives of the Department of Justice and Constitutional Development.
- (2) The Director may, in order to achieve one or more of the objectives listed in paragraphs (a) to (h), utilise or allocate amounts of money allocated to or standing to the credit of the Fund to organs of state, private organisations, institutions and agencies with the objective of -
 - (a) developing, establishing and coordinating the delivery of services to and assistance programmes for victims of crime;
 - (b) promoting access to justice for victims of crime and participation by victims of crime in the criminal justice system;
 - (c) developing legislation, policies, programmes and projects regarding the delivery of services to and assistance programmes for victims of crime;
 - (d) promoting the participation of communities and non-governmental organizations in the development of legislation, policies, programmes and projects regarding the delivery of services to and assistance programmes for victims of crime;
 - (e) promoting the implementation of the Victims' Charter of Rights;
 - (f) creating awareness of and providing information to victims of crime and criminal justice practitioners regarding the impact of victimization and new developments relating to services to and assistance programmes for victims of crime and existing as well as new legislation;
 - (g) developing and implementing appropriate mechanisms and procedures to refer victims of crime to relevant organs of state, private organisations, institutions and agencies providing services to and assistance programmes for victims of crime;
 - (h) providing training for and developing the skills of persons, organisations, institutions and agencies providing services to and assistance for victims of crime.

- (3) Whenever the Director allocates moneys in terms of subsection (2) to an organ of state, a private organisation, institution or agency, he or she must indicate the purpose for which that moneys is to be utilised to the relevant organ of state or private organisation, institution or agency.
- (4) Moneys allocated in terms of subsection (2) may not be utilised for any other purpose than that specified in terms of paragraphs (a) to (h) of subsection (2) and must be accounted for in accordance with and subject to the provisions of the Public Finance Management Act, Act 1 of 1999, the financial directives governing the public service and the financial directives governing the Department of Justice and Constitutional Development.
- (5) No allocation of property or money may be made under subsection (2) to a private organisation, institution or agency unless an accounting officer for that organisation, institution or agency is appointed or designated for such organisation, institution or agency.
- (6) An accounting officer appointed or designated under subsection (5) must be charged with the responsibility of accounting for all money allocated under subsection (2) and all payments made by him or her in respect of the purpose for which the allocation had been made.
- (7) The Director may, after consultation with Treasury and the Auditor-General, in such manner as it deems necessary, issue guidelines to accounting officers appointed or designated under subsection (5) in connection with the systems of book-keeping and accounting to be followed by them.
- (8) Accounting by an organ of state as defined in section 239 of the Constitution and private organisations, institutions or agencies for moneys allocated to it from the Fund under subsection (2) must be done separately from accounting for money received from any other source.
- (9) The Auditor-General must audit the books of accounts and accounting and financial statements kept in terms of subsection (8) of each organ of state and

private organisation, institution or agency to which money had been allocated under subsection (1) in respect of that allocation, and the provisions of the Auditor-General Act, 1989 (Act 52 of 1989), apply in respect of any such audit.

- (10) The Auditor-General must submit a copy of the report on an audit done in terms of subsection (9) to the Director.

14. Accounting

- (1) The Director-General is the accounting officer for the Office and must provide for a budget for the Office.
- (2) The Director is the accounting officer for the Fund.
- (3) The Director receives all money payable to or for the benefit of the Fund in terms of this Act, and is charged with the responsibility of accounting for all money received and the utilization thereof.
- (4) The Director must keep such accounts, including an account with a bank contemplated in the Banks Act, 1990 (Act 94 of 1990), and records as are necessary for the exercise of proper control over the Fund, and must prepare yearly balance sheets made up to the last day of the financial year, showing in all necessary detail the assets and liabilities and the revenue and expenditure of the Fund.
- (5) The Director must annually prepare a budget for the Council and the Fund for consideration by the Council and, upon approval by the Council, submit the budget to the Minister for approval.

15. Applications for assistance from the Fund

- (1)
 - (a) Organs of state, private organisations, institutions and agencies designated by the Minister as responsible for the provision of services to and assistance for victims of crime; and
 - (b) in respect of emergency cases, a victim of crime -

may apply in writing to the Director for the allocation of money from the Fund.

- (2) An application for money contemplated in subsection (1) must provide -
 - (a) particulars of the name, composition, goals and objectives of the organ of state, private organisation institution or agency;
 - (b) a copy of the constitution, statute or other instrument establishing and regulating the applicant;
 - (c) a list of current office-bearers, in the case of any non-governmental applicant;
 - (d) full particulars of the purpose for which the money is to be used;
 - (e) full particulars of the person who will be responsible for managing the money and written proof of his or her authority to receive and manage such money;
 - (f) full particulars of the time frame within which the money will be used; and
 - (g) any information requested by the Director which is necessary to give effect to the provisions of this Act.

- (3) Money may be allocated in terms of subsection (1) subject to a written agreement between the Director and the applicant and the agreement must give effect to the provisions of this Act and outline the conditions of the allocation.

- (4) The Director may, if money is available in the Fund, provide emergency financial assistance to a victim of crime by allocating money to him or her on written application and upon submission of evidence in support of the application which satisfies the Director that:
 - (a) he or she is:
 - (i) a victim of crime;
 - (ii) he or she has directly suffered harm through an act or omission that is a crime in terms of the criminal law;
 - (b) no appropriate service or support or assistance can immediately be rendered to him or her by the Director or the Office, or any other institution, medical aid scheme or insurance agency from whom he or she is entitled to assistance;

- (c) without financial assistance, a delay in providing a service, assistance or support would cause him or her to suffer irreparable harm; and
- (d) the financial assistance which is provided is the minimum necessary to prevent irreparable harm.

16. Regulations

- (1) The Minister, after consulting the Council, may make, repeal and amend regulations concerning -
 - (a) any matter that may be prescribed in terms of this Act;
 - (b) any other matter which is necessary or expedient to prescribe to promote the objectives of this Act;
 - (c) the assistance to be rendered or functions to be performed by any organ of state, person, private organisation, institution or agency for the purpose of giving effect to the provisions of this Act; and
 - (d) the powers, functions and duties of officers of the Office and branches of the Office.
- (2) Regulations issued in terms of subsection (1) must be reviewed by the Council at such intervals as the Council deems appropriate.

18. Short title and commencement

This Act is called the Victims of Crime Act, 2004, and takes effect on a date fixed by the President by notice in the *Gazette*.

SCHEDULE 1**Guiding principles to be considered in the application of this Act in respect of the treatment of victims of crime**

In recognition of the United Nations Declaration of Basic Principles of Justice for Victims of Crime, the following principles must be considered in the application of the provisions of this Act in promoting access to justice, fair treatment and assistance to victims of crime:

- (a) Victims of crime should be treated with courtesy, compassion and with respect for their dignity and privacy.
- (b) Victims of crime should receive, through formal and informal procedures, such prompt and fair redress as is reasonably possible in the circumstances for the harm which they have suffered.
- (c) Information regarding remedies and the mechanisms to obtain them should be made available to victims of crime.
- (d) Information should be made available to victims of crime about their participation in criminal proceedings and the scheduling, progress and outcome of the proceedings.
- (e) Where appropriate, the views and concerns of victims of crime should be ascertained and assistance provided throughout the criminal process.
- (f) Where the personal interests of the victim of crime are affected, the views or concerns of the victim should be brought to the attention of the court where appropriate and consistent with the Criminal Procedure Act.
- (g) Measures should be taken when necessary to promote the safety of victims of crime and their families and to protect them from intimidation and retaliation.
- (h) Enhanced training should be made available to acquaint criminal justice personnel with the needs and concerns of victims of crime and guidelines developed, where appropriate, for this purpose.
- (i) Victims of crime should be informed of the availability of health and social services and other relevant assistance to ensure that they receive the necessary medical, psychological and social assistance through existing programmes and services.
- (j) Victims of crime should be encouraged to report the crime and cooperate with the law enforcement authorities.

ANNEXURE A

LIST OF RESPONDENTS

1. Prof L de Koker, University of Orange Free State
2. The Democratic Party
3. The National Council of Women of South Africa
4. H L Hlongwane of the Directorate Community Corrections
5. Mr S Segal
6. Mr Maree, an attorney of Pietersburg
7. Advocate N Cassim (on behalf of the Johannesburg Bar)
8. Ms van der Walt, Magistrate Pretoria-North
9. Lawyers for Human Rights
10. Mr PJ Jacobs, Magistrate Bloemfontein
11. Mr M de Kok, Regional Court Magistrate
12. Mr AM Bluhm
13. The Women's Lobby
14. Jacob Raseroka and Lawrence Muzame, researchers for the National Institute for Public Interest Law and Research
15. The Criminal Law Committee of the Law Society of the Cape of Good Hope
16. Advocate Botha of the office of the Director of Public Prosecutions, Bloemfontein
17. The South African Agricultural Union
18. Mr L Naidoo, member of the Criminal Law Procedure Committee of the Natal Law Society
19. The SA Council for Social Work
20. The National Council of Women of South Africa
21. Hugh Wetmore
22. The Catholic Commission for Justice and Peace
23. The Gauteng provincial branch of the Department of Welfare and Population Development
24. Professor DP van der Merwe of Unisa
25. The Centre for the study of Violence and Reconciliation
26. Cheryl Goodenough
27. Pagad, Kwa Zulu Natal
28. Mr PB Monareng, former Regional Court President, North West
29. Professor Beaty Naudé, Unisa
30. Dr S King and Ms J Fredericks from the Industrial Health Research Group

31. Advocate MT Chidi of the Office of the Premier of Limpopo
32. Mr Justice Bertelsman, High Court Pretoria
33. The judges of the High Court KwaZulu Natal
34. Mr J Bothma of the Free State Agricultural Security Committee
35. Professor SS Terblanche, Unisa
36. Mr CGH Hlatswayo of the Department of Social Services and Population Development, Germiston
37. Mr H Visagie
38. Mr Trevor Babich
39. Mr Paul Smulders
40. Mr H W Mileson
41. Mr Daan Coertze
42. Naveen Maharaj
43. Iain Campbell
44. Mr Frik Jordaan
45. Merylyn Granger
46. John Neil
47. Clive and Anso Spencer
48. Mr Michael Folton
49. Charles Norris
50. Colin and Mary Hayne
51. Dr DF Anderson
52. Mr RH Boothroyd, Chairman of the Somerset West Pistol Club and Vice Chairperson of SAGA Western Province
53. Mr Justice HCJ Flemming, High Court Johannesburg
54. Mr VR Ming
55. Mr H Potgieter
56. Mr F Greeff
57. Mr P Smulders
58. SDW du Plessis
59. ME de Vries
60. SAGA (SA Gunowners Association)
61. Pradeep Kessa
62. Johann E Stander
63. David Feinstein

64. Mrs ME Huson
65. Dr LJ Stander
66. Michael Janssen
67. Michiel Pretorius
68. C Wilcocks
69. Evan Summerson
70. E Kapp
71. Peter Moss
72. RR Galpin
73. Arthur Brown
74. Dr AWP Coleby
75. Richard Meyer
76. PR Joubert
77. MC Duffy
78. R Smith
79. RP James
80. J Botma Free State Agricultural Union
81. PA van Wyk
82. C Hlatswayo
83. K Strydom, Legal Component: Detective Service and Crime Intelligence
84. Director of Public Prosecutions, Cape Town
85. National Director of Public Prosecutions
86. Department of Justice and Constitutional Development

LIST OF PARTICIPANTS AT THE WORKSHOPS**PRETORIA**

1. Altbeker A, Mr C S V R
2. Bezuidenhout H C H, Supt SAPS
3. Binta C C, Mr SAPS
4. De George P Andre, Mr, Safari Club International
5. Denge N E, Mrs, Magistrate's Office
6. Digwamaje R J, Mr, Magistrate's Office
7. Dronnet Francois J
8. Themba Lesizwe, S A network of Trauma Service providers
9. Du Preez Marie, Ms, Dept Justice: Gender Issues
10. Eksteen C J, Mr, Regional Court:Regional Court President
11. Evans I D, Mr, NICRO
12. Govender J, Adv, NDPP
13. Greyling Amanda, Ms, Dept Social Services and Population Development
14. Hlatswayo Cyprian G H, Mr, Dept Social Services and Population Development
15. Holmes Alex G, Mr, National Firearms Forum South African Arms and Ammunition Dealers Association
16. King B J, Mr, Justice College
17. Kok L, Comm SAPS
18. Kotze Suzette M, Mrs, Dept of Welfare: National Co-ordinator VEP Programme
19. Ledwaba J Masarele, Mrs, Dept Social Services and Population Development
20. Lekganyane M E N, Mr, I C D
21. Lotter M, Past Metro Police City of Tshwane
22. Maartens A C, Mrs, A T K V - Woman
23. Mabaso N D, Ms, Dept of Health
24. Mahumani K A, Mr, Magistrate's Office
25. Maitse T, Dr, Commission on Gender Equality
26. Makhuzeni Rosina, Ms, Social Development Logal Government
27. Malele Lydia, Ms, Dept Social Services and Population Development
28. Manthata Thomas, Mr, S A Human Rights Commission
29. Masoa Q D, Mr, SAPS

30. Mguqulwa V K Mr, Regional Office: Justice
31. Moeketsi J M, Ms, NICRO
32. Molopyane P S T, Mr , SAPS
33. Moodley S, Mrs, Dept Social Services and Population Development
34. Mthombeni Sugar, Mrs, POWA People Opposing Woman Abuse
35. Mukhathedzwa T Cynthia, Mrs, Dept of Welfare and Population Development
36. Naude C M Beaty, Prof, UNISA: Dept Criminology
37. Nel D A, Mrs, Business Against Crime
38. Nkgatho E S, Ms, Dept of Social Services
39. Nordier J P, Adv, Pretoria Bar
40. Ntshangase N, Capt, SAPS
41. Opperman M C, Mr, City of Tshwane Metropolitan Police Service
42. Ovens M, Dr, UNISA Dept of Criminology
43. Pather Thina G, Mr, Public Protector
44. Pooe M P, Ms, Dept Social Services
45. Pretorius W, Mr, Correctional Services
46. Rademeyer J P, Mr, Magistrate's Office Senior Public Prosecutor
47. Ramabulana A O, Mr, Technicon S A
48. Ramokgopa M M, Mrs, National Council of African Woman
49. Schönreich Martin, Mr, Institute for Security Studies
50. Shabangu Athalia P, Mrs, Dept of Welfare and Population Development
51. Swanepoel J P Prof, UNISA: Criminal and Procedural Law
52. Thoka A T, Mrs, Univ of the North
53. Van der Hoven A E, Prof, UNISA Dept of Criminology
54. Venter M J, Mrs, Magistrate's Office
55. Warnick B, Mr, Correctional Services

DURBAN

56. Aaron G A, Wentworth Org of Women
57. Ahrens Linda L, Wentworth Org of Women
58. Barnard P C, Mrs, Univ Natal: Law Clinic
59. Cele N C, Ms, Dept of Welfare: Umlazi
60. Cele S P, Ms, Dept Social Welfare: Kwamashu
61. Chetty K K, Umtshezi Municipality

62. Chitray D N, Phoenix Domestic Violence
63. Crompton S A, Mrs, Practical Ministries
64. Deyi Nellie, Ms, Durban Mental Health
65. Dlamini C Nomsa, Mrs, Dept Social Welfare: Sibusisiwe Clermont Child Welfare
66. Dlamini S E, Dept Child Welfare: Kwamashu
67. Du Plessis Joey M, Ms, Care Line Crisis and Trauma Centre
68. Edwards Cookie Mrs, KZN Network Violence Against Women
69. Enoch A E, Ms, Addington Abused Desk
70. Gcumisa N K N, Ms, Dept of Welfare
71. Goba L B, Ms, Dept of Social Welfare
72. Golding Debbie A, Ms, Care Line Crises and Trauma Centre
73. Govendar P, Newlands Community Policing Forum
74. Govender S, Ms, Govindasamy & Pillay Attorneys
75. Grieves Melba, Ms, Dept of Welfare: Umlazi Place of Safety
76. Grobler S, Mr, Peace Haven Community Services
77. Gumede Bongiwe R, Mrs, Safecare
78. Hove McDivitt, Mr, Univ of Natal: Campus Law Clinic
79. Jappie A N, Judge, High Court
80. Jokweni M A, Mr, TAC
81. Khumalo K C, Ms, Durban Mental Health
82. Kuzwayo, P Z, Mrs, Litha Labamtu
83. Leach Gavin G, Mr, S A Gunowner's Association (SAGA)
84. Lund James R, Prof, Univ of Natal School of Law
85. Mafuleka N P, Ms, Dept Social Welfare: Pinetown
86. Maletshe C, Mr, Taxi Community Newspaper
87. Manyatheie N P, Ms, Mental Health
88. Mavundla N R, Dept Social Welfare: Maphumulo
89. Mazibuko T N, Ms, ACDP
90. Mbanda Beata N, Ms, Ocean View Place of Safety, Dept Social Welfare
91. Mbongwe K E, Supt, SAPS
92. Mchumu J M, Mrs, Ekuzameni Rehab Centre
93. Miller Barry R, Mr
94. Miner Markershan, C G E Commercial City Building
95. Mkhize B, Mrs, Dept of Welfare
96. Mkhize N P, Mrs, Correctional Services

97. Mkhize Z T, Ms, SEWU
98. Modise P P, Addington Hospital
99. Moonsamy M E, Pastor, Practical Ministries
100. Morar B C, Mr, Univ of Durban Westville
101. Moreki B G, Mrs, NICRO
102. Msomi Snow P, Ms, Dept Welfare: Phoenix
103. Mthethwa A Thokozani, Ms, Univ Natal: Law Clinic
104. Mthiyane R J, Mr, Black Sash Trust
105. Munnoo T, Ms, Human Rights Commission
106. Mvundla T H, Mrs, Practical Ministries: Paralegal desk
107. Naicker Daisy, Mrs, Dept Social Welfare: Phoenix
108. Naidoo Ashini, Mrs, Peace Haven Community Services
109. Ndlovu S I T, Umtshezi Municipality
110. Ngcobo Beatrice T, Ms, Commission on Gender Equality
111. Ngcobo L, Ms, Durban Children's Society
112. Ngcobo X S, Mr, Msunzuzi Municipality
113. Nondabula M C, Mrs, Dept of Social Welfare
114. Norris Charles E, Mr, S A Gunowner's Association (SAGA)
115. Nqeto N C, Ms, Vuka Uzithathe
116. Ntinqa Doris H, Mrs, Ntambanana
117. Nxumalo I, Mr, Durban Safer City Project
118. Nzama T S, Mrs, Durban Children's Society
119. Omar Anisa, Mrs, Newlands Park Rehabilitation Centre Dept Social Welfare
120. Osman-Hyder Munirah, Univ of Natal: Campus Law Clinic
121. Pillay K R, Mrs, Chatsworth Crisis Care Centre
122. Pillay L A, Ms, Chatsworth Crisis Care Centre
123. Pillay Daya, Mrs, Advice Desk for the Abused
124. Pitso M T, Mr, Dept Social Welfare: Ndwedwe
125. Popiah M P, Ms, Phoenix Domestic Violence Network
126. Power Megan E, Ms, Sunday Tribune: Senior Journalist Independent Newspapers
127. Prinsloo Lynette, Supt, SAPS Serious Crime
128. Radebe P P, Ms, Dept Social Welfare: Kwamashu
129. Reddy D, Insp, SAPS Umbilo Police Station
130. Rosen Andreas, Mr, Survivors of Violence
131. Selebalo S S, Mr, KZN Network on Violence Against Women

132. Shaw Bruce M, Mr, S A Gunowner's Association (SAGA)
133. Shelembe M L, Mr, Umtshezi Municipality Mayor
134. Singh P I, Magistrate's Office, Magistrate
135. Singh Raashi, Ms, Univ Natal: Law Clinic
136. Singh K J, Mr, Lawyers for Human Rights
137. Singh Vanessa, Ms, Dept Social Welfare: Excelsior
138. Solomon Sonia, Mrs, Dept Social Welfare: Social Services: Durban
139. Somi S S, Ms, ACDP
140. Soni A, Ms, I C D
141. Sozoyi N H, Ms, NASA
142. Stevenson B B, Mrs
143. Van Niekerk Joan M, Mrs, Childline Sexual Offences Committee
144. Van Wyk L, Wentworth Organisation of Women
145. Venkatsamy R L, Mr, Regional Office
146. Von Benecke Ursula L, Ms, Valley View Place of Safety Dept Social Welfare
147. Zondi D M, Mr, Mshwathi Municipality
148. Zuma T R, Mr, Umsunduzi Municipal Council

EAST LONDON

149. Arnold Barbara, Ms, SANCA Alcohol and Drug Centre
150. Bazi Phumla, Mrs, Life Line
151. Dhlodhlo A E B, Judge, High Court
152. Jakuja N R, Ms, Magistrate's Office
153. Kristafor J G, Adv, D P P
154. Kume N E, Miss, NICRO
155. Loggerenberg P M, Ms, Dept of Welfare: Social Workers
156. Lubanga Z B, Miss, Commission on Gender Equality
157. Magadla N, Dept of Welfare
158. Magwebu L V, Mr Independant Complaints Directorate
159. Magwentshu Z, Ms, Dept of Welfare: Social Workers
160. Makangee Leonne, Mrs, Lifeline
161. Makapela N N Y, Miss, Dept Social Development
162. Mantakana Fezeka, Ms, Peddie Women's Support Centre
163. Matsha N, Miss, Women Suport Centre: Masonwabisane

164. Mdzeke S A, Regional Office Legal Admin Officer
165. Mfana N J , Miss, Dept of Welfare
166. Mgebisa M M, Mr Magistrate's Office
167. Mjikeliso Z M, Ms, Dept of Social Development
168. Mkabe N, Ms, Dept Social Development
169. Mkwindana G W, Capt, SAPS
170. Moss A R, Mrs, Dept of Welfare: Social Workers
171. Mpondwana N T, Mrs, NICRO
172. Mqwala Notemba, Ms, SANCA Alcohol and Drug Centre
173. Msindwana A A M, Dept of Welfare: Mdantsane
174. Ncubukezi Miranda T, Ms, Life Line
175. Nell E D Supt, SAPS
176. Ngubo Immanuel B, Mr, SANCA Alcohol and Drug Centre
177. Nomonde Mfaxa, Magistrate's Office: Masonwabisane
178. Ntxandi N R, Magistrate's Office, Senior Prosecutor
179. Opperman L de V, Mrs, Magistrates Office
180. Papiyana P P, Ms, Dept of Welfare
181. Qangule N Tabita, Ms, Legal Resources Centre
182. Sandi B, Judge, High Court
183. Schoeman I, Judge High Court Umtata
184. Simoyi M, Mr, Area Commissioner Legal Services
185. Skosana S Z, Ms, Dept of Welfare
186. Yake M, Mr, Social Development

KIMBERLEY

187. Botha A J, Adv, Committee for Crime Prevention
188. Gouws P L, Rev, Correctional Services
189. Greyvensteyn J H J, Mr, Magistrate's Office
190. Kambo M G, Ms, Youth Against Crime
191. Khati T D, Mr, Magistrate's Office
192. Kruger Beatri, Adv, Univ O F S
193. Madlolo Thabo, Mr, Galishawe Youth Against Crime
194. Majiedt S A, Judge, High Court Northern Cape Division
195. Makhanya Leonard, Mr, United Democratic Movement

196. Matjie W G, Ms, National Council for African Woman
197. Matthews M D, Ms, National Council for African Woman
198. Mohosho H P, Mr, Magistrate's Office
199. Molusi Mary, Ms, National Council for African Woman
200. Montshiwa V, Ms, Rape Crisis Centre
201. Mosala M A, Mr, Kimberley Youth Masters
202. Motlekar A, Ms, Magistrate's Office
203. Msinda Nongazi, Mrs, African National Congress: Provincial Organiser Women's League
204. Muller F C, Mr, Magistrate's Office
205. Ngqele T S, Mr, Young Women and Children Self Empowerment Forum
206. Nyambi K A, Mrs, N C A W
207. Phakedi Mamokwena, Mrs, ANC Women's League Regional Secretary
208. Phokoye M O G, Mr, Matswemaswel Social Service
209. Reyneke J M, Adv, Univ O F S
210. Steenkamp M D J, Judge, Chairperson: Committee for Crime Prevention
211. Van Rooyen R, Mrs, Magistrate's Office
212. Viewe M, Mr, Magistrate's Office
213. Wessels J D, Magistrate's Office

CAPE TOWN

214. Altbeker A P, Mr, C S V R
215. Barday R, Mrs, Univ of Western Cape: Community Law Centre
216. Blom J, Capt, SAPS: Provincial Commissioner Eastern Cape
217. Boothroyd R H, Mr, S A G A
218. Clark Miriam, Mrs, ANC
219. De Greeff J, Mr, S A Firearms Instructors Assoc
220. Delpont Belinda, Ms, Independent Newspapers
221. Engel Ike, Mr, Community Police Forum / Greater Blue Downs
222. Franzman D, Ms, West Coast Law Clinic Lawyers for Human Rights
223. Gaerdes Fritz C, Mr, Lawyers for Human Rights / West Coast Law Clinic
224. George Danny, Mr, United Congregational Church of S A
225. Glasser Nikki, Mrs, UCT: Law Faculty Senior Researcher Centre for Socio-Legal Research
226. Hans N A, Ms, L R C

227. Harrison Felicity A, Ms, S A Catholic Parliamentary Office
228. Heinrich U D O, The Lodge
229. Hunter J C C, Mr, Spoornet
230. Kenyon J, Ms, National Council of Woman
231. Lubowski A, Ms, Abrahams & Gross Inc
232. Macdonald Magrieta C, Ms, ANC
233. Mangali Mirriam, Ms, ANC
234. Mavungavunga N V, Mr, ANC
235. Mazwayi Nolitha F, Mrs, Rape Crisis
236. Naidoo G, Ms, NICRO: Legal Adviser -Victim Support Project
237. Nkabi Z A S, Sgt, SAPS
238. Nqadini S B, Ms, NICRO
239. Padayachee Venessa, Ms, NICRO: National Program Manager
240. Parker M K, Mr, Mushtak K Parker Attorneys
241. Patterson E K, Mr, Magistrate's Office, Magistrate
242. Paul R B, Ms, L R C
243. Peika S, Sgt, SAPS
244. Ray M, Mr
245. Saloojee R A, Mr, Independent Complaints Directorate
246. Sibeko C O V, Mr, Protection Dis M/Ment
247. Snitcher N, Mr, Law Society: Cape of Good Hope
248. Turren R V, Dr, NCOP
249. Van Wyngaardt N, Adv, SAPS: Provincial Commissioner Eastern Cape
250. Van Wyk P A, Mr, Spoornet
251. Yako P M, Mr, Magistrate's Office