



DISCUSSION PAPER 167

REVIEW OF THE CRIMINAL JUSTICE SYSTEM: REVIEW OF SOUTH AFRICA'S BAIL SYSTEM

Closing date for comment: 31 March 2025

ISBN: 978-177997-3771-1

© Copyright South African Law Reform Commission

Date of first publication: 20 February 2025

Table of Contents

ABOUT THE SOUTH AFRICAN LAW REFORM COMMISSION	iii
CHAPTER 1: SOUTH AFRICA'S BAIL REGIME AND NEED FOR REFORM	1
A Introduction – basis and rationale for review of bail	1
B Outline of statutory framework	2
1 Generic bail provisions - Chapter 9 of the CPA	2
2 Reforms to bail law after 1994.....	7
C Other specific and ancillary laws regulating bail	9
1 Constitution.....	9
2 Other relevant provisions of the CPA.....	10
3 Extradition Act of 1962	11
4 Correctional Services Act of 1998 – time limit on incarceration	11
5 Child Justice Act of 2008 – bail rules applicable to children	12
CHAPTER 2: DEFICIENCIES IN THE LEGISLATIVE FRAMEWORK	14
A Introduction	14
B Deficiencies and proposals for law reform	14
1 Improving participatory rights of victims (complainants and witnesses) in the criminal justice system and bail proceedings	14
2 Postponements, delays, overcrowding and lengthy remand detention.....	40
3 Unaffordable amount of bail.....	57
4 Verification of the particulars of the accused.....	70
5 Widening the powers of the police in bail matters	79
6 Bail pending appeal	84
7 Foreign nationals	90
BIBLIOGRAPHY	94
CASES	96

“It is rather odd that – 20 years into our constitutional democracy – we are left with a statute book cluttered by laws surviving from a bygone era remembered for the oppression of people; the suppression of freedom; discrimination; division; attempts to break up our country; and military dictatorship...”

(Justice Van der Westhuizen in *Khohliso v The State*, Constitutional Court, 2015)

ABOUT THE SOUTH AFRICAN LAW REFORM COMMISSION

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

The members of the Commission are:

1. Justice Chris Jafta (Chairperson)
2. Professor Wesahl Domingo (Deputy Chairperson)
3. Professor Karthigasen Govender
4. Dr Advocate Jacob Buti (JB) Skosana
5. Dr Keneilwe Radebe
6. Dr Nazreen Shaik-Peremanov
7. Advocate Sejako Joseph Senatle SC
8. Professor Debbie Collier-Reed
9. Professor Tshepo Mongalo

The Secretary of the Commission is Mr Nelson Matibe. The Commissioner designated to this project is Dr Adv JB Skosana and the official assigned is Fanyana Mdumbe. The Commission offices are situated in Spooral Park Building, 2007 Lenchen Avenue South, Centurion, Pretoria.

The Commission has instituted an advisory committee for this project in terms of section 7A(1)(b)(ii) of the abovementioned Act comprising of:

- | | |
|-----------------------------|---------------------------------|
| 1. Judge MF Legodi | Chairperson: Advisory Committee |
| 2. Mr John Baloyi | Member |
| 3. Professor Nina Mollema | Member |
| 4. Dr Thomas Mokoena | Member |
| 5. Professor Lukas Muntingh | Member |
| 6. Prof Concetta Lorizzo | Member |
| 7. Ms Colette Ashton | Member |
| 8. Ms Matshego Ramagaga | Member |

Correspondence relating to this inquiry should be addressed to:

The Secretary
 South African Law Reform Commission
 Private Bag X668
 Pretoria
 0001

Telephone: (012) 622 6353
 Fax: (012) 633 6321
 Email: fmdumbe@justice.gov.za
 Website: <http://www.justice.gov.za/salrc/>

CHAPTER 1: SOUTH AFRICA'S BAIL REGIME AND NEED FOR REFORM

A Introduction – basis and rationale for review of bail

1.1 South Africa's bail law forms an integral part of the Criminal Procedure Act of 1977 (CPA),¹ a law of apartheid extraction which has been in existence for almost five decades. Therefore, the decision to review bail provisions stems primarily from the need to align it with the Constitution.² It is also probable that the relevant provisions have become obsolete and redundant,³ convoluted as a result of intermittent amendments over the years, require consolidation and harmonisation, are deficient in some or other respect, or need to be modernised and simplified.

1.2 To explore these issues and possible reforms, there has been continuous engagement between the South African Law Reform Commission (Commission) and the key role players in the criminal justice sector, viz the Department of Justice (DOJ), National Prosecuting Authority (NPA), South African Police Service (SAPS), Correctional Services (DCS), and Legal Aid SA. The Commission has had the opportunity to solicit the views of ordinary citizens and civil society organisations in this regard.⁴ To supplement these processes, it has undertaken extensive literature review and legal research, which encompassed the examination of bail regimes in other jurisdictions.

1.3 The ultimate goal of this review is, as Justice Cameron aptly puts it, 'to make bail better, more efficient and more just.'⁵ Consequently, bail provisions that have been working well and thus cannot be faulted will be retained in the statute book.

¹ Act 51 of 1977.

² The Constitution of the Republic of South Africa, 1996.

³ For instance, the CPA defines police official and police as any member of the Force as defined in section 1 of the Police Act, 1958 (Act 7 of 1958), which law was repealed by Proclamation R5 of 1995. Although few provisions of this proclamation are still in force, it too was repealed by the South African Police Service Act 68 of 1995. This definition thus needs updating.

⁴ The National Conference on the Integrated Criminal Justice System and the Review of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) hosted by the DOJCD on 27-29 February 2024, was used to elicit inputs in this regard.

⁵ Edwin Cameron 'The Crisis of Criminal Justice in South Africa' *South African Crime Quarterly* No. 69 2020 4-8.

B Outline of statutory framework

1 Generic bail provisions - Chapter 9 of the CPA

1.4 South Africa has a comprehensive legislative framework regulating bail which is contained mainly in Chapter 9 of the CPA.⁶ Broadly, the principles embodied in this chapter apply to the forms of bail recognised in our law namely:

- (a) police bail;
- (b) prosecutorial bail; and
- (c) court bail.

1.5 These principles vary, depending on the nature and gravity of the offence.

(a) Police bail

1.6 Firstly, the CPA accords police officials of or above the rank of non-commissioned officer authority to grant bail.⁷ Therefore, warrant officers, sergeants and constables⁸ have the power to release accused persons on bail albeit in respect of less serious offences.⁹ The only prerequisite is that the investigating officer must be consulted before a decision to release the accused on police bail is taken.

⁶ This chapter comprises sections 58-71.

⁷ Section 59 of the CPA.

⁸ On police ranks, see https://www.saps.gov.za/about/emblem_symbolism_rankstructure.php

⁹ This power does not apply to treason; murder; sedition; rape; sexual offence against a child or mentally disabled person; robbery; assault; arson; breaking and entering premises with intent to commit a crime; theft or receiving a stolen property, fraud, forgery or uttering a forged document if the amount or value involved in the offence exceeds R2500; trafficking in persons; drug offences; offence relating to coinage; offences in section 4(1) and (2) of the Prevention and Combating of Torture of Persons Act of 2013; offences under the Protection of Constitutional Democracy and Related Activities Act of 2004; public violence; kidnapping; child stealing; house breaking; offences under the Intimidation Act of 1982; any conspiracy, incitement or attempt to commit any of these offences; offences against a person in a domestic relationship as defined in Domestic Violence Act of 1998; offences referred to in section 17(1)(a) of the abovementioned Act, section 18(1)(a) of the Harassment Act of 2011, any law that criminalises a contravention of a prohibition, condition, obligation or order issued by a court to protect the person against whom the offence in question was committed, from the accused. See section 59(1)(a) of the CPA.

1.7 The accused is set free upon depositing, at the police station, the sum of money determined by such police official. Bail granted by a police official endures until verdict and sentence is passed by the court.

(b) Prosecutorial bail

1.8 Similarly, prosecutors may release accused persons charged with certain offences on bail prior to their first court appearance.¹⁰ This power does not extend to essential-infrastructure related offences;¹¹ domestic violence matters, harassment or offence in any law that criminalises a contravention of a prohibition, condition, obligation or an order issued by a court to protect a person against whom the offence was committed from the accused.¹²

1.9 The accused gains freedom after paying at the place of detention, or furnishing a guarantee to pay, the sum of money determined by the prosecutor.

1.10 Prior to making the decision to release an accused on bail, the prosecutor must consult with the investigating officer. Secondly, the prosecutor may impose reasonable conditions that the accused must comply with while out on bail. Bail granted by a prosecutor endures until the accused appearance in court.¹³

(c) Court bail

(i) General rules

1.11 Generally, any accused person who has been detained may apply in court to be released on bail at any stage prior to conviction; and is entitled to be released if the interests of justice permit.¹⁴

¹⁰ Section 59A of the CPA. The offences to which this power relates, which are listed in Schedule 7 of the CPA, are public violence; culpable homicide; bestiality; assault; arson; housebreaking; malicious injury to property; robbery if amount involved is less than R20 000; theft, receiving stolen property, failure to give satisfactory account for possession of goods, and absence of reasonable cause for believing that goods were properly obtained, if the amount involved is less than R20 000; illicit possession of drugs; extortion, fraud, forgery or uttering if the amount involved is less than R20 000; and any conspiracy, incitement or attempt to commit any of these offences.

¹¹ Section 2 of the Criminal Matters Amendment Act 18 of 2015.

¹² Section 59A(1) of the CPA.

¹³ In terms of section 59A(5) the court may extend bail, retain or amend conditions, consider new bail application if it decides to cancel the said bail.

¹⁴ Section 60(1)(a) of the CPA.

1.12 If the interests of justice allow the accused to be released on bail, and the payment of a sum of money is a condition for such bail, the court must inquire into the accused's ability to pay the said amount of money. If he or she is unable to pay, the court must impose conditions that do not include payment of money or consider releasing the accused in terms of a guarantee.¹⁵ If the accused is able to pay, the court must consider setting conditions for the release of the accused on bail and appropriate sum of money.¹⁶

1.13 The accused is released upon payment of the sum of money set by the court or furnishing a guarantee with or without sureties to pay the said amount of money.

1.14 The only basis upon which a court may refuse to release an accused person on bail (instances where the interests of justice would not permit the release of an accused) is when there is a risk that the accused will:¹⁷

- endanger the safety of the public, the victim, or any other person;
- commit any of the specified offences;¹⁸
- abscond;
- intimidate or influence witnesses;
- conceal or destroy evidence;
- undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or
- disturb public order or undermine public peace or security.

¹⁵ Section 60(2B)(a) and (b)(i) of the CPA. These provisions must be read in conjunction with section 60(13), which provides that the court releasing an accused may order the accused to deposit the sum of money determined by the court (with the clerk or registrar of the court, correctional official, at correctional facility or police official at place where accused is detained); or furnish a guarantee, with or without sureties, to pay the said amount.

¹⁶ Section 60(2B)(b)(ii) of the CPA.

¹⁷ See section 60(4) of the CPA.

¹⁸ These offences, which are listed in Schedule 1 of the CPA, are treason, murder, sedition, public violence, culpable homicide, rape, sexual assault, bestiality, robbery, kidnapping, childstealing, arson, malicious injury to property, breaking or entering premises with intent to commit offence, theft, receiving stolen property, fraud, forgery, offences relating to coinage, any offence the punishment of which is imprisonment exceeding six months without the option of fine, escaping from lawful custody, offences in Prevention and Combating of Torture of Persons Act, offences in Protection of Constitutional Democracy against Terrorist and Related Activities Act, and conspiracy, incitement or attempt to commit any of these offences.

1.15 Considerations a court may take into account to determine whether any of the above-mentioned factors have been established are legion¹⁹ and include the prevalence of a particular type of offence.²⁰

1.16 Moreover, the court is required to weigh the interests of justice against the accused's right to personal freedom, in particular prejudice he or she is likely to suffer as a result of detention, when deciding whether the interests of justice militate against releasing the accused on bail.²¹

(ii) *Special rules applicable to serious offences*

1.17 The rules alluded to above are qualified in respect of an accused who is charged with a serious offence, namely an offence referred to either in Schedule 5 or 6 of the CPA.²² Firstly, an accused charged with a *schedule 6 offence must satisfy the court*, on balance of probabilities, *that exceptional circumstances exist which in the interests of justice permit his or her release*. In the case of a schedule 5 offence, the accused must prove that the *interests of justice permit his or her release on bail*. The latter rule also applies to an accused person who has committed an offence:

- against a person in domestic relationship as defined in section 1 of the Domestic Violence Act of 1998; or referred to in
- section 17(1)(a) of the Domestic Violence Act;
- section 18(1)(a) of the Protection from Harassment Act of 2011; or

¹⁹ Section 60(5)-(8A) of the CPA.

²⁰ Section 60(5)(f) of the CPA.

²¹ Section 60(9) of the CPA. When assessing whether the accused would suffer prejudice, the court must consider:

- (a) the period for which the accused has already been in custody since his or her arrest;
- (b) the probable period of detention until the disposal or conclusion of the trial of the accused if the accused is not released on bail;
- (c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
- (d) any financial loss which the accused may suffer owing to his or her detention;
- (e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
- (f) the state of health of the accused; or
- (g) any other factor which in the opinion of the court should be taken into account.

²² Section 60(11)(a)-(c) of the CPA.

- any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused.

1.18 Should the question arise whether bail of an accused convicted of Schedule 5 or 6 offence must be extended, the court must consider whether exceptional circumstances or interests of justice exist which justify the release of such person on bail; the fact that the accused stands convicted of that offence; and the sentence likely to be imposed by the court.²³

(d) Consequence of bail

1.19 As can be inferred from the preceding paragraphs, a person who has been granted bail by any of the organs of state referred to above is *released* from custody upon *payment money* determined for bail, or *furnishing a guarantee* (with or without surety) to pay and forfeit to the state the said amount if the bail conditions are not complied with. The release of accused persons is invariably *conditional*.^{24 25}

1.20 Furthermore, unless it is terminated earlier, this freedom endures until the verdict is handed down or appropriate punishment (sentence) is imposed by the court.²⁶ Although bail can be granted or extended pending appeal (against conviction and/or sentence) for a Schedule 5 or 6 offence, the strictures and guidelines referred to above apply, namely that:

- (a) interests of justice permit the release of the accused (in respect of a Schedule 5 offence); or exceptional circumstances exist which in the interests of justice permit the release of the accused (in respect of a Schedule 6 offence);
- (b) the fact that the accused has been convicted of that offence; and

²³ Section 58(a) and (b) of the CPA.

²⁴ Section 60(12)(a) of the CPA.

²⁵ In terms of section 62 of the CPA, the conditions may include reporting in person by the accused at any specified time and place to any specified person or authority; place where the accused is forbidden to go; prohibition of communication by the accused with witnesses for the prosecution; refer to any place at which any document may be served on him or her; a condition which in the opinion of the court will ensure that proper administration of justice is not placed in jeopardy by the release of the accused; and which may provide that the accused must be placed under supervision of a probation officer or correctional official. Key consideration in this regard is the interests of justice, which include the safety of any person against whom the offence in question has been committed. See section 60(12)(a) of the CPA.

²⁶ Section 58 of the CPA.

(c) the sentence the court is likely to impose.²⁷

(e) Contextual background

1.21 The abovementioned provisions of Chapter 9 must be read in the context of the CPA as a whole, including the definition section; schedules; and other provisions of the CPA. This requirement is mandated by the CPA itself. For example, whilst police officials are authorised to release accused persons on bail in certain circumstances,²⁸ and the CPA itself contains a definition of police official, this definition stipulates that another law, the Police Act of 1958,²⁹ must be consulted to determine which police officials qualify to exercise this power.³⁰

2 Reforms to bail law after 1994

1.22 Extensive reforms were made to the law regulating bail after 1994,³¹ primarily to:

- (a) cleanse this area of the law of its ignoble provenance by infusing it with human rights ethos;
- (b) address systemic failures, institutional incompetence, and ineptitude that seemed pervasive in the criminal justice system; and to
- (c) respond to incessant public outcry regarding bail, particularly in the late 1990 and early 2000s.³²

1.23 So, post-1994, the following key legislative measures were incorporated into the bail system.³³

²⁷ Ibid.

²⁸ Section 59 of the CPA.

²⁹ Act 7 of 1958.

³⁰ Section 1 of the CPA provides that a police official means any member of the Force as defined in the Police Act, 1958 (Act 7 of 1958); and that police has a corresponding meaning.

³¹ By the Criminal Procedure Second Amendment Acts 75 of 1995 and 85 of 1997; Judicial Matters Amendment Acts 34 of 1998, 62 of 2000, 42 of 2001 and 66 of 2008; Child Justice Act 75 of 2008; and Criminal and Related Matters Amendment Act 12 of 2021.

³² See in this regard, Helene Combrinck 'He's Out Again: The Role of the Prosecutor in Bail of Persons Accused of Sexual Offences' *Law, Democracy and Development* Vol 5 (2001) 31-32.

³³ Sections 60(1)(c); 60(2)(d); 60(11); 63A, of the CPA.

(a) the court:

- has a responsibility to ascertain from the accused whether he or she wishes the question of bail to be considered if the issue is not raised by the prosecutor or the accused;
- may, in certain circumstances, postpone a bail application for a period not exceeding seven days at a time;
- may, inter alia, deny the accused bail if it is of the view that the public sense of peace and security or confidence in the criminal justice system will be undermined; and
- may require the prosecutor to place on record reasons for not opposing bail;

(b) the head of a correctional facility may apply to court for an order to release an accused person on warning in lieu of bail on account of prison conditions;

(c) an accused person:

- who has been detained is, as of right, entitled to have his or her application to be released on bail heard and adjudicated upon by the court;
- is no longer entitled to apply for bail outside ordinary court hours;
- charged with serious crime (Schedule 6 or 5 offence) *must* convince the court, on balance of probabilities, that *exceptional circumstances* exist which in the interests of justice justify his or her release on bail or that it would be in the *interests of justice* to do so;
- must inform the court whether he or she has previously been convicted of any offence and whether there are other charges pending against him or her; and
- does not have a right of access to police docket for purposes of a bail application; and that

(d) the record of bail proceedings is admissible as part of the record at the trial and anything the accused testifies to during bail hearing may be used at subsequent trial.

1.24 The majority of these reforms have been berated as being draconian, harsh, constitutionally-suspect and controversial.³⁴ Nevertheless, it ought to be asked, in view of

³⁴ According to Graham Bursey ‘- Time for a Return to Sanity’ *De Rebus* (September 1999) 33-35 these requirements are not only unnecessary in the light of constitutional provisions, but they are also draconian, smack of the old apartheid system of detention without trial; and use of pre-trial detention as informal punishment in advance of a formal determination of guilt and sentence. See also Clare Ballard and Ram Subramanian ‘Lessons from the Past: Remand Detention and Pre-trial Services’ *SA Crime Quarterly* No 44 (June 2013) 18.

these changes, whether South Africa's bail law is now settled or whether there still room for further improvement.

C Other specific and ancillary laws regulating bail

1.25 As stated above, whilst Chapter 9 of CPA is an *overarching general law* relating to bail, it forms an integral part of, and supplement, other laws *in pari materia*, some of which incorporate the provisions of Chapter 9 by reference, namely:

- (a) the Constitution;
- (b) Extradition Act of 1962;³⁵
- (c) Child Justice Act of 2008;³⁶
- (d) Correctional Services Act of 1998;³⁷ and
- (e) other miscellaneous provisions of the CPA itself.

1.26 Laws that bestow the power to arrest and detain, but make no reference to bail, i.e. the Immigration Act of 2002³⁸ should not be overlooked. Chapter 9 of the CPA applies to these laws by default.

1.27 In the ensuing paragraphs, we highlight salient features of these laws relevant to bail that may, with the exception of the Constitution, and depending on the outcome of this review, require consequential amendments, consolidation or alignment.

1 Constitution

1.28 The Constitution contains several rights that are applicable to bail, which are couched in broad terms and which Chapter 9 of the CPA amplifies, namely the rights not to be deprived of freedom arbitrarily or without just cause; to be informed of the reason for continued detention; to be released from detention if the interests of justice permit subject to reasonable conditions; and to challenge the lawfulness of detention.³⁹ These, coupled with a host of other complementary rights that arrested, accused and detained persons enjoy,⁴⁰ are often key

³⁵ Act 67 of 1962.

³⁶ Act 75 of 2008.

³⁷ Act 111 of 1998.

³⁸ See section 34 of the Immigration Act 13 of 2002.

³⁹ Sections 12(1)(a), 35(1)(e) and (f), 35(2)(d) of the Constitution.

⁴⁰ The rights to be brought before court within 48 hours after arrest; to be informed of reasons for arrest, consult with legal representative, and to conditions of detention consistent with human dignity; to have their trial begin and conclude without delay; to be presumed innocent; to adduce

considerations in conversations about bail reform and the approach the courts must adopt in bail matters. Moreover, the argument that pre-trial liberty must be norm and refusal to release an accused on bail an exception is anchored on these constitutional protections.

1.29 Equally important, in our view, are rights that are beginning to take centre stage, particularly in conversations about the criminal justice system, namely rights to equality, life, dignity, freedom and security of the person, which victims of crime too enjoy and against which the rights of accused persons must be balanced, particularly in bail matters and when reforms to the law are being mooted.⁴¹

2 Other relevant provisions of the CPA

1.30 Undoubtedly, bail receives a lot of attention, especially in public discourse relating to overcrowding in prisons and the workings of the criminal justice system, in general. However, it is actually one of the ways stipulated in the CPA whereby an accused person could *temporarily*, conditionally or unconditionally, gain freedom pending the outcome of their trial. An accused may also be released by a court, police officer or peace officer on warning; written notice; on account of prison conditions, mental illness or intellectual disability; or pending the outcome of review proceedings.⁴²

1.31 Secondly, there are numerous provisions in other chapters of the CPA that are incidental to bail, which broadly require that a person who has been arrested, accused or charged must:

- be placed in *lawful custody* until they are lawfully discharged or released;
- be informed, as soon as reasonably possible, of their right to apply for bail;
- be brought before a lower court within 48 hours after arrest, if they are not released in terms of section 59 or 59A;
- at their first appearance in court, be charged; be allowed to apply for bail; or if not charged, be released.

and challenge evidence; and to review and appeal. See section 35(1)(d); 35(2)(a)-(c) and (e); 35(3)(d), (h), (i) and (o) of the Constitution.

⁴¹ Section 9-12,14 and 21 of the Constitution. For a discussion on the centrality of these rights in issues under consideration in this review, see *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); and Government of Canada Office of the Federal Ombudsman for Victims of Crime *Bail Reform Getting Fair Outcomes for Victims in Canada's Criminal Justice System* (November 2017) 2.

⁴² See sections 56, 63A, 72, 77, 78(6), 116(3)(b), 304A and 307-309 of the CPA.

1.32 Furthermore, these supplementary provisions do not focus exclusively on accused's rights. They also empower the courts, Director of Public Prosecutions to postpone bail applications or proceedings in certain circumstances; to direct that bail applications relating to schedule 6 offences be heard by regional court; and authorise the taking of fingerprints, buccal samples, body prints or bodily samples of a person being released on bail if this was not done upon arrest.⁴³

1.33 In contrast to other jurisdictions,⁴⁴ and except in respect of Schedules 5 and 6 offences,⁴⁵ it is noteworthy that the CPA does not categorically state whether the court may entertain bail application of an accused who has been convicted and/or sentenced and has lodged an appeal against same.

3 Extradition Act of 1962

1.33 A magistrate holding an enquiry whether a person in detention should be extradited to a country where he or she allegedly committed an offence has the power, inter alia, to admit such a person to bail. Where a person appeals against an order of a magistrate surrendering him to the State where the offence was committed or committing him or her person to prison pending the decision of the Minister with regard to his or her surrender, the said person may apply to be released on bail. The relevant provisions of Chapter 9 of the CPA apply to bail granted in terms of this Act.⁴⁶

4 Correctional Services Act of 1998 – time limit on incarceration

1.34 In terms of section 49G(1) of the Correctional Services Act, the maximum period a remand detainee may be detained is two years. Any detainee whose incarceration will exceed

⁴³ See sections 36B(1)(b); 36D(1)(a) and (b)(ii), (2)(a) and (b)(ii); 37(1)(a)(ii); 39(3); 50(1)(b) and (c), (3), (6)(a)(i)(bb),(c) (d)(i),(ii),(iv) and (v) of the CPA.

⁴⁴ Section 9E of the Bail Act 1992 (Australian Capital Territory); sections 12,13, 30(30 and 53 of the Bail Act 2000 (New Zealand); and sections 22 and 62 of the Bail Act 26 of 2013 (New South Wales).

⁴⁵ Section 58 of the CPA provides that: '...where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60(11)(a) or (b), as the case may be, and the court shall take into account-

- (a) the fact that the accused has been convicted of that offence; and
- (b) the likely sentence which the court might impose.'

⁴⁶ Sections 9(2) and 13(3) of the Extradition Act 67 of 1962.

this period must be brought to court so that his or her further detention or release may be determined.⁴⁷

5 Child Justice Act of 2008 – bail rules applicable to children

1.35 This Act creates a separate dispensation for children who are in conflict with the law. Firstly, both the prosecutorial authority and the courts may release the child on bail in terms of section 25 of the Child Justice Act.⁴⁸ Prosecutors may do so only in respect of certain offences. To this end, section 25 of this Act incorporates the provisions of Chapter 9 of the CPA by reference.⁴⁹ In other words, when bail application of a child is considered, the provisions the CPA apply. The courts may also release a child into the care of a parent, appropriate person or guardian or on his or her own recognisance.⁵⁰ Police officials, on the other hand, are required, where appropriate, to release a child on written notice into the care of a parent, appropriate person or guardian. This power may only be exercised in respect of less serious offences.

1.36 Where bail proceedings are instituted, the following three stages must be followed:

- (a) the court must first consider whether the interests of justice permit the release of the child on bail;
- (b) if so, it must conduct an inquiry into the ability of the child or parent (including an appropriate person or guardian) to pay;
 - (i) if they cannot afford, it must set appropriate conditions that do not include an amount of money for the release of the child; or
 - (ii) if they can afford, it must set conditions for the release of the child on bail and an amount of bail which is appropriate in the circumstances.

⁴⁷ Section 49G(1) and (4) of the Correctional Services Act.

⁴⁸ Section 21(2)(b) and (3)(c) of the Child Justice Act.

⁴⁹ Section 25(1) of the Child Justice Act provides that: 'Chapter 9 of the Criminal Procedure Act applies to an application for the release of a child on bail, except for section 59 and section 59A, to the extent set out in section 21(2)(b)'.

⁵⁰ Section 21 of the Child Justice Act.

1.37 The aforementioned provisions also apply when the child applies for bail pending review or appeal of a sentence.⁵¹ Moreover, section 50(6)(d) of the CPA⁵² applies to a child whose bail application has not been finalised,⁵³ meaning that bail proceedings or application may be postponed for a period not exceeding seven days at a time and on terms the court may deem proper.

1.38 Detention of a child in prison may be ordered if bail has been refused, postponed or bail has been granted but one or more conditions have not been met, the child is 14 years or older, the child has committed a serious offence,⁵⁴ incarceration is necessary in the interests of justice, safety or protection of the child or public, and it is probable that if convicted the child could be sentenced to imprisonment.⁵⁵ This decision is subject to automatic review.⁵⁶ At subsequent appearances of a child in custody, the presiding officer must, inter alia, consider a reduction of the amount of bail, if applicable, and enter any decision made in this regard.⁵⁷ Furthermore, information obtained at assessment of a child by a probation officer to establish, for example, whether the child has previous convictions, may not be used against the child during bail application.⁵⁸ This rule also applies to information given by any person against the child at a preliminary inquiry. This information may not be used against the child in any bail hearing.⁵⁹

⁵¹ Section 86 of the Child Justice Act.

⁵² This provision prescribes that bail application or proceedings may be postponed by a court for a period not exceeding 7 days at a time and on terms the court may deem proper.

⁵³ Section 66(3) of the Child Justice Act.

⁵⁴ Schedule 3 of the Child Justice Act lists 24 offences deemed serious offences, including murder, kidnapping, robbery, treason, sexual exploitation, child pornography, and offences relating to firearms.

⁵⁵ Section 30(1)(a)-(e) of the Child Justice Act.

⁵⁶ Section 30(4) of the Child Justice Act provides that: 'A presiding officer ordering the detention of a child in prison in terms of this section must direct that the child be brought before him or her or any other court *every 14 days* to reconsider the order.'

⁵⁷ Section 32(c) and (f) of the Child Justice Act.

⁵⁸ Section 36(1)(b) of the Child Justice Act.

⁵⁹ Section 45 of the Child Justice Act.

CHAPTER 2: DEFICIENCIES IN THE LEGISLATIVE FRAMEWORK

A Introduction

2.1 Following extensive and painstaking literature review and consultations with key government entities and the general public, the following areas, deficiencies or gaps in the statutory framework have been identified as needing urgent attention:

1. enhancing protection afforded to the victims of crime (and by extension complainants and witnesses) in the criminal justice system and bail proceedings;
2. postponements of bail proceedings, refusal to grant bail and delays in finalisation of criminal matters and resultant lengthy pre-trial detention and overcrowding in correctional facilities;
3. affordability of bail;
4. fixed residential address as a prerequisite for bail;
5. police powers to release accused persons on bail;
6. bail pending appeal; and
7. granting bail to foreign nationals.

2.2 Matters falling outside this scope will not be considered and provisions that have not been impugned will be retained in the CPA or re-enacted in the new law designed to substitute it.

B Deficiencies and proposals for law reform

1 Improving participatory rights of victims (complainants and witnesses) in the criminal justice system and bail proceedings

(a) *Gap in the law*

2.3 With few exceptions, some of which were enacted recently,⁶⁰ the Criminal Procedure Act (CPA) in general and the current bail regime in particular accord no role or recognition to victims of crime. The lack of *generic provisions* in the CPA or *specific provisions* in Chapter 9 thereof expressly stipulating the rights and responsibilities of victims of crime remains one of the most glaring and pronounced gaps in the statutory framework.

⁶⁰ See para 2.9 *et seq* below.

(b) Background

2.4 In the late 1990s and early 2000s, the South African Law Reform Commission (Commission) lamented the failure of the law to cater specifically for victims of crime. It argued, at the time, that if the position of victims was not drastically reformed in the criminal justice system, it would lead to a legitimacy crisis.⁶¹ In the context of sexual offences, it had decried that while existing legislation regulating bail seemed theoretically sound, it was not consistent with lived experiences of complainants and witnesses. To plug this gap in the law, it recommended that a system be devised that would enable:

...victims and state witnesses [to] be informed of bail applications and [to] participate in them if they choose to. Where the witness is the complainant in the matter of a person below the age of 18 years and such witness is called to or wishes to participate in the bail application, such witness must be declared vulnerable witness and be afforded such protective measures as the court may deem necessary.⁶²

2.5 Whilst the inclusion of the abovementioned proposal in the statutory framework was strongly supported, stakeholders also lobbied for the concretisation of the rights of victims and concomitant duties of police and prosecuting authority in general in legislation. To this end, they proposed, inter alia, that the following key provisions germane to bail should be included in legislation:

(a) the rights of complainants to:

- (i) be reasonably protected from the accused;
- (ii) be notified of all court proceedings, including bail hearings;
- (iii) make statements regarding potential danger posed by the accused for the purposes of determining pre-trial release of the accused or the conditions of such release;
- (iv) request the prosecutor to present to the court information relevant to pre-trial release of the accused; and to
- (v) be kept informed about the pre-trial release of the accused.

(b) the duties of police to inform the complainant:

- (i) regarding the place, date and time of the accused's first appearance in court; and
- (ii) the rights referred to above; and

⁶¹ South African Law Reform Commission *Project 82: Sentencing (A Compensation for Victims of Crime) Report* (April 2004) 27.

⁶² South African Law Commission *Project 107: Sexual Offences Process and Procedure* 19-20.

(c) the duties of prosecutors:

- (i) to take steps including presentation at bail hearings of evidence in the form of affidavits or *viva voce* evidence to ensure reasonable protection of the complainant;
- (ii) where the accused is released on bail or warning, to request the imposition of appropriate conditions to ensure the reasonable protection of the complainant;
- (iii) to make efforts to consult with the complainant prior to the bail hearing;
- (iv) to notify the complainant of the outcome of the bail hearing if they were not present at such hearing;
- (v) where the accused is conditionally released on bail or warning, to take steps to ensure that the complainant is informed of the procedure to follow if the accused contravenes any of these conditions; and
- (vi) to take immediate action against accused who contravenes the conditions of bail or who harasses, threatens, injure, intimidate the complainants or witnesses.⁶³

(c) *Legislative developments*

(i) *South Africa's international obligations*

2.6 South Africa has obligations arising from the United Nations Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power (Declaration).^{64 65} For our purposes, the following principles signatories to this Declaration are required to incorporate into their processes are worth noting:⁶⁶

- (a) informing the victims of their role and the scope, timing and progress of the proceedings especially where serious crimes are involved and where they have requested 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,

⁶³ Helene Combrinck *Chapter Five: Bail* available at: https://health.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/806/files/bail.pdf

⁶⁴ Adopted by the UN General Assembly Resolution 40/34 of 29 November 1985.

⁶⁵ South Africa is a signatory to this Declaration. See Department of Justice *Minimum Standards on Services for Victims of Crime* 3.

⁶⁶ Article 6(a)-(e) of the Declaration.

without prejudice to the accused and consistent with the relevant national criminal justice system;

- (c) providing proper assistance to the victims throughout the legal process;
- (d) taking measures, inter alia, to ensure the safety of victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
- (e) protecting the privacy of victims; and
- (f) avoiding unnecessary delays in the disposition of cases and the execution of orders or decrees granting awards to victims.

(ii) *Policy response*

2.7 To give effect to these principles, the Department of Justice and Constitutional Development has promulgated *Minimum Standards on Services for Victims of Crime* (Standards). These standards define victim of crime;⁶⁷ and in relation to bail:⁶⁸

- (a) require the prosecutor to:
 - (i) request information relevant to the bail proceedings from the police official responsible for the case and present it in court to ensure the victim's best interests are taken into account;
 - (ii) ask the victim to disclose any information relevant to a decision in connection with the release of the accused on bail, for example whether the accused is interfering with evidence or witnesses;
 - (iii) inform the victim of the outcome of bail proceedings, of any special conditions imposed, and explain the implications of such bail conditions;
- (b) require the police to provide, *on request*, details relating, inter alia, to dates of bail hearings and the outcome thereof (whether the accused will be released on bail); and
- (c) the *victim could urge* the police or prosecutor to withhold personal particulars from the accused.

2.8 As can be gleaned in paragraphs (b) and (c) above, these laudable standards do not necessarily impose a duty on authorities to act proactively, the victim must take the initiative.

⁶⁷ These Minimum Standards define a 'victim of crime' as a person who has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights through acts or omissions that are in violation of our criminal law. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim.

⁶⁸ Id 6, 17, 19, 21 and 24.

*(iii) Legislative response**(aa) The CPA*

2.9 Extensive reforms intended to protect the interests of victims of crime have been effected to Chapter 9 of the CPA,⁶⁹ some very recently by the Criminal and Related Matters Amendment Act of 2021.⁷⁰ These measures not only render failure to comply with bail conditions an offence, but also enjoin:

- (a) the police and prosecutors not to grant bail to a person who has contravened a court order meant to protect the victim of crime; and
- (b) the courts:
 - consider the victim's views concerning his or her safety before making a bail decision;
 - to deny bail where the safety of the victim, witnesses or any other person would be compromised;
 - bar the accused from communicating with state witnesses; and to
 - to hold an enquiry to determine the necessity of a protection order for a victim of domestic violence against an accused who is deemed eligible for bail.⁷¹

2.10 Over and above the provisions alluded to above, the interests of victims and complainants are now central to decision-making processes relating to plea and sentence agreements, publication of certain information, parole, and delays.⁷²

2.11 But beyond the limited safeguards referred to above, which have been added to the law in a piecemeal fashion, the CPA in general and Chapter 9 in particular accords no further protection, role, rights, or specific recognition to the victims of crime. The lack of victim-focused legislation, or a chapter in the CPA containing all-encompassing statutory provisions relating to victims of crime, or generic provisions in chapter 9 protecting the interests of victims in bail proceedings, remains one of the most pronounced gaps in the current statutory framework.

⁶⁹ See sections 59(1); 60(2A)(b); 60(4); 62(c); 67(A) and 68 of the CPA.

⁷⁰ Act 12 of 2021.

⁷¹ Section 60(12) of the CPA. For criticism of this provision, see Desmond Francke 'Improving the Legal System and Resources for Victims of Domestic Violence' *De Rebus* (December 2022).

⁷² See in this regard, sections 105A(b)(iii) and (c); (7)(b)(i)(bb); 154(2)(a) and (3B)(c)(v); 299A; 342A(2)(h) of the CPA.

Therefore, notwithstanding numerous government driven policy initiatives⁷³ and handful of amendments in the CPA, the law is still lagging behind in this regard.

(bb). *Draft Victim Support Services Bill, 2023*

2.12 The Department of Social Development has prepared and is piloting the Victim Support Services Bill, 2023.⁷⁴ The latest version of this proposed law – 2023 edition - defines ‘victim’ as:

‘any person who has suffered physical, emotional, spiritual or psychological harm because of a crime relating to gender-based violence committed against such person, irrespective of whether any perpetrator is identified, apprehended, and prosecuted or convicted.’

2.13 An inference from this definition and other clauses of this Bill, for example, the preamble, that its main thrust is to protect and promote the rights of *victims of gender-based violence* is unavoidable. However, other provisions, when read in isolation, appear to have wider application, particularly those that stipulate the rights of victims;⁷⁵ relate to responsibilities of service providers and organs of state;⁷⁶ and entrust certain responsibilities,

⁷³ Government introduced Victim Empowerment Programmes, the Charter of Victim Rights, and the Minimum Standards on Services for Victims of Crime, all of which have undoubtedly contributed immensely to victim empowerment. On the effectiveness of legislation as opposed to policy determinations, see *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7, which was quoted with approval in *Minister of Education v Harris* 2001 (4) SA 1297 (CC) para 10.

⁷⁴ See Government Gazette No. 43528 of 17 July 2020. See also: <https://nedlac.org.za/wp-content/uploads/2023/05/Nedlac-Report-on-Victims-Support-Services-Bill-2023.pdf> (accessed 04 October 2024).

⁷⁵ See in this regard, the long title, objects provision (clause 2), clause 5(1) of the Bill which provides that a victim has the right, inter alia: (a) to be treated with respect, dignity and privacy; to be provided with information; to apply for compensation and restitution in terms of the CPA and any other relevant legislation; to have a legal practitioner assigned to him or her by the state and at state expense; and to exercise his or her right to remain silent if not ready to testify and to be informed promptly of the consequences of remaining or not remaining silent.

⁷⁶ Chapter 3 of the Bill.

inter alia, to the SAPS,⁷⁷ National Prosecuting Authority (NPA),⁷⁸ DOJCD,⁷⁹ and other organs of state.⁸⁰ However, these clauses too must be interpreted in the context of the Bill as a whole including the definition of ‘victim’, which is the entry point and restricts its application to victims of gender-based violence. So, considered cumulatively, this Bill is at best ambiguous, or at worst, its scope is narrowly circumscribed.

2.14 Notwithstanding the interpretive difficulties alluded to above namely its narrow focus and/or ambiguity, this Bill also contains provisions germane to bail which require:⁸¹

- (a) the Minister of Police to notify the victim if the suspect *will be released* from custody, whether on *bail*, warning or if he or she will not be charged for the offence in question; and
- (b) the NPA to inform the victim when the accused has been *granted bail* by the court.

2.15 As a victim-focused legislation intended to put the interests of victims at the centre of decision-making in the criminal justice system, among others, this Bill is commendable. The question is whether it goes far enough, particularly in relation to bail. Regrettably, when the bail provisions contained in the DSD Bill are juxtaposed with those proposed by interested parties or those contained in the *Minimum Standards on Services for Victims of Crime*, they seem to fall short.

⁷⁷ Clause 12 of the Bill requires the Minister of Police to provide victims among others with: case number; details of the investigating officer; information relating to the arrest of the suspect, release of the suspect whether on bail, warning or not being charged; court date and place; name of prosecutor and progress in the matter; and information regarding why the case has not been referred to the NPA and steps taken towards investigating the case.

⁷⁸ Clause 18(a) – (f) require the NPA, inter alia, to notify the victim of the decision to prosecute or not to prosecute; if the case is enrolled, of the court case number, whether bail has been granted to the accused, the first appearance and all subsequent court dates, date of handing down the judgment; consult the victim before criminal proceedings; inform victim about court processes and right to attend court proceedings, unless the court orders otherwise; preparation services if the victim is to appear as witness; and presentation of victim’s evidence.

⁷⁹ In terms of clause 13(a) – (e), these include the provision of witness fees; raising awareness regarding the availability of facilities for audio-visual testimony; and coordination of the implementation of the victim’s charter.

⁸⁰ Responsibilities have also been assigned to the Departments of Social Development, Health, Correctional Services, Basic Education, Women and Legal Aid South Africa. See in general clauses 9 – 19 of the Bill.

⁸¹ Clauses 12(1)(f) and 18(b)(ii) of the Bill.

(d) *The problem persists – an overview of stakeholder perspective received at Criminal Justice Conference*

(i) public and stakeholder perspective on victims' rights

2.16 Judging by the inputs made at the National Conference on Integrated Criminal Justice and Review of the CPA⁸² making our criminal justice system victim-centric is a goal that we have not yet fully attained.

2.16.1 At a broader level, attendees averred and proposed that:

- the criminal justice system must prioritise the protection of victims of crime;
- the provisions of the CPA relating to witness protection must be strengthened to enhance whistle-blowing and reporting of crime;
- the victim has a right and must be kept abreast of developments in respect of his or her case;
- there is a need for, and the strengthening of, statutory provisions relating to victim support services including counselling, legal assistance, access to protective measures, empowering victims of crime participating in the criminal justice process and ensuring they are heard throughout the proceedings; victim impact statements; and protection of victims and witnesses from intimidation and retaliation;
- the law, through the amendment of section 274 of the CPA⁸³ for example, should permit victims of crime, complainants, the victim's next of kin, any person directly connected to the victim or an elected representative of such person, to make representations or to testify in court for the purpose of aggravation of sentence;
- It has been submitted that the aforementioned right must be extended to community members, particularly where there is a strong and overriding public opinion about the seriousness of the offence or the prevalence of the crime or offence or where the committed offence or crime has caused a sense of shock in the community or where the community is highly interested in the acquittal or conviction and sentence of the accused. An elected representative of the affected community should be allowed to

⁸² The Department of Justice hosted a national conference on the Integrated Criminal Justice System and the Review of the CPA on 27-29 February 2024.

⁸³ Section 274 of the CPA provides that:
 'Evidence on sentence
 (1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
 (2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.'

make representations on behalf of the directly affected community, for the purpose of aggravation or mitigation of sentence;

- corrupt practices throughout the criminal justice system must be stemmed out; and that
- victims of crime must be compensated and that the regulations should stipulate the amounts and how payment should be made.

2.16.2 In respect of *bail* or the release of the accused person, they submitted that:

- where the police contemplate releasing an accused, the victim, complainant and next of kin must be informed *by the police* of the intention before the decision is taken; and that
- at a bail hearing, evidence must be presented in court directly by the affected party in support or opposition of bail; and the investigating officer must inform the prosecutor of the attitude of the complainant or victim of crime or the victim or complaint's next of kin or the investigating officer about whether or not the accused should be released on bail; and the prosecutor must bring these views to the court's attention for consideration.

(ii) *Cursory analysis of comments and applicable law*

(aa) *Impending legislation*

2.17 These issues, individually and collectively, constitute the mischief that the Victim Support Services Bill of 2023 seeks to address, albeit in relation to gender-based violence.⁸⁴

(bb) *Victim compensation and restitution*

Others, particularly victim compensation and restitution and witness protection, are regulated in detail in legislation.⁸⁵ At face value, the submission relating to restitution for victims of crime suggests, on the one hand, that the relevant statutory framework - section 297,⁸⁶ 300 and 301

⁸⁴ See Preamble; clauses 5(1)(c) and (e); 8; 9(1) and 12(1)(j) and 18(b) of the Bill. Provision of support services is referred to throughout the Bill.

⁸⁵ See ensuing discussion and Witness Protection Act 112 of 1998.

⁸⁶ The relevant part of section 297(1)(a)(i)(aa)and(bb) of the CPA provides that: ' Where a court convicts a person of any offence other than an offence in respect of which any law prescribes minimum punishment, the court may in its discretion postpone for a period not exceeding five years the passing of sentence and release the person concerned on one or more conditions, whether as to compensation; or the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss. '

of the CPA;⁸⁷ section 44 of the General Law Further Amendment Act of 1962;⁸⁸ section 52 of the Correctional Services Act of 1998;⁸⁹ and the common law delictual liability, are not

⁸⁷ **300 Court may award compensation where offence causes damage to or loss of property**

(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that-

(a) a regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds the amount determined by the Minister from time to time by notice in the *Gazette* in respect of the respective courts.

(b)

(2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.

(3) (a) An award made under this section-

(i) by a magistrate's court, shall have the effect of a civil judgment of that court;

(ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.

(b) Where a superior court makes an award under this section, the registrar of the court shall forward a certified copy of the award to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such award shall have the effect of a civil judgment of that magistrate's court.

(4) Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.

(5) (a) A person in whose favour an award has been made under this section may within sixty days after the date on which the award was made, in writing renounce the award by lodging with the registrar or clerk of the court in question a document of renunciation and, where applicable, by making a repayment of any moneys paid under subsection (4).

(b) Where the person concerned does not renounce an award under paragraph (a) within the period of sixty days, no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made.

301 Compensation to innocent purchaser of property unlawfully obtained

Where a person is convicted of theft or of any other offence whereby he has unlawfully obtained any property, and it appears to the court on the evidence that such person sold such property or part thereof to another person who had no knowledge that the property was stolen or unlawfully obtained, the court may, on the application of such purchaser and on restitution of such property to the owner thereof, order that, out of any money of such convicted person taken from him on his arrest, a sum not exceeding the amount paid by the purchaser be returned to him.'

⁸⁸ **44 Penalties for defacement or disfigurement of property**

(1) Notwithstanding anything to the contrary in any other law contained, any person who commits an offence by placing any placard, poster, writing, word, letter, sign, symbol, drawing or other mark on any property, whether movable or immovable, of any other person or of the State, and thereby defaces or disfigures such property, shall be liable on conviction to imprisonment for a period not exceeding six months in lieu of or in addition to any other penalty which may be imposed in respect of such an offence.

adequate or are deficient in some or other way and thus require overhaul.⁹⁰ On the other hand, it seems to be a veiled attempt to resuscitate the conversation regarding the introduction of a Victim Compensation Scheme,⁹¹ an issue which raises complex policy issues.⁹² Because of the centrality of this issue in public discourse on victims' rights and policies of government,⁹³ a brief outline of the law in this regard is necessary.

(2) If the court imposing upon a person over the age of eighteen years any penalty in respect of an offence referred to in subsection (1), is satisfied that the property concerned belongs to some particular person or to the State and if the owner of such property does not apply under the provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977) for compensation, the court shall, in addition to such penalty sentence the convicted person to a fine equal to the cost or estimated cost of restoration of such property less any such cost which may have been paid to such owner or imprisonment for a period not exceeding twelve months in default of payment of the fine and the convicted person shall serve such additional sentence of imprisonment after the expiration of any other sentence of imprisonment imposed upon him in respect of such offence except where the operation of such other sentence has been suspended in which case he shall commence to serve the additional sentence forthwith.

(3) Such fine may be recovered in the manner provided in section 288 of the said Act and any amount recovered shall be paid to the owner of the property defaced or disfigured.

(4) Notwithstanding anything to the contrary in any other law contained, a magistrate's court other than the court of a regional division shall have jurisdiction to impose summarily any sentence in respect of an offence referred to in subsection (1) which the court of a regional division may impose.

⁸⁹ Section 52 of the Correctional Services Act 111 of 1998 provides that a person placed under non-custodial measure or supervision (community correction) may be required (by court or relevant organ of state), among other things, to pay compensation or damages to victims.

⁹⁰ The DSD Bill only refers to compensation provided for in the CPA or other legislation, whereas the DOJCD Minimum Standards on Services for Victims of Crime refers to compensation for damage to property, physical and psychological injuries.

⁹¹ For detailed discussion on this subject, see South African Law Reform Commission *Sentencing – A Compensation Fund for Victims of Crime Report* (April 2004).

⁹² Key stakeholders have urged the Commission to give careful consideration to some of these proposals and how they should be addressed in legislation. Among crucial and complex issues to be considered in this regard include who would be liable for the payment of compensation, the tax payer or perpetrator in line with the idea of restorative justice; would a perpetrator sentenced to imprisonment or ordered to pay a fine be liable to compensate the victim. They also cautioned that if compensation is treated as an alternative form of accountability, there is risk that the perception may be created that affluent perpetrators may pay their way out of punishment, while the poor would have to face severe criminal sanctions such as imprisonment.

⁹³ DOJCD Minimum Standards 9, 26, 30 and 32. These standards also provide guidance to victims whose property is lost or damaged while in custody of the police.

2.18 Firstly, in contrast to other jurisdictions,⁹⁴ South Africa does not have a *statutory scheme* for the payment of compensation to victims of, for example, personal violence. Secondly, there are few cases dealing with section 300 of the CPA and none on the other provisions, which suggests that even this provision is rarely invoked in practice. However, from the few decided cases and limited research on this topic, the following limitations have been identified in respect of the provisions alluded to above:⁹⁵

- the offender must arrested, prosecuted and convicted;
- the victim or complainant must apply to the court for an order through the prosecutor;
- postponement of sentence on condition of payment of compensation is deemed suitable only for trivial offences and is thus not an option for offences involving violence;
- where imprisonment is imposed it is unlikely that the offender would be able to pay the stipulated amount of compensation unless he or she has assets or is able to raise money;
- where a fine is imposed in addition to compensation order, this will reduce the likelihood that compensation would be paid;
- compensation is ideal when the sentence is suspended on condition of payment of compensation to the victim. Even then, an enquiry whether the accused would be able to pay the amount of compensation would be necessary. Where an accused is unemployed, has no money or assets that could be sold in execution, these provisions should not be invoked;
- An award made in terms of these provisions is a civil remedy and obviates the institution of a civil claim;
- cannot be made against a person married in community of property unless the other spouse who would be affected thereby is joined in the proceedings;
- the suspension of a sentence in cases involving serious transgression could be contrary to considerations of public interest and safety.

⁹⁴ See Part 4-6 of the Victims of Crime Act 2001 (South Australia); section 16 Victims' Charter Act 2006 (Victoria).

⁹⁵ See South African Law Reform Commission Report (April 2004) 46-50; and the following cases dealing with section 300 of the CPA: *S v Bapela* 1978 (2) SA 22 (BH); *S v Maelane* 1978 (3) SA 528 (T); *S v Lepale* 1979 (1) SA 117 (B); *S v Msiza* 1979 (4) SA 473 (T); *S v Baloyi* 1981 (2) SA 227 (T); *S v Tlame* 1982 (4) SA 319 (B); *S v Wildschut* 1983 (4) SA 604 (C); *S v Liberty Shipping and Forwarding (Pty) Ltd and Others* 1982 (4) SA 281 (D); and *National Director of Public Prosecutions Rebutzi* 2000 (2) SA 869 (W).

2.19 In 2004, the Commission concluded on the basis of these restrictions that the abovementioned provisions of the CPA pertaining to compensation appear to have little relevance particularly in relation to serious offences involving violence against the person.⁹⁶

2.20 Besides the provisions above, a victim could institute a civil action against the accused and, after the decision of the Constitutional Court in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*,⁹⁷ a delictual action for damages against the state the test of which (whether the police and the prosecutor owed a legal duty to the victim)⁹⁸ the court located within the precepts of the Constitution.⁹⁹ So, as the court stressed, immunity that public authorities in the American and British legal systems enjoy against claims in delict by members of the public does not apply in South African law. Any chilling effect (that the proper performance by civil servants of the functions will be inhibited if they are required to constantly look over their shoulder to avoid liability in negligence) such delictual action might have on the exercise of duties by public servants is sufficiently addressed by the requirements of proportionality, foreseeability and proximity.¹⁰⁰

2.21 Whilst the court clarified that failure by the state to protect victims of crime does not automatically entitle him or her to damages in delict and that all the facts and circumstances of a particular case must be considered by the court, it categorically stated that there is no reason why a prosecutor (and by extension a police officer) who withholds crucial information which, if it was divulged to the court, would have persuaded it to remand the accused in custody than release him or her on bail, *should not be held liable suffered by the victim for the consequences of such negligent failure*.¹⁰¹

⁹⁶ South African Law Reform Commission Report (April 2004) 46-50.

⁹⁷ 2001 (4) SA 938 (CC).

⁹⁸ The court stated that for the victim to succeed with this claim, he or she must prove that the state owed him or her a legal duty of protection; it acted in breach of such duty and did so negligently; and that there was a causal connection between such negligent breach of the duty and the damage suffered by the victim. *Id* para 25.

⁹⁹ Namely, the right to life, human dignity freedom and security of the person; the duty on government to promote and uphold these values; and the principle of proportionality which must be carried out in accordance with section 39(2). *Id* para 43 et seq. For an outline of the test prior to the advent of the constitutional democracy, see para 56.

¹⁰⁰ *Id* 49.

¹⁰¹ *Id* 30, 74 and 80.

2.22 Whilst the necessity and feasibility of a statutory compensation fund for victims of crime, reconsideration of the Commission's recommendations in this regard,¹⁰² and the possible overhaul of section 297, 300 and 301 of the CPA, are matters that will be explored further in the course of the broader review of the criminal justice system which will ensue in due course, for the purposes of this leg of the inquiry, the Commission recommends that at a minimum the right of victims of crime to *compensation and restitution as provided for in the law* must be entrenched in legislation.

(e) Comparative law analysis

2.23 In other countries, the jurisprudence relating to the rights of victims of crime has evolved and the scope of their participation in the criminal justice system has expanded, largely as a result of the enactment of victim-focused legislation and development of guidelines with more detailed and comprehensive obligations regarding different rights of victims, including rights applicable in bail proceedings. We consider the salient features of some of these laws.

(i) Australia

2.24 Various states in Australia have enacted *victim-focused laws*¹⁰³ which, among other things, require investigatory agencies (and other people representing the Crown) to advise victims of the outcome of bail applications; if the accused is released on bail, of the conditions; and any application for the variation of conditions that may affect the victim's safety or welfare; and if the victim has expressed the need protection from alleged offender, for reasonable effort to be made to provide the victim with necessary protection, *unless the victim has waived these rights*.

2.25 To give effect to these principles, some states in Australia have established statutory bodies which are entrusted with oversight responsibility.¹⁰⁴ In Victoria, organs of state in the

¹⁰² South African Law Reform Commission *Sentencing – A Compensation for Victims of Crime Report* (April 2004).

¹⁰³ See Victims Rights Act 1996 (NSW); Victims of Crime Assistance Act 2009 (Qld); Victims' Charter Act 2006 (Vic); Victims of Crime Act 1994 (WA); Victims of Crime Act 2001 (SA); and Bail Act 1992 (ACT). For detailed discussion, see Australian Law Reform Commission *Informing Victims About Bail Decisions* (10 November 2011).

¹⁰⁴ Victims Rights Act 114 of 1996 (NSW) established Victims of Crime Bureau which resides in the Attorney General's Office, provides information to victims about support services and compensation for victims; assist victims in the exercise of their rights; coordinates delivery of services; promotes and oversees implementation of this law; receives complains about breaches of their rights; and reports to Parliament. This Act also created the Victims Advisory

criminal justice system are required to institute and operate a system to deal with complaints. Therefore, an effort is made to resolve complaints internally by the organ of state concerned before it is referred to a higher authority - the Victims of Crime Commissioner. The complaints mechanism referred to above must offer, among other things, fair and reasonable remedies which may include an apology, an acknowledgment that an error has occurred, or an explanation as to why an error occurred and steps being taken to prevent the error from reoccurring.¹⁰⁵

2.26 The downside of these laws is that their application is dependent on the victim's request for information; focus disproportionately on victims of family violence and/or sexual assault; and the breach thereof does not give rise to any right or claim for damages.

(ii) *Canada*

2.27 Canada recently enacted the Canadian Victims Bill of Rights Act, 2015. Whilst this law is not perfect (for example, it does not impose an obligation on authorities to proactively fulfil these rights), has limitations, and efforts are being made to address some of its deficiencies, it accords victims of crime rights to information, protection, participation and to seek restitution.¹⁰⁶

2.28 For our purposes, few specific provisions of this law are noteworthy. Firstly, the term 'victim' is defined as an individual who has suffered physical or emotional harm, property damage or economic loss as a result of the commission or alleged commission of an offence. Secondly, for this law to find application the victim has to be present in Canada, or be a Canadian citizen or permanent resident. Thirdly, it provides, inter alia, victims of crimes have a right to:

- information about the criminal justice system and the role of victims;
- case-specific information about the location of the proceedings, when they will occur, their progress and outcome; conditional release of the offender, and the timing and conditions of release;

Board which advises the Minister, inter alia, on policy issues. See also Part 3 of the Victims of Crime Act 2001 (SA).

¹⁰⁵ Section 19A and 19B of the Victims' Charter Act 2006 (Vic).

¹⁰⁶ See Government of Canada *Canadian Victims Bill of Rights – Public Engagements on the Federal Government's Criminal Justice System Review* (November 2017).

- protection, including the right to have their security considered by authorities in the criminal justice system; to have appropriate steps taken to protect them from intimidation and retaliation;
- participate in the proceedings by conveying their views and to have them considered;
- to present victim impact statements and have it considered; and the
- right to have the court consider making a restitution order against the offender.

2.29 These rights accrue the moment the offence is reported to the authorities and have been operationalised, among others, in the *Canadian Criminal Code* through technical (consequential amendments). In relation to bail, this Code requires the courts consider the safety of the victims and to note this consideration in bail orders.¹⁰⁷ Furthermore, the Canadian Victims Bill of Rights has primacy over key criminal justice statutes.

2.30 Although the Victims Bill of Rights Act does not create any right to a cause of action or damages in relation to any infringement (failure) or denial of a right contained therein, nor create a right to appeal solely on the basis that a right under it was infringed or denied,¹⁰⁸ it does require institutions of government in the criminal justice system with responsibilities under the Act to have a complaints mechanism in place; and to make provision for a victim aggrieved by the denial or infringement of rights under this Act to file a complaint with the organ of state concerned.¹⁰⁹ Furthermore, this complaints mechanism must provide for the review of complaints, the power to make recommendations and the obligation to inform victims of the outcome of these processes.¹¹⁰ Recourse to a body that has review powers in relation to that organ of state is possible if the victim is not satisfied with the manner in which the organ of state has dealt with the matter is possible.¹¹¹

¹⁰⁷ Id 1.

¹⁰⁸ Section 28 and 29 of the Canadian Victims Bill of Rights Act.

¹⁰⁹ Section 25(1) of the Canadian Victims Bill of Rights. See also Canadian Victims Bill of Rights - Public Engagements 2.

¹¹⁰ Section 25(3) of the Canadian Act provides that: 'Every federal department, agency or body that is involved in the criminal justice system must have a complaints mechanism that provides for
 (a) a review of complaints involving alleged infringements or denials of rights under this Act;
 (b) the power to make recommendations to remedy such infringements and denials; and
 (c) the obligation to notify victims of the result of those reviews and of the recommendations, if any were made.'

¹¹¹ Section 25(2) of the Canadian Act above.

2.31 Another important law is the Canadian Criminal Code in terms of which a victim is entitled to a copy of the bail hearing or release order (the decision to detain or release the accused, along with conditions, if any have been imposed).¹¹²

(iii) *Namibia*

2.32 In Namibia, victims are permitted by law to be represented, at their own expense, by a legal practitioner at the trial of the accused.¹¹³

2.33 Secondly, victims and complainants of sexual or domestic violence have a right to attend bail hearings and to request the prosecutor to present relevant information to the court. Moreover, police officials have a duty to inform complainants of the place, date and time of first appearance of the accused person in court. Where the accused is released on bail, the presiding officer must add conditions aimed at ensuring that he or she does not make any contact with the complainant.¹¹⁴

2.34 Moreover, the Namibian Criminal Procedure Act imposes a duty on the police releasing an accused person on bail to consult with the victim prior to making the decision *if the victim is readily available*; and a court considering bail application must consider whether the victims objects to the release of the accused on bail.¹¹⁵ It is noteworthy that in Namibia only a police officer of a rank of commissioned officer may release an accused on bail.

2.35 In respect of rape or domestic violence cases, the complainant must be informed of the accused place, date and time of first appearance in court and his or her rights in terms of the Act; and the person discharging this responsibility must prepare an affidavit relating to compliance with these provisions which must be handed to the judge or magistrate presiding at the relevant proceedings at which bail is considered and that affidavit forms part of the record of the bail proceedings.¹¹⁶

¹¹² Office of the Federal Ombudsman for Victims of Crime *Bail Reform-Getting Fair Outcomes for Victims in Canada's Criminal Justice System* (November 2017) 1 and 4.

¹¹³ Section 18 of the Criminal Procedure Act 25 of 2004 (Namibia).

¹¹⁴ Section 12 and 13 of the Combating of Rape Act 8 of 2000 (Namibia) and section 64 of CPA (Namibia).

¹¹⁵ Section 62(1)(a)(ii) and 63(5)(h) of the Namibian Criminal Procedure Act, 2004.

¹¹⁶ Section 64 pf the CPA 25 of 2004.

(iv) *India*

2.36 The Supreme Court of India recently stated that victims of crime have:

A legally vested right to be heard at every step post the occurrence of the offence...(they have) unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision...and that the mere presence of the State...does not tantamount to according a hearing to a victim of the crime.¹¹⁷

2.37 Therefore, victims of crime are not mute spectators in the criminal justice process. Their unbridled participatory rights initiated by the offence committed against them, extends to the stage of adjudication of the bail application.¹¹⁸ The term 'victim' is expressly defined in the Code of Criminal Procedure to mean 'a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression includes his or her guardian or legal heir.'¹¹⁹

2.38 Section 439(1A) of the Code requires the court to hear the victim at the stage of considering bail petitions and other similar matters. This may assist the court in clarifying the relevant facts, such as any threats received by the victim or other witnesses, or the possibility of evidence tampering or even flight risk.¹²⁰

(v) *United States*

2.39 In the United States, the Crime Victims' Rights Act¹²¹ accords a myriad of rights to victims of crime, including the right to reasonable, timely, and accurate notice of any public court proceeding or of any release of the accused; the right to be reasonably heard at proceedings involving the release, plea, sentencing or parole proceedings; the right to full and timely restitution; the right to proceedings free from unreasonable delay; and the right to be treated with fairness and respect. It contains a broad definition of 'victim'.¹²² Where there are

¹¹⁷ *Jagjeet Singh & Ors vs. Ashish Misshra alias Monu & Anr* (2022) 9 SCC 321.

¹¹⁸ Law Answer Online *Victim has the Right to be Heard at Every Stage from Investigation to Culmination of Trial in Appeal/Revision*.

¹¹⁹ Section 2(wa) of the Code of Criminal Procedure of 1973. This amendment was introduced in 2008.

¹²⁰ *Saleem v The State of NCT Dehli & Anr* 2023 DHC: 2622 para 29.

¹²¹ 18 U.S.C § 3771.

¹²² In this regard, it provides: 'For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is a under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the crime victim or the

multiple victims, the court must fashion a reasonable procedure to give effect to the abovementioned rights that does not unduly complicate or prolong proceedings.

2.40 Whilst no action for damages arises from failure to give effect to these rights nor do they limit prosecutorial discretion, the aforementioned rights are justiciable and thus enforceable in court in which the accused is being prosecuted for the crime or, if no prosecution is underway, in the district court in which the crime occurred.¹²³ Furthermore, the Attorney General must promulgate regulations to enforce these rights and ensure compliance by responsible officials. The law is very prescriptive in this regard in that it requires, inter alia, the regulations in question to designate an administrative authority within the US Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of victims; contain disciplinary sanctions, including suspension and dismissal of employees who wilfully fail to comply with the law pertaining to the treatment of crime victims; and bestows the power on the Attorney General to be the final arbiter of the complaint.¹²⁴

2.41 The guidelines issued by the US Department of Justice, inter alia, require *prosecutorial authority* to notify the victim as soon as possible of the release or detention status of the offender or suspected offender; the *investigative agency* to inform the victim that he or she has a right to make statement regarding the danger posed by the defendant for the purposes of determining pre-trial release of the defendant or conditions of such release.¹²⁵

(f) Evaluation and options for reform

2.42 It cannot be gainsaid that victims of crime and complainants have an obvious interest in knowing whether the accused who allegedly committed a crime for which they have laid a charge with the police intends applying for bail; and if the accused has been released on bail by the police, prosecutorial authorities or the courts; the conditions of bail, if any have been imposed. This information is vital to their safety, that of their families and could prompt them to take necessary precautions. Neither can it be refuted that they must be accorded the right to be heard throughout the process.

representative of the crime victim's estate, family members, or any other person appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative'.

¹²³ See sections (c)(6) and (d)(3) of the Crime Victims' Rights Act 18 U.S.C § 3771.

¹²⁴ Section (f)(1) and (2) of the Crime Victims' Rights Act.

¹²⁵ Helene Combrinck *Chapter Five: Bail – Proposals by Law Commission*.

2.43 As can be gleaned from the preceding comparative survey, the majority of countries enact a *generic law* that lays down broad principles that govern the treatment of victims of crime. These rights are then further refined and incorporated into procedural law, or provisions thereof relating to bail. As the Canadian experience shows, these approaches are not mutually exclusive. In the South African context, the enactment of a *comprehensive* victim-focused legislation in *our law* to promote the rights of victims of crime in general in the criminal justice system will obviate the approach adopted by the legislature hitherto, which regrettably the Bill being promoted by DSD in its current form seems to perpetuate, which has been sporadic, fragmented and not all-encompassing.¹²⁶ Fashioning and including therein or in relevant procedural law or part thereof victims' rights relating to bail will eliminate any ambiguity or uncertainty in this regard.

2.44 Finally, there are currently numerous provisions in the CPA and other laws¹²⁷ dealing with victims' rights. These exist alongside, common law rules of delict, for example. This minefield of law will increase when the law initiated by DSD is enacted and should the recommendations emanating from this inquiry find favour with the executive. The following rules of law will assist users to navigate these laws. Firstly, if the common law is altered by legislation expressly or by necessary implication, legislation will prevail. Secondly, earlier and subsequent enactments *in pari materia* must be read together and reconciled. If such reconciliation is not achievable, the latter of the two laws or provisions will prevail resulting in the amendment or repeal of the earlier law. Lastly, it is also important to emphasise that a provision in a general Act does not repeal a specific provision.¹²⁸

(g) Recommendations

2.45 In the absence of an operational and comprehensive victim-focused legislation that incorporates rights of victims in bail proceedings; interpretive difficulties and limited scope of the Victim Support Services Bill, 2019; and fragmented approach to victims' rights in the current CPA, the Commission recommends:

(i) firstly, that a separate chapter stipulating *the rights of all victims of crime in the criminal justice system* be included in the CPA (or envisaged new legislation or the relevant provisions of the Victim Support Service Bill) and encompassing the following key features:

¹²⁶ See paragraphs 2.09 and 2.10 above.

¹²⁷ See section 52 Correctional Services Act 111 of 1998 and provisions of the Child Justice Act 2008.

¹²⁸ Botha Christo *Statutory Interpretation* Third Edition (1998) 65-66.

1. the term 'victim' be *expansively* defined to include a person who has suffered physical, emotional, damage to property or economic loss as a result of commission or alleged commission of a crime;
2. the aforementioned definition of 'victim' should cater for victims who are incapable of acting on their own behalf. In the case of victim who is a child, incompetent, incapacitated, or deceased, the term 'victim' should include a parent, legal guardian of the victim, representative of the victim's estate, family member, or any other person appointed by the court;
3. basic rights of victims to information, protection, privacy, participation, restitution, and to be heard throughout the criminal justice process, be expressly stipulated;
4. where there are multiple victims, the NPA (working with the SAPS) must devise a procedure to give effect to the aforementioned rights that does not unduly obfuscate or delay proceedings;
5. the aforementioned rights should accrue the moment the offence is reported to the police;
6. the victim or complainant of an offence against the person or property be permitted to appoint *at his or her expense* a legal practitioner to represent in general his or her interests at the trial of the accused;
7. each organ of state involved in the criminal justice system, if no provision is already made in this regard, should develop a complaints mechanism that will regulate receipt, investigation and resolution of complaints by victims relating to officials who have failed to comply with the obligation to protect and enforce the rights of victims stipulated in this chapter; and this mechanism must stipulate disciplinary process and sanctions of officials who deliberately fail to comply with the relevant provisions;
8. if the victim is not satisfied with the outcome of process referred to above, he or she may approach the court for appropriate relief, including a mandamus order in terms of the Promotion of Administrative Justice Act.¹²⁹
9. enforcement of victims' rights should not be dependent on the victim asking for information and they should neither be asked whether they wish to be notified, authorities in the criminal justice sector must proactively provide relevant information to victims, complainants, and where necessary, witnesses.
10. the national instructions of the police, police code of conduct and operating procedures, and prosecutorial guidelines and polices, training and education programmes should also cover this obligation to inform victims of crime, complainants and witnesses, of their rights including those relating to bail decisions.

¹²⁹

See sections 6 and 8 of the Promotion of Administrative Justice Act 3 of 2000.

11. no organ of state in the criminal justice system should be held criminally responsible for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty contemplated in the proposed chapter; and
12. Consideration should be given to extending the rights contained therein to *complainants* and *witnesses mutatis mutandis*.

(ii) Secondly, in relation to bail, that:

(a) In respect of *all* offences, including rape and domestic violence cases, police officers and/or prosecutor must, as soon as practicable and as far as is reasonably practical inform the victim of:

- the accused's place, date and time of first (and subsequent) appearance in court;
- his or her rights under the law, including providing information to the investigating officer and to the prosecutor about how the release of an accused could affect him or her so that it can be taken into consideration by the police officer, prosecutor or court in the lead up to making bail decision;
- actual or impending application for bail by the accused whether at a police station, to a prosecutor or in court;
- decision to grant or refuse bail to the accused; and if bail has been granted, any conditions imposed on the accused to protect the victim from the alleged offender;
- any application for variation of bail condition and the outcome thereof.

(b) As there is currently no statutory duty to do so, a victim should be given a copy of the recognizance or bail hearing or release order containing the decision to remand the accused in custody or release him or her on bail, along with the timing of the release and any conditions imposed.

(c) A police official or prosecutor referred to in paragraph (a) above must prepare an affidavit stipulating compliance with these injunctions which must be handed to a judge or magistrate, as the case may be, presiding at the relevant proceedings at which bail is considered and that affidavit must form part of the record of bail proceedings.

(d) The police or prosecutor releasing or considering releasing an accused on bail, must consult with and inform the victim (or complainant and witnesses) prior to taking the decision.

(e) The court must consider whether the victim objects to the release of the accused on bail.

(f) As there is no statutory duty currently to inform victims when an offender applies for or is release on bail, conditionally or unconditional, the law should expressly require a copy of the bail decision and conditions to be provided to the victims, complainants and witnesses.

2.46 The proposed legislative reforms – a chapter on victims’ rights and the relevant provisions applicable in bail proceedings – are contained hereunder.

CHAPTER RIGHTS OF VICTIMS OF CRIME IN THE CRIMINAL JUSTICE SYSTEM

1 Objects of this Chapter

The objects of this chapter are-

- (a) to recognise, protect and promote the rights of victims of crime in the criminal justice system; and
- (b) to stipulate basic principles that govern how victims of crime must be treated by agencies, officials and organs of state in the criminal justice system.

2 Interpretation of this Chapter

(1) For the purposes of this Chapter, unless the context indicates otherwise-

- (a) **‘agency or official’** means a body and/or employee *in the public sector* whose functions involve dealing with victims of crime and offenders (and *includes* Department of Correctional Services, Department of Health, Department of Justice and Constitutional Development, Department of Social Development, National Prosecuting Authority, and South African Police Service, or any other organ of state and officials thereof that provides services to victims of crime.
- (b) **‘criminal justice system’** means the investigation and prosecution of offences; court and review board proceedings relating to offences; correctional services and conditional release of convicted persons;
- (c) **‘law’** includes the common law;
- (d) **‘organ of state’** has the meaning assigned to it in section 239 of the Constitution
- (e) **‘support services’** include health, welfare, counselling and other services provided to persons adversely affected by crime;
- (f) **‘victim’** means any individual who has suffered any physical or emotional harm, property damage or economic loss as a result of the commission or alleged commission of an offence by the accused; and includes in the case of victim who is a child, unable to act in their own stead, incompetent, incapacitated or

deceased, a parent, legal guardian or family member or any other person appointed by the court.

3 Rights of victims of crime

- (1) A victim has a right to be heard throughout the criminal justice process.
- (2) A victim must be treated-
 - (a) with respect, courtesy and empathy by organs of state involved in the criminal justice system; and
 - (b) with due regard to any special needs he or she may have.
- (3) A victim must be informed at the earliest practical opportunity, by the relevant agency, official or organs of state, of-
 - (a) support services and remedies available to victims of crime including health, welfare, counselling, restorative justice programmes, legal assistance and how to access these services;
 - (b) the name of the alleged offender, if the offender is not known to the victim;
 - (c) the charges laid against the accused, and if no charges are brought against the accused, reason thereof;
 - (d) progress of the investigation into the alleged offence, which must be done at reasonable intervals, unless the provision of such information could endanger the investigation;
 - (e) the details of the place, date and time of the accused's appearance in court in relation to the offence;
 - (f) trial process and his or her role, rights and responsibilities in the criminal proceedings instituted against the accused;
 - (g) the progress of the prosecution, including the outcome of the criminal proceedings against the accused, any sentence imposed on the accused in respect of the offence in question or any other order made by the court; appeal and review proceedings and the result thereof;
 - (h) decision of the prosecutor not to proceed with the charge, to amend the charge, or to accept a plea to a lesser charge and the reasons for the prosecutor's decision;
 - (i) impending release, escape from custody, application by the offender to be released on parole, the outcome of such proceedings and any condition imposed to protect the victim; and
 - (j) compensation and restitution as provided for by law.
- (4) A victim must be protected from the accused which includes-

- (a) the right to have their security considered by agencies, officials and organs of state involved in the criminal justice system;
 - (b) protection from unnecessary intrusion of the victim's privacy;
 - (c) the right to have reasonable and appropriate measures taken by agencies, officials and organs of state to protect the victim from intimidation and harassment by the accused, defence witnesses, family members and supporters of the accused;
 - (d) protection from unnecessary contact with the accused and defence witnesses during the court proceedings; and
 - (e) non-disclosure of victim's personal information including residential address and telephone number unless the court orders otherwise.¹³⁰
- (5) A victim is entitled to-
- (a) attend any relevant court proceedings. to be present in court during the proceedings for the offence, and to participate therein, unless the court, in accordance with the law, orders otherwise.
 - (b) have the impact of the offence on him or her considered by the court before sentencing unless the court orders otherwise; or release of the accused on parole.
- (6) A victim has a right to proceedings that are free from unreasonable delay.

4 Rights of victims in bail proceedings

- (1) A police officer or prosecutor who considers releasing an accused person on bail must consult with the victim before taking the decision.
- (2) *Reasonable effort* must be made by the police official and the prosecutor to-
 - (a) consult with the victim prior to the bail hearing;
 - (b) inform the victim of bail application or variation of bail condition by the accused;
 - (c) if the victim was not present at proceedings, of the outcome thereof, including impending release of the accused and any condition imposed by the court;
 - (d) where such proceedings have been postponed, the date and time to which such proceedings have been postponed.
- (3) A copy of the order of court relating to such bail must be provided to the victim.
- (4) The police officer or prosecutor who informs, or is required to inform, the victim in terms of this section must prepare an affidavit stating the extent to which the

¹³⁰ Note: section 6(1)(e) of the Protection of Personal Information Act of 2013 excludes the application of this Act from the processing of personal information by a court.

provisions of this subsection have been complied with; if not, the reasons for not complying therewith; the manner in which the victim has been so informed; and the date and time when the victim was informed.

(5) An affidavit prepared in terms of this section must be handed to a judicial officer presiding at the proceedings at which bail is considered, and that affidavit forms part of the record of bail proceedings.

(6) The prosecutor must, during bail proceedings, present to the court any information or evidence that is relevant, including any need for protection against the accused expressed by the victim.

(7) Any police officer or prosecutor who considers a bail application by the accused and who is aware of concern expressed by the victim about the need for protection against the accused, must consider that concern before making a decision.

(8) If the accused is provisionally and conditionally released, the police and the prosecutor must take steps to ensure that the victim is informed of the procedure to follow if the accused contravenes any of the conditions.

5 Restitution

(1) A victim has a right to compensation and restitution as provided for by law.

(2) A victim's property held by the state for the purpose of investigation or evidence, must be returned to the victim promptly as soon as it appears that it is no longer required for the purposes for which it was taken.

(3) For the purpose of subsection (2), a victim includes an innocent purchaser of property unlawfully obtained contemplated in section 301 of the Criminal Procedure Act.

6 Enforcement

(1) The rights contained in this chapter are binding and enforceable.

(2) A victim must be informed of the rights in this Chapter.

(3) A victim must be informed about procedures available to deal with grievances relating to protection, promotion and enforcement of his or her rights under this chapter.

(4) All agencies, officials and organs of state involved in the criminal justice system must, in the performance of their functions and exercise of their powers and duties, have regard to the rights contained in this Chapter when dealing with victims of crime.

(5) A victim who is of the opinion that his or her rights under this chapter have been infringed, denied or not upheld by an agency, official or organ of state may –

(a) submit a complaint in accordance with the complaints' mechanism applicable to the organ of state concerned for appropriate relief;

(b) for the purposes of paragraph (a)-

- (i) each agency or organ of state must develop and operate a system, if such mechanism does not already exist, to receive and resolve complaints from victims in respect of the agency or organ of state's compliance with the principles set out in this chapter;
- (ii) the complaints system must be accessible and transparent; and offer fair and reasonable remedies; and
- (iii) must stipulate disciplinary process and sanctions for officials who deliberately fail to give effect to the principles contained in this chapter.

(c) If the victim has exhausted the complaints mechanism referred to in paragraph (a) and is not satisfied with the outcome thereof, he or she may, on good grounds and on the basis that the decision to grant bail materially violated his or her rights as stipulate in this chapter, approach a competent court, having jurisdiction, to set aside the decision to grant bail to an accused.

(6) No person is criminally or civilly liable for anything done in good faith in the exercise or performance of any power or duty in terms of or under this Chapter.

7 Miscellaneous

(1) The provisions of this Chapter-

- (a) may be invoked by victims who are present in the Republic, or who are South African citizens or permanent residents in the Republic; and
- (b) apply to victims of crime, complainants, victim's and complainant's family and witnesses, *mutatis mutandis*.

(2) This chapter must be interpreted in a manner that is reasonable and not likely to-

- (a) interfere with the proper administration of justice;
- (b) cause unnecessary delays;
- (c) hamper or compromise investigation and prosecution of offences; or
- (d) adversely interfere with the work of the police, prosecutors or courts.

2 Postponements, delays, overcrowding and lengthy remand detention

(a) Problem statement

2.47 South Africa is grappling with the problem of overcrowding in its correctional facilities. As at March 2022, the inmate population in correctional facilities was 143 244, comprising 96

080 sentenced offenders and 47 164 remand detainees, constituting almost a third of inmate population. It is noteworthy that 2 724 of awaiting trial prisoners could not afford bail of less than R1000.¹³¹ Although these numbers have somewhat stabilised since the early 2000s,¹³² prison population in general and the number of remand inmate remains exceedingly high. According to the Departments of Justice and Police Service, prisons are currently 143% full.¹³³ The state, of course, has a constitutional obligation to ensure that conditions at correctional facilities are consistent with human dignity, which comes at a cost.

2.48 In so far as this state of affairs – overcrowding in prisons – has been attributed, in addition to minimum sentences legislation and other laws which fall outside the scope of this inquiry,¹³⁴ to delays in the conclusion of trials,¹³⁵ postponements of bail applications and proceedings, unaffordability of bail, and other deficiencies in the statutory framework allegedly occasioned by the Criminal Procedure Second Amendment Acts of 1995 and 1997,¹³⁶ this brings it within the ambit of this inquiry. These factors, coupled with inordinate amount of time it takes for a case to get to trial and eventually to reach finality, which ranges between two and six years or more,¹³⁷ compounds the problem resulting in lengthy pre-trial detention which not only affects accused persons charged with serious offences, but also those accused of petty crimes. Cumulatively, overcrowding in prisons and lengthy pretrial detention come at a huge (and unsustainable) cost to the state.¹³⁸ Moreover, the causes of this crisis and possible

¹³¹ *JICS Annual Report 2021-2022* 9 and 88.

¹³² Clare Ballard and Ram Subramanian 'Lessons from the Past: Remand Detention and Pre-trial Services' *SA Crime Quarterly* No 44 (June 2013) 15 footnote 3.

¹³³ Information provided by the departments at the conference held in February 2024 on integrated criminal justice system and the review of the CPA.

¹³⁴ Criminal Law Amendment Act 105 of 1997, Correctional Services Act 111 of 1998 and the Prevention of Organised Crime Act 121 of 1998. These laws were designed to purposefully impose harsher punishments, increase sentence jurisdiction, lengthen prison terms, limit courts' discretion in sentencing and increase non-parole periods. See Edwin Cameron 'The Crisis of Criminal Justice in South Africa' *South African Crime Quarterly* No. 69 (2020) 4-2.

¹³⁵ Wits Justice Project *Innocent But Incarcerated: An Analysis of Remand Detention in South Africa* 10 and 25.

¹³⁶ Criminal Procedure Second Amendment Act 75 of 1995 and Criminal Procedure Second Amendment Act 85 of 1997.

¹³⁷ Graham Burse 'Time for a Return to Sanity' *De Rebus* (September 1997) 33.

¹³⁸ Section 35(2)(e) of the Constitution guarantees detained and sentenced prisoners the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

solutions are interconnected. All these factors bolster the resolve to explore interventions from a law reform perspective.

(b) Analysis of the law

(i) Introduction

2.49 The Constitution contains a host of measures aimed at protecting the interests of the accused and ensuring that incarceration of awaiting trial offenders is a measure of last resort including liberty right, security of the person and right to speedy trial.¹³⁹ Moreover, where detention is unavoidable, it must be consistent with human dignity and proceedings must be concluded speedily.¹⁴⁰ The right to a speedy trial applies from the time a charge is laid to the date upon which sentence is imposed. In fact, implicit in this right is the right to render the verdict and to sentence the accused within reasonable time. However, it does not cover pre-charge and appellate or review delays. These must be considered under section 12(1)(a) of the Constitution.¹⁴¹ A concerted effort was made to align bail law with these constitutional injunctions. The CPA enjoins the police and the courts to inform detained accused of their right to bail and to deal with unreasonable delays.¹⁴² The norms and standards regulating judicial functions,¹⁴³ require judicial officers (magistrates and judges) to be impartial, to dispose of proceedings expeditiously, to scrutinise applications postponements for merit and to deal with them firmly and fairly, to avoid lengthy incarceration of accused awaiting trial, and contain varying enforcement mechanisms and thus mirror the law in this regard.¹⁴⁴ At the same time,

In fulfilling this obligation, it is estimated that it costs government R330 per day and approximately R10000 to keep a single inmate in incarceration, whether on remand or sentenced. See Edwin Cameron 4-8-9. At the recent Conference on Integrated Criminal Justice System and Review of the CPA, the Director-General of the Department of Justice stated that actually government spends R550 on each incarcerated inmate per day.

¹³⁹ Section 12(1)(a) and (b); 35(1)(e) and (f); 35(2)(d) and 35(3)(o) of the Constitution.

¹⁴⁰ 35(2)(e) and (f) and 35(3)(d)

¹⁴¹ This approach is adopted in Canada to similar provisions. See Government of Canada *Section 11(b) - Trial Within a Reasonable Time*.

¹⁴² Section 50(1)(b), (3), (6) and 342A of the CPA.

¹⁴³ The Norms and Standards for the Performance of Judicial Functions published by the Office of the Chief Justice in the *Government Gazette* of 28 February 2014; the Code of Judicial Conduct, and the Code of Judicial Conduct for Magistrates.

¹⁴⁴ To ensure these principles are adhered to, judicial officers must report on their compliance with these injunctions and their breach constitutes misconduct which could have dire consequences for the judicial officer concerned. Most importantly, they acknowledge that the complexity of

contemporary challenges also had to be addressed, particularly the scourge of violent crime, hence the inclusion of provisions empowering the courts to postponement bail proceedings in certain circumstances.¹⁴⁵

(ii) Deficiencies in bail law contributing to overcrowding and lengthy detention

(aa) Reverse onus and access to police docket

2.50 Generally, the Criminal Procedure Second Amendment Acts of 1995 and 1997 were strongly criticised for 'limiting access to bail' and 'circumstances under which an accused can be released on bail'.¹⁴⁶ More specifically, the reverse onus provisions in section 60(11) applicable to offenders charged with serious offences and the fact that in terms of section 60(14) the accused is no longer entitled to information contained in the police docket for the purposes of applying for bail.¹⁴⁷

2.51 Both issues were settled by the Constitutional Court in *S v Dladla and Others; S v Joubert; S v Schietekat*.¹⁴⁸ Section 60(11), which was challenged on the basis that it contravened section 35(1)(f) of the Constitution was deemed a justifiable limitation as a result of high levels of crime. In the same case, the court clarified, in relation to section 60(14), that it does not sanction an absolute denial and ordered the veil to be lifted to give an applicant falling under section 60(11)(a) of the CPA, a reasonable opportunity to prove exceptional circumstances. It stressed though that physical access to the docket in the sense of having sight thereof or perusing such content is prohibited.

some cases and the workload could hamper adherence to these standards and that errors by judicial officers must be addressed through then the normal appeal and review process.

¹⁴⁵ Section 50(6)(d) of the CPA.

¹⁴⁶ Cameron 4-2 and Graham Burse 'Time for a Return to Sanity' *De Rebus* (September 1999) 3-4.

¹⁴⁷ Section 60(14) of the CPA provides:
'Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by a police official charged with the investigation in question, unless the prosecutor otherwise directs. Provided that this section shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.' Section 39 of the Promotion of Access to Information Act 2 of 2000 contains a similar prohibition.

¹⁴⁸ *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) paras 68-77, 82, 84-85. For commentary see Wium de Villiers 'An Accused 's Right to Information in the Police Docket for Purposes of a Bail Application – S v Green 2006 1 SACR 603 (SCA)' *THRHR* (2007) 336.

(bb) Custody time limit and automatic review of bail decision

Custody time limit

2.52 Others pointed to gaps in the CPA – the lack of provisions that stipulates the maximum period, which once expired would entitle the accused to be released on bail or provide for continuous or intermittent review of bail decisions.¹⁴⁹

2.53 In line with developments in European and Latin American countries,¹⁵⁰ Parliament has enacted section 49G of the Correctional Services Act of 1998 in terms of which the maximum amount of time a remand detainee may spend in detention is two (2) years. Beyond this period, the necessity of further detention must be determined by a judge. Where continued incarceration is deemed justifiable, it must be reviewed by the court annually.¹⁵¹ While this provision has put South Africa on par with other countries that prescribe time limit on custody, it has not been spared from criticism. It has been submitted that two years is a very long time

¹⁴⁹ Clare Ballard *Research Report on Remand Detention in South Africa: An Overview of the Current Law and Proposals for Reform* (2011) 6, 20 and 21.

¹⁵⁰ Ballard 22.

¹⁵¹ Section 49G of the Correctional Services Act reads:

‘49G Maximum incarceration period

(1) The period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility, without such matter having been brought to the attention of the court concerned in the manner set out in this section: Provided that no remand detainee shall be brought before a court in terms of this section if such remand detainee had appeared before a court three months immediately prior to the expiry of such two year period and the court during that appearance considered the continued detention of such detainee.

(2) The Head of the remand detention facility must report to the relevant Director of Public Prosecutions at six-monthly intervals the cases of remand detainees in his or her facility that are being detained for a successive six-month period.

(3) Any remand detainee whose detention will exceed the period stipulated in subsection (1) must be referred to the relevant court by the Head of the remand detention facility or correctional centre, as the case may be, to determine the further detention of such person or release under conditions appropriate to the case.

(4) If, subsequent to the referral of the remand detainee to court as contemplated in subsection (3), the finalisation of his or her case is further delayed, the Head of the remand facility or correctional centre, as the case may be, must refer the matter back to the court on a yearly basis to determine the remand detainee’s further detention or release under conditions appropriate to the case.

(5) The National Commissioner may, in consultation with the National Director of Public Prosecutions, issue directives regarding the procedure to be followed by a Head of a remand detention facility or correctional centre, as the case may be, and a Director of Public Prosecutions whenever it is necessary to bring an application contemplated in subsection (3) or (4).’

to wait, especially if the case is a simple one;¹⁵² and it is perceived as passing the buck - the courts' responsibility to deal with the scourge of pre-trial and trial delays - to the Department of Correctional Services.

Mandatory review of bail decision

Overview

2.54 Another mechanism utilised in other jurisdictions to curb lengthy pretrial detention is mandatory review of bail decisions. In Latin American countries, for example, Costa Rica, El Salvador and Paraguay, bail applications are reviewed every three months and these prescripts contained in the respective criminal codes.¹⁵³ In the United States, Article 1270.2 of the California Penal Code provides a model provision for automatic review of an order fixing the amount of bail. This provision provides:

When a person is detained in custody on a criminal charge prior to conviction for want of bail, that person is *entitled to an automatic review of the order fixing the amount of bail* by the judge or magistrate having jurisdiction of the offence. That review shall be held not later than five days from the time of the original order fixing the amount of bail on the accusatory pleading. The defendant may waive this review.

2.55 The question that ought to be asked therefore is how does South Africa compare to these jurisdictions?

Child offenders

2.56 In respect of child offenders, the Child Justice Act contains two measures, both of which are intended to prevent or reduce the incidence of lengthy detention of children. Firstly, if bail application of a child has been postponed or refused, the presiding officer remanding the child in custody must, in terms of section 30(4) of the Child Justice Act:

...direct that the child be brought before him or her or any other court every 14 days to reconsider the order.

2.57 Essentially, therefore, a decision to incarcerate a child is reviewable every 14 days.

2.58 Secondly, this Act requires presiding officers, at preliminary inquiries or child justice court proceedings, to constantly:

- (a) determine whether or not the detention is or remains necessary and whether the placement is or remains appropriate;

¹⁵² Ballard and Subramanian 19.

¹⁵³ Ballard 24.

- (b) enter the reasons for the detention or further detention on the record of the proceedings;
- (c) consider the reduction of the amount of bail, if applicable; and to
- (d) enter the reasons for any decision made in this regard on the record of the proceedings.¹⁵⁴

Adult offenders

2.59 The equivalent of section 30(4) of the Child Justice Act which is applicable to adult offenders and noticeably prescribes a shorter period for the reconsideration of bail applications is section 50(6)(d) of the CPA. In terms of this provision the courts may, for reasons stipulated therein, postpone bail proceedings or applications *to any date or court, for a period not exceeding seven days at a time*, which in essence means bail applications must be considered again after the lapse of this period. Similar rules obtain in Namibia and Singapore.¹⁵⁵

Criticism of section 50(6)(d)

2.60 This provision has been criticised on the basis that it gives the courts wide discretion which results in prosecutors' requests for postponements being accepted without further inquiry; in practice, as a result of overburdened court rolls in the magistrates' court, its invocation actually means that remands are often longer than seven days; and that delays emanating from the application of this provision violate the accused's right to a speedy decision.¹⁵⁶

Judicial approach

2.61 The European Court of Human Rights has urged national judicial authorities considering bail applications to ensure that the pre-trial detention of an accused person *does not exceed reasonable time*.

2.62 Our courts go slightly further. In matters relating to repeated bail applications and postponements (be it second, third, fourth bail application) the courts require the state to provide *reasons additional to those given at the initial bail hearing* to satisfy the court that the interests of justice are indeed, and continue to be, served by the continued incarceration of

¹⁵⁴ Section 32(a), (b) and (f) of the Child Justice Act.

¹⁵⁵ Section 52(5)(b) of the Criminal Procedure Act 25 of 2004 (Namibia) and 238(3) of the Criminal Procedure Code 2010 (Singapore).

¹⁵⁶ Palesa Rose Madi and Lubabalo Mabhenxa 'Possibly Unconstitutional? The Insistence on Verification of Address in Bail Hearings' *SA Crime Quarterly* (December 2018) 19 26-27.

the accused.¹⁵⁷ Therefore, what might be a relevant and sufficient justification for the accused's detention at his or her first bail hearing, might not be so as time progresses and in the absence of additional factual information justifying further detention.

2.63 Besides, when a matter is routinely postponed, a judicial officer would not hesitate to *strike the case off the roll* or to *ask the police officer to rather sort the investigation out and re-arrest*, as opposed to keeping the accused in custody.¹⁵⁸

Is s 50(6)(d) a mandatory/automatic bail review mechanism?

2.64 The system of mandatory review has been described as a check on unnecessary delays which reduces, to some extent, the burden on the accused of finding new facts with which to present a new bail application. Its usefulness lies in the fact that it obviates the need for the accused to ascertain the reasons for the delays in the prosecution of his or her case. Instead, it compels the state to provide the relevant information to the court at regular intervals, enhancing the chances of the accused being released on bail. Consequently, the possibility of the accused being detained further simply because he or she cannot acquire this information, is significantly reduced.¹⁵⁹

2.65 New South Wales¹⁶⁰ and the Australian Capital Territory provide perfect models of this system. The Bail Act 1992 of the latter state succinctly provides:

¹⁵⁷ Ballard 11, 15, and 18.

¹⁵⁸ Wits Justice Project 15.

¹⁵⁹ Ballard 24.

¹⁶⁰ Section 55 of the Bail Act 26 of 2013 (NSW) provides:

'55 Variation of bail decision if accused person remains in custody

- (1) A court or authorised justice that has power to hear a variation application may conduct a hearing (without application) if an accused person granted bail has remained in custody because a bail condition has not been complied with.
- (2) The purpose of the hearing is to review the bail conditions imposed on the grant of bail, not the decision to grant bail.
- (3) The court or authorised justice may conduct the hearing of its own motion or at the request of the accused person or a police officer.
- (4) A hearing under this section is not to be conducted at the request of a police officer unless the court is satisfied that the request was made—
 - (a) to benefit the accused person, and
 - (b) with the consent of the accused person.
- (5) If the court or authorised justice decides to conduct a hearing, this Act applies (subject to the regulations) as if the hearing were a hearing of a variation application, except that the powers of the court or authorised justice are the powers conferred by this section.
- (6) The court or authorised justice may, after hearing a variation application of a kind referred to in this section—
 - (a) affirm the bail decision (as to the conditions of bail), or
 - (b) vary the bail decision, but not revoke or refuse bail.'

41A Court may review on its own initiative

(1) A court that has made a decision in relation to bail may review the decision on its own initiative if the court considers it is in the interests of justice to do so.

(2) The court may issue a warrant for the arrest of the person and for bringing the person before the court at the time and place stated in the warrant.

2.66 Section 50(6)(d) of the CPA is couched differently compared to, for example, section 30(4) of the Child Justice Act, Article 1270.2 of the California Penal Code referred to above. Whilst it requires the courts to review decisions made in terms of this section every seven days, it is not strictly speaking a mandatory and automatic bail review provision.

Question

Is there a need for automatic and mandatory bail review mechanism in South African law? If such automatic and mandatory bail review provision were to be enacted, should it apply to all offenders/offences or to a specific category thereof? For example, should it be limited to the variation of bail conditions of offenders who have been granted bail but remain in custody because such conditions have not been complied with or extend to the review of bail decision; should it exclude accused persons charged with serious offences whose bail applications have been denied; and would such an approach not offend the right to equality? Would such a law, whatever form it takes eventually, not over burden the courts?

(iii) *Current law on unreasonable delays*

(aa) Overview

2.67 The Constitution promises accused persons a speedy trial¹⁶¹ and the codes of conduct of judicial officers urge judges and magistrates to deal with matters expeditiously, to scrutinise applications for postponements and deal with them fairly and firmly. However, a number of studies prove that on average it takes between two and seven years or more before a criminal case is heard and/or finalised. And, repeated postponements are a common occurrence.¹⁶² The case of *S v Maredi*¹⁶³ where the accused spent 17 months in remand detention before he was charged and 22 months before the case was concluded because he could not afford bail

¹⁶¹ Section 35(3)(d) provides that every accused person has a right to a fair trial which includes a right to have their trial begin and conclude without unreasonable delay.

¹⁶² Wits Justice Project 10 and 25 refers to a case that was postponed 50 times in 166 sessions and another where the accused appeared in court 76 times in six years.

¹⁶³ 2000 (1) SACR 611 (T).

of R500 that was set by the court after the 17th month, typifies these cases. In the review proceedings relating to this case, the High Court stated:

This state of affairs is shocking. Section 35(3)(d) of the Constitution ...provides that every accused person has a right to a fair trial, which includes the right to have their trial 'begin and conclude without unreasonable delay'. It seems to me, prima facie, that the right of the accused [to a speedy trial] was blatantly ignored by not only the prosecutors who were involved in this matter but also by the magistrates who were presided over the court from time to time and who granted postponements of the case *without enquiring whether or not the requests were reasonable or justified*.¹⁶⁴

2.68 Undoubtedly, as the norms and standards for the performance of judicial functions acknowledge, the complexity and magnitude of the issues and the case load that some courts are confronted with contribute to the delay in finalisation of the proceedings. There are other reasons, of course, including missing files, dockets and manuscripts; over-stretched court resources; unnecessary postponements and adjournments; presiding officers retiring or passing away in the middle of the proceedings; delays in finding a judge to preside over the matter; judges being allocated to other cases; and stenographer, lawyer, prosecutor not being available. When a magistrate is suspended, retrenched, indisposed or passes away, cases have to be reheard from scratch which adds months to an awaiting-trial detainee. Moreover, while the Code of Judicial Conduct requires magistrates to complete part-heard cases upon resignation or retirement, there is no legal framework to compel them to do so.¹⁶⁵

2.69 The impact of delays on the accused include disruption of employment, financial drain, cause of anxiety and public condemnation.¹⁶⁶ Furthermore, as the case of *S v Maredi* above belaboured the point, delays affect witnesses too.

2.70 To determine whether there has been an infringement of section 35(3)(d) of the Constitution and to curb unnecessary delays in criminal matters, the legislature introduced an analytical framework in respect of adult offenders and numerical ceilings in the case of child offenders which are contained in:

- (i) section 342A of the CPA; and
- (ii) section 66 of the Child Justice Act, which deals with the same subject matter but in relation to child offenders.

¹⁶⁴ Id 613. (Our emphasis).

¹⁶⁵ Wits Justice Project 10, 26-27 and 29. According to this report, a magistrate may not retire if they still have cases on their roll.

¹⁶⁶ Ballard 29.

(bb) Child offenders

2.71 Section 66(1) of the Child Justice Act, which is couched in peremptory language, requires the child justice court to conclude all trials of children as speedily as possible and to ensure that postponements are limited in number and duration. Furthermore, in terms of section 66(2), postponements prior to the commencement of a trial may not exceed:

- 14 days at a time if a child is in detention in prison;
- 30 days at a time if a child is in detention in a child and youth care centre;
- 60 days at a time if the child has been released.

2.72 As far as bail application of a child offender that has not been finalised is concerned, section 66(3) provides that section 50(6)(d) of the CPA applies. This essentially means that if bail proceedings have been postponed for reasons stipulated in the aforementioned provision of the CPA, the decision must be reviewed after every 7 days.

*(cc) Adult offenders - section 342A of the CPA***Overview of section 342A**

2.73 Section 342A, which is located in Chapter 33 of the CPA – general provisions - seeks to curb unreasonable delays in criminal proceedings. To this end, it incorporates three key elements which do not feature in section 50(6)(d) and the provisions of the Child Justice Act meant to reduce delays in finalisation of cases, namely unreasonableness, the duration and consequences, of the delay. It expressly empowers the court before which criminal proceedings are pending to investigate any unreasonable delays which could cause substantial prejudice to the prosecution, the accused or his or her legal representative, the State or a witness, and to make an order it deems fit to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice.

2.74 In considering whether the delay is unreasonable, the court must consider, inter alia:

- (a) the duration of the delay;
- (b) the reasons advanced for the delay;
- (c) whether any person can be blamed for the delay;
- (d) the effect of the delay on the personal circumstances of the accused and witnesses
- (e) the seriousness, extent or complexity of the charge or charges; and
- (f) actual or potential prejudice caused to the state or the defence by the delay, including a weakening of the quality of the evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and consideration of costs.

Criticism of section 342A

2.75 This section has been criticised on the basis that it neither prescribes that an inquiry be undertaken by the court to establish whether the accused has been detained or not; nor require, as a remedy for undue delay, the provisional release of the accused if he or she is in custody.¹⁶⁷

2.76 Secondly, section 342A deals with delays *ex post facto*, in the sense that the inquiry is conducted after the damage has been done.

2.77 Section 342A(7) has been berated on the basis that whilst it shows political concern for remand detainees, its value is doubtful.¹⁶⁸

*(iv) Affordability of bail*¹⁶⁹

2.78 The reality is that poor and indigent accused cannot afford to pay even the smallest amounts set for bail. Consequently, they languish in prison for indeterminate amount of time irrespective of the nature or gravity of the crime with which they are charged. The legislature was alive to this possibility and included provisions in the CPA to address it. Firstly, the courts may dispense with payment of money as a condition for bail or payment of money right away (the accused may be required to furnish a guarantee that he or she will pay and forfeit to the state the amount of money set as bail). Secondly, the accused may approach the court to have the amount of bail reduced.¹⁷⁰

2.79 Thirdly, in terms of section 63A of the CPA, the head of a correctional facility may ask the court to release accused charged with less serious offences and who cannot afford bail on warning on account of deplorable prison conditions.

¹⁶⁷ Id 30 and footnote 148.

¹⁶⁸ Section 342A(7) of the CPA provides:
The National Director of Public Prosecutions must, within 14 days after the end of January and of July of each year, submit a report to the Cabinet member responsible for the administration of justice, containing the particulars indicated in the Table of Awaiting Trial Accused in respect of each accused whose trial has not yet commenced in respect of the leading of evidence, as contemplated in section 150 and who, by the end of the month in question, has been in custody for a continuous period exceeding-

- (i) 18 months from the date of arrest, where the trial is to be conducted in a High Court;
- (ii) 12 months from the date of arrest, where the trial is to be conducted in a regional court; and
- (iii) six months from the date of arrest, where the trial is to be conducted in a magistrate's court.

¹⁶⁹ For detailed discussion in this regard, see paragraph 3 below.

¹⁷⁰ Section 60(2B); 60(13); and 63 of the CPA.

2.80 The Child Justice Act contains similar safeguards for child offenders. In addition, this law allows the release a child into the care of a parent, appropriate person or guardian before their first appearance at a preliminary inquiry; and prescribes that a child who cannot afford bail can be detained only if the child is above the age of 14, has committed a serious offence, his or her detention is necessary in the interests of justice, and is likely be sentenced to imprisonment, if convicted.¹⁷¹

2.81 These provisions are important because financial bail discriminates against the poor – without the funds to access the services of a private lawyer, the accused must rely on the services provided by Legal Aid, which may not be available before the case goes to court, which effectively prevents applying for bail before first court appearance.¹⁷² However, the problem persists, notwithstanding these provisions. This may be due to the courts not applying the two-stage approach contemplated in section 60(2B) of the CPA; or the police, prosecutors and correctional services officials not exercising their powers in terms of the Act.

(d) Law reform proposals

2.82 As can be gleaned from the preceding discussion, the law currently in force addresses, to a very large extent, the concerns relating to the review of bail decisions, custody time and delays in the finalisation of matters before court. However, there is definitely room for improvement.

2.82.1 As will become apparent below, in addition to strengthening the analytical framework in sections 50(6)(d) and 342A of the CPA, we are proposing the inclusion of numerical presumptive limits or custody time limit for the maximum amount of time an accused may be held in custody during the pre-trial stage and from the time the charge is laid to the completion of the trial, which vary depending on the nature of the offence, beyond which incarceration, postponement or delay should be considered presumptively unreasonable.

2.82.2 As experience in other parts of the world that introduced time limits show, without sanctions or safeguards, these provisions will either be ineffective or unduly benefit accused persons and thus bring the administration of justice into disrepute.¹⁷³ So, we have included the following caveats: delays caused solely and directly by the

¹⁷¹ Section 21 – 24; 25(2)(c); 30 of the Child Justice Act.

¹⁷² Wits Justice Project 13-14.

¹⁷³ Georgina Ryan-White *Statutory Time Limits in other Jurisdictions – Northern Ireland Assembly Briefing Paper* (March 2021).

accused will not count in determining the period the accused has spent in detention to prevent the accused from benefitting from his or her own delay causing action or inaction; secondly, in contrast to other jurisdictions where a stay of prosecution or mitigation of sentence would follow upon a finding of unreasonable delay, for example, we are proposing that the accused must be released on bail or warning pending the finalisation of the matter in accordance with applicable laws rather than immunity from prosecution; and thirdly, the prosecution will retain the right to apply to the court, within the prescribed time frames, to have the time limit extended, which the court may do on good cause shown.

(i) *Non-legislative reforms*

2.83 Firstly, quite a number of reforms have been proposed over the years to reduce the number of people in remand detention, which do not require statutory underpinning. These interventions, which could be reconsidered and pursued by government if it has not already done so, include:

- (a) the establishment of a Remand Detainee Task Team that independently investigates, and where possible, fast-track cases of remand detainees;
- (b) the development of Awaiting Trial Detainee Guidelines by the NPA to sensitise prosecutors as to the various options available to reduce the number of awaiting trial detainees;¹⁷⁴
- (c) the establishment of courts to deal exclusively with non-trial matters such as remands, bail applications and pleas;
- (d) prioritising cases involving remand detainees – by reviewing and withdrawing cases and releasing the accused where the charges are frivolous or where there is insufficient evidence;
- (e) combating case backlogs by instituting Saturday courts; deployment of more experienced magistrates and court officials to the busier court centres in the country; and expansion of court capacity through the appointment of acting magistrates, as well as additional interpreters, clerks, prosecutors and legal aid defence lawyers to ensure cases were disposed of speedily;
- (f) devising an effective case-load management system;
- (g) reducing the number of arbitrary arrests;

¹⁷⁴ It appears, from Ballard and Subramanian 20 that these guidelines were developed, and required prosecutors, for instance, to reconsider bail if an accused has been in custody for longer than six months; and to make sure that the investigations and presentation of the state's evidence are fast-tracked in such matters.

- (h) training of police officers;
- (i) avoiding arresting people for petty offences or civic by-law such as drinking in public;
- (j) addressing challenges faced by courts, including lack of equipment and court rooms; and erratic water and electricity supply;
- (k) introducing a digital system where dockets, transcripts and records can be readily and easily accessed;
- (l) developing a system whereby the verification of ID and address can be streamlined;
- (m) provision of pre-trial services;
- (n) introduction of non-custodial measures (electronic tagging, mediation and resolution); and
- (o) improvement and expansion of services provided by community advice centres and paralegal organisations.¹⁷⁵

2.84 As stated above, notwithstanding the effluxion of time, these proposed solutions remain valid and could be dusted-off, independently evaluated,¹⁷⁶ improved on, and implemented, if government has not already done so.

(ii) Legislative reforms

2.85 To address the issues alluded to in the discussion above, the Commission makes the following legislative reform recommendations.

- (a) That section 50(6)(d) be amended to require that:
 1. postponements contemplated therein should not, cumulatively, be unreasonable and the incarceration of the accused by virtue of these provisions should not exceed reasonable time;
 2. when exercising its discretion in terms of this section, the court must weigh the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely suffer if he or she is remanded in custody, taking into account:
 - (i) the period for which the accused has already been in custody since his or her arrest;
 - (ii) the reasons for inadequacy of information or evidence; and the time it would take the state to issue a written confirmation contemplated in section

¹⁷⁵ Ballard and Subramanian 20-21 and Wits Justice Project.

¹⁷⁶ Ballard and Subramanian 20.

60(11A), procure material evidence, perform the functions referred to in section 37;

(iii) any financial loss which the accused may suffer owing to his or her detention; and

(iv) any other factor which in the opinion of the court must be taken into account and that

3. a proviso must be added to section 50(6)(d) that if a court, having considered the factors above, finds that granting a postponement or further postponement is unreasonable or that the period the accused has spent in detention exceeds what is reasonable in the circumstances, must release the accused on bail, unless there are substantial and compelling reasons to remand the accused in custody.

2.85.1 In other words, the considerations in section 60(9) of the CPA must be incorporated into section 50(6)(d) by reference.

2.85.2 The aforementioned proposal, if implemented, would compel the court in bail proceedings to hold an inquiry, to interrogate and examine all the facts for and against the continued incarceration of the accused.

(b) That the following subsection be inserted into section 60 of the CPA:

'(11C)(1) Except as otherwise provided in this Act, an accused who is in custody, and has not been released on bail or warning, and his or her trial has not commenced within a period of –

(a) One hundred and twenty (120) days in respect of an offence set out in Schedule 6;

(b) Ninety (90) days in circumstances where an accused is charged with an offence referred to in Schedules 1, 5, and 7

shall be released forthwith on bail or warning, in terms of the relevant provisions of this Act, subject to conditions which in the opinion of the court are in the interest of justice.

(2) The prosecutor assigned to the case must-

(a) not less than 5 days before the expiry of the time limit in subsection (1) give notice to the clerk of the court or registrar and the accused or his representative stating –

(i) that that accused has the benefit of the time limits in terms of this section;

(ii) whether it intends acceding to the release of the accused on bail or to ask the court to impose conditions, and must stipulate the nature of the conditions to be sought, or to apply for the extension of the custody time limit; and

(b) make arrangements for the accused to be brought to court within the period of 2 days before the expiry of the time limit for the determination of the matter.

(3) The provision of subsection (1) shall not apply if the court if the court is satisfied that-

(a) the interests of justice justify remanding the accused in custody; or

- (b) the delay in commencing with the proceedings is attributable to the actions of the accused.
- (3) in making a determination in terms of subsection (2)(b), the court must consider the following factors:
- (a) the determination of the capacity of the accused to stand trial in terms of sections 77-79;
 - (b) a calculation of the period during which the accused is deemed unable to stand trial;
 - (c) pre-trial motions;
 - (d) appeals;
 - (e) different trials in respect of separate charges to the one before court;
 - (f) the period during which matters the matters in para (a) – (e) above, are under consideration by the court; and
 - (g) any other reason which, in the opinion of the court, must be considered as relevant to the delay.
- (c) Section 342A(2) and (3) respectively be amended by the insertion of new paragraphs requiring the court:
- (i) to consider whether the accused is in detention; and if so, the duration he or she has been detained;
 - (ii) to consider, as a remedy, whether it would be in the interests of justice for the accused to be released provisionally.
- (d) In view of the constitutional requirement to a speedy trial, the following section is hereby inserted after section 168:

'168A Prosecution of Offences (Time Limits)

- (1)(a) After the commencement thereof, the court must ensure that the proceedings against the accused begin and conclude without unreasonable delay.
- (b) The commencement of criminal proceedings in terms of subsection (1) must be interpreted mean the accused's first appearance as interpreted according to the provisions of this Act.
- (c) As far as practicable the proceedings of the accused person who is in custody must be given preference over those of an accused who has been released on bail or warning.
- (e) The trial of every accused must commence within-
 - (i) One hundred and twenty (120) days in respect of an offence referred to Schedule 6;
 - (ii) Ninety (90) days where an accused is charged with an offence referred to in Schedules 1, 5 and 7.'
- (2) An accused whose custody time limit has expired shall be released on bail in accordance with this Act subject to a condition to appear for trial at date and time specified.
- (3) The court may extend the any time fixed in subsection (1) on good cause shown.
- (4) The provisions of section 60(11C)(2)(a) and (b) shall apply to this section mutatis mutandis.

(e) The practical utility of including an automatic bail review provision should be explored, particularly in view of the number of indigent persons in remand detention.

(f) To the extent that section 49G of the Correctional Services Act, section 50(6)(b) and 342A of the CPA seem to deal with the same subject matter, their consolidation should be explored.

3 Unaffordable amount of bail

(a) *The problem*

2.86 The statistics released by the Judicial Inspectorate for Correctional Centres in its 2021/2022 annual report revealed that 2 724 remand detainees could not afford to pay bail amount of less than R1 000. Justice Cameron has referred to detainees who could not afford bail of sums as small as R200 to R300. It therefore appears that cash bail is ineffective and discriminatory as it impacts adversely and disproportionately on impoverished accused persons. The number referred to above might seem negligible, but it is not especially when regard is had to the fact that the upkeep of inmates in correctional facilities, whether remand or sentenced, costs government R330 per day, and approximately R10 000 per month.¹⁷⁷ So the cost of all 2 724 inmates exceeds R27 million per month. Commenting on the ineffectiveness of this measure, Justice Cameron said:

‘...cash bail in trivial amounts that an accused cannot afford is not only unjust – it is wasteful, unproductive and inefficient.’¹⁷⁸

2.87 The lack of consistency in setting bail amount with different courts fixing varying bail amounts, despite the offence and accused’s means being the same; and failure by the courts to conduct a two-stage bail inquiry contemplated in section 60(2B) exacerbates the problem of indeterminate incarceration of indigent accused.¹⁷⁹ This begs the question what can be done from law reform perspective to alleviate this situation?

¹⁷⁷ Cameron 4-9.

¹⁷⁸ Ibid.

¹⁷⁹ Nicola de Ruiter and Kathleen Hardy *Study on the Use of Bail in South Africa* APCOF Research Series (May 2018) 3.

(b) *Appropriate reforms that could be explored*

(i) General

2.88 To alleviate the plight of indigent accused, Justice Cameron has proposed the following solutions:¹⁸⁰

- (a) adult diversion schemes (diversion of the offender which could include an apology, compensation and commitment to restorative justice);
- (b) prohibiting pre-trial detention in certain circumstances;
- (c) reintroduction of pre-trial services (mainly interventions aimed at ensuring that the accused person appears at trial and is not arrested pre-trial);¹⁸¹
- (d) to the extent that the inquiry into the ability of the accused to pay bail is not done uniformly, there should be a clear and accepted definition of 'indigent' or 'inability to pay' in the law to guide the courts; and
- (e) introducing or replicating duty solicitors model used in other countries in terms of which newly qualified lawyers provide legal service to suspects at police stations.

(ii) Property as security for bail

2.89 Amending the law to make provision for pledging property as security for bail has been thrown into the mix, for two reasons: firstly, section 60(2B) of the CPA is silent on this aspect; secondly, accused persons may have sufficient assets which they can offer as security instead of cash that they can use to pay right away.

2.90 This proposal drew a lot of interest at the Conference hosted by the Department of Justice in February 2024 on the Integrated Justice System and Review of the Criminal Procedure Act with participants suggesting that where the release on bail is secured by way of property, the court must insist on proof of ownership thereof and the conclusion of a legally binding agreement before bail is granted.

(iii) Approach of the Commission

2.91 A few of the abovementioned interventions fall outside the scope of this inquiry, whose main focus is strengthening the law of bail; their implementation may not necessarily require statutory underpinning, or have already been incorporated into the legislative framework and will thus not be explored further, with the exception of pledging property as security for bail,

¹⁸⁰ Cameron 4-9.

¹⁸¹ For key elements, failures and successes and support for the reintroduction of this mechanism piloted by the Department of Justice and Vera Institute in the 1990s, see Wits Justice Project 16, Ballard and Subramanian 16, and Cameron 4-9.

proscription of pretrial detention for certain offences and amending the law to make provision for the release of an accused or variation of bail decision on ground of indigence, which have, coincidentally received scant attention in public discourse on bail. We examine these strands more fully below.

(c) Analysis of the law

(i) Relevant provisions of the CPA

2.92 If some of the provisions of the CPA, as it currently stands, were conscientiously applied, indigent accused persons, particularly those deemed eligible for bail, would not be languishing in prison solely on the grounds that they cannot afford bail. These provisions require the courts to:

- consider the pre-trial services report containing information such as residential address, criminal record and employment status of the accused, if such a report is available;¹⁸²
- inquire into the accused's ability pay bail, if he or she is unable to pay the sum of money set by the court for bail, to impose appropriate conditions that do not include payment of money or consider releasing the accused in terms of a guarantee;¹⁸³ and
- consider increasing or reducing the amount of bail;¹⁸⁴

¹⁸² Section 60(2A)(a) of the CPA.

¹⁸³ Section 60(2B)(a) of the CPA reads:
 '(2B)(a) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.
 (b) If, after an inquiry referred to in paragraph (a), it is found that the accused is
 (i) unable to pay any sum of money, *the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13)(b); or*
 (ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances.'

¹⁸⁴ Section 63(1) of the CPA provides:
 'Any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any condition imposed under section 60 or 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application.'

2.93 Section 60(2B)(a) merits further discussion. The differences between this and other provisions of the CPA regulating police and prosecutorial bail are obvious. Police bail is secured through the payment of a sum of money determined by the police official. The police official has no concomitant powers to enquire into the accused's financial situation. Prosecutorial bail, on the other hand, is obtained through the payment of money determined by the prosecutor or *furnishing of a guarantee to pay the amount in question*. The prosecutor, however, has been bestowed with powers to *impose conditions*.¹⁸⁵ This section puts it beyond question that only the courts, and no other functionary or entity, can dispense with the payment of money as a condition for bail. In lieu thereof, it may impose other suitable conditions, for example that the accused should report at a police station.

2.94 Lastly, there is section 63A which provides another mechanism through which an accused person may be released on warning in lieu of bail. This power is circumscribed. It can only be invoked by the head of a correctional facility; in respect of a detainee who has been charged with an offence for which a police official has the power to grant bail or Schedule 7 offence; who has been granted but is unable to pay bail; and where overcrowding in the correctional facility or remand detention centre where the accused is detained is such that it constitutes a threat to human dignity, physical health or safety of the accused.

2.95 The problem at face value, therefore, appears not to be the lack of appropriate measures in the statutory framework, but failure to invoke the relevant provisions which require the financial circumstances of the accused to be considered in suitable circumstances. **Nevertheless, to the extent that the law is considered deficient in that it does not make provision for pledging property as security for bail and thus excludes persons with sufficient assets but not money from being eligible for bail, this aspect requires further examination.**

(ii) *Property bail*

(aa) *Current law*

2.96 As stated above, the CPA does not make provision for property bail or pledging of property as security for bail. Neither does the Child Justice Act.

(bb) *Comparative law*

2.97 In other countries, particularly in the United States, complex and detailed rules exist which regulate bail bond processes. In addition to cash bail, these rules regulate bail bond businesses (professional bail companies, professional bondsman and professional surety

¹⁸⁵ Section 58 and 59A of the CPA.

companies) that furnish bail or become sureties for accused persons for a valuable consideration (fee). These processes are foreign to South African law, will require considerable amount of effort to fully comprehend and to adapt to suit our peculiar challenges, and will therefore not be considered further in this paper.

2.98 In contrast, there are handful of countries and states have incorporated into their bail provisions and guidelines modest rules relating to property bail that could easily be adapted and incorporated into our bail law to address the challenges of overcrowding and incarceration of poverty-stricken accused, namely Alabama, Connecticut, New South Wales, Pennsylvania, Singapore, and Tanzania.¹⁸⁶ The Commission has distilled the following salient features of these laws and guidelines.

1. Requirements relating to the property

- (a) While legislative provisions and relevant forms focus disproportionately on real estate, both movable and immovable property the value of which is equal to the amount set by the court for bail may be pledged as security for bail.¹⁸⁷
- (b) Only the owner may pledge property as security for bail. If the property is co-owned, the consent of the other party must be provided to the court.
- (c) Multiple sureties may be allowed provided the cumulative value of the properties is equivalent to the amount set for bail.
- (d) The pledge constitutes a lien on the property and in the case of immovable property, it must be filed with the Deeds Office where the property is located.
- (e) Although the property itself need not be surrendered to the court, proof of ownership is required. In respect of immovable property, the title deed, a copy of which must be retained by the court, clerk or registrar of the court or approving authority; latest copy of the municipal account; and recent mortgage statement, must be provided. If the title deed is not available, or any other evidence deemed satisfactory by the court will be sufficient.

2. Effects of pledging property as security for bail

Besides the release of the accused from detention, other consequences flow from depositing property as security for bail namely:

¹⁸⁶ Alabama Bail Reform Act Code of Alabama; Bail Act 26 of 2013 (New South Wales); Title 54, Criminal Procedure Chapter 960 Information, Procedure and Bail, Connecticut General Statutes 2023; Criminal Procedure Act [Cap. 20 R.E. 2022] (Tanzania); United Republic of Tanzania Judiciary of Tanzania Bail Guidelines (September 2020);

¹⁸⁷ In Singapore, the following property may not be used as security for bail: credit cards and loans, investment accounts, insurance policies and monies in provident fund accounts, and housing and commercial property provided by the housing development board (the state).

- (a) The property owner may not charge a fee or receive any consideration for pledging property as security for bail.
 - (b) The pledge constitutes a lien on the property and must, in certain circumstances, be filed with relevant authorities, for example, in the case of immovable property, a lien must be filed with the deeds office where the property is located.
 - (c) Providing false information in relation to the property which is material and on the basis of which the accused is released on bail, constitutes an offence.
 - (d) Failure by the accused to adhere to the bail conditions results not only in the issuance of a warrant of arrest, but also the confiscation by attachment and sale of the property pledged. To mitigate the potential risk of losing property used as a collateral (movable or immovable) the rules applicable in the countries incorporate the *audi alteram partem rule* and the pledged property does not necessarily need to be sold, a penalty may be paid in cases of default. However, where penalty is not paid and cannot be recovered by attachment and sale, the person so bound is liable, by the order of the court, to imprisonment.¹⁸⁸
 - (e) The accused or surety may not dispose of the bail security, cause or allow it to be disposed of, for the purpose of preventing the bail security from being realised. The court may revoke bail if bail security has ceased to be intact (if it has ceased to exist, its value has diminished or has ceased to be available as security for any other reason, i.e if it has ceased to be in control of the person who deposited it.
 - (f) Where, through mistake, fraud or for any other reason, insufficient security is accepted, or if it subsequently becomes insufficient, the court may direct that the accused be brought before it and may order him to find sureties and upon failure to do so, may commit him or her to prison.
3. Specific obligations on the courts (and court clerks or registrars) or persons having authority to assess and approve property bail
- (a) The court must scrutinise all documents and sureties presented to it.
 - (b) If it has doubt as to the validity of deposited property, it may order verification by any relevant authority.
 - (c) The authority or functionary authorised to approve and accept property bail must determine the sufficiency thereof and may take into consideration any appraisal of such property by a qualified person presented by the owner thereof; may request the owner to produce any documents or forms which may aid in the determination of sufficiency; and may also rely solely on the information provided by the owner in the sworn declaration or affidavit.

¹⁸⁸

Section 160(1)-(5) of the Criminal Procedure Act of Tanzania.

- (d) Property pledged is registered in a special register which must be signed by the presiding officer or registrar.
- (e) Upon the conclusion of the proceedings, or pursuant to a court order, the property bail must be cancelled and such cancellation must be in writing. Alternatively, the defendant or surety must file a certified copy of the judgment and conviction or order of court with the registrar or clerk where the bail bond was recorded to have the property released.

4. Forms

Forms are widely used to give effect to this framework, vary considerably, but they are publicly available (have been developed and published by the relevant authorities).

(a) Special Register – Tanzania

In Tanzania, property deposited as bail must be registered in a special register which contains the case number; name of the accused; date of release; name of presiding officer; name of depositor; name of receiving officer or court clerk; type and description of property; date property was deposited; name of officer returning the security; and name, signature and ID card of the person or depositor to whom the property is returned.

(b) Sworn affidavit and lien – Alabama

In Alabama, the surety must sign the prescribed sworn affidavit and lien which contains the name of the surety, the description of the property, and its total value. The prescribed form used for this purpose expressly states, and warns the deponent, that providing false information constitutes an offence.

(c) Bail bond agreement and surety affidavit– Pennsylvania

The requirements for bail bond secured by property or real estate issued by the District Court of Pennsylvania provide that the accused and the property owner must sign the bail bond agreement which provides explicitly that in the case on non-compliance, the property will be forfeited to the state.

The property owner (surety) must also sign surety affidavit, which must be provided by the clerk of court, containing residential address; whether he has pending criminal cases; the description of the property; how it was obtained; whether he or she is a surety in another matter; whether there are mortgages, lien or other encumbrances upon the property; whether real estate taxes have been paid; judgments entered or actions instituted against him; pending negotiations for the sale of the property concerned of foreclosures; and an undertaking not to transfer or encumber the property in question.

(cc) Commission's recommendations

2.99 The Commission, mindful of section of section 25(1) and 26(1) and (3) of the Constitution,¹⁸⁹ and the risk of potential loss of property if bail conditions are not adhered to, which could be mitigated through incorporation of *audi alteram partem* principle; making provision for the payment of penalty instead of sale of the property in the proposed provisions and making sure parties fully understand consequences of pledging property as collateral for bail, recommends that property bail be incorporated into the bail regime. And, to that end, it proposes an amendment to section 60(2B)(a) of the CPA to incorporate this rule. Such a measure would provide an additional option, particularly to accused persons with limited or no cash available to secure bail or temporary release from prison.

2.100 However, the proposed amendment is drafted in a skeletal form (in broad terms). Regulations, guidelines or detailed provisions would be necessary to assist the courts in their implementation of these provisions. The Commission thus recommends that the relevant criminal procedure provisions, regulations or guidelines meant to effectuate practical implementation of property bail, must:

- (a) define key concepts used therein such as 'bail,' 'property bail', 'bail agreement' and 'sworn declaration';
- (b) entrust the responsibility to assess eligibility for, suitability of, and sufficiency of property for the purposes of using it as a collateral for bail; compliance with statutory requirements; assessment of sureties; and verification of information used in support thereof, on the court;
- (c) specify circumstances in which the surety may be discharged of his or her liability;
- (d) subject to the *audi alteram partem* principle, empower the court to revoke bail and order property forfeited to the state in certain circumstances, for example where there is non-compliance with bail conditions, the property has ceased to exist or bail was secured through misrepresentation or fraud;
- (e) render it an offence to wilfully and intentionally provide false information
- (f) require –
 - the accused or any other person who pledges property as security for bail on his or her behalf, to sign a bail agreement and sworn declaration and file it with the court
 - the court to register such property in property register or bail register form;

¹⁸⁹ Section 25(1) of the Constitution provides that: 'No one may be deprived of property except in terms of a law of general application and no law may permit arbitrary'. And section 26(1) read in conjunction with (3) guarantees everyone access to housing and prohibits arbitrary evictions.

- (g) provide that upon conclusion of the proceedings, the pledge or lien must be cancelled; and that
- (h) the Department of Justice and Constitutional Development must prescribe different forms used for property bail and publish them.

2.101 The proposed provisions, regulations or guidelines are contained below.

CHAPTER PROPERTY BAIL

1 Pledge of Property as security for bail

- (1) In any criminal case in which the accused has been granted bail, the accused, or any person on his or her behalf, may pledge property, the value of which is equal to the amount set by the court for bail, as security for bail, and such accused shall thereupon be released on bail.

2 Requirements for property bail

- (1) The court must assess eligibility for, suitability of, and sufficiency of property bail; sureties and any document submitted to it in support thereof.
- (2) The accused, or his or her surety, must provide proof of ownership and value of the property to be encumbered, which must be equal to or exceed the amount set by the court for bail. Provided that-
 - (a) Where the property is immovable property, the accused or surety must provide the title deed of the property to the court which must retain a copy thereof, or if it is not available such other evidence the court may consider sufficient as proof of the existence of such property; recent appraisal of such property by an estate agent; latest copy of municipal rates and taxes and a recent copy of the mortgage account;
 - (b) a court may consider appraisals of such property presented by the owner thereof and may request the owner to produce any document which may aid in the determination of sufficiency and may rely on the information provided by the owner in this regard in the prescribed sworn declaration;
 - (c) if the property is co-owned, consent of the other owner must be provided to the court;
- (3) A property owner who becomes surety in terms of these provisions may not charge a fee or receive anything of value as consideration for pledging property as security for bail for the accused.
- (4) The person who enters into a bail agreement must not dispose of the property, or cause or allow it to be disposed of, for the purpose of preventing bail security from being realised.

(5) If it appears to the court, on information provided to it under oath, that property bail has ceased to exist, the court may revoke the accused's bail.

3 Miscellaneous

(1) The accused, or his or her surety, must sign the prescribed sworn declaration and file it with the clerk of court.

(2) Where the accused has been admitted to bail as contemplated in section 1(1), the court must—

(a) record the property pledged as security for bail in the prescribed special register or bail register which must contain the case number, name of the accused, date of release, name of the presiding officer, name of the depositor, name of the court official or clerk responsible for receipt thereof, type and description of property, date the property was deposited, name of official returning the property, name of the person or depositor to whom it was returned;

(b) the accused and his or her surety bail must sign the prescribed bail agreement; and

(c) in the case of immovable property, the legal representative of the accused, the property owner, the clerk of court or registrar of the high court must file a certified copy of the bail agreement with the Deeds Office where the property is located.

(3) Any person who pledges property as security for bail on behalf of the accused may, at any time, apply to the court to be discharged of his or her liability.

(4) Where the accused fails to abide by the conditions of bail, the court may –

(a) order his or her property, or that belonging to the surety, pledged as security provisionally forfeited to the state; order the arrest of the accused; order a stay in execution for such period as the court may determine; and cause a written notice to be served on any person who pledged property on the accused's behalf. Provided that the court may call upon the accused or surety to pay the penalty in lieu of the sale of property or to show cause it should not be paid or why provisional forfeiture should not become final.

(b) where sufficient cause is not shown and the penalty is not paid, the court may issue an order for the attachment and sale of the property.

(c) The court may, in its discretion, remit any portion of the penalty and enforce payment in part only.

(5) Upon conclusion of the proceedings, the court must ensure that the property encumbered in connection with property bail is returned to the owner thereof

(6) The provisions of this Chapter shall not apply to police or prosecutorial bail.

4 Offences

(1) Any person who -

- (a) deliberately and intentionally provides false information on the sworn declaration, on the basis of which the court makes the determination of sufficiency of the bail and approves the release of the accused; or
- (b) indemnifies an accused or person who pledges property on the accused's behalf, against any forfeiture that they may incur, or agrees to do so; and
- (2) any accused person or surety who is indemnified by, or enters into an agreement under which he or she is indemnified by another person, against any forfeiture he or she may incur under property bail, commits an offence.

5 Interpretation of this Chapter

In this Chapter, unless the context otherwise indicates-

'bail agreement' is an undertaking by an accused or his or her surety which binds him or her to comply with bail conditions;

'bail' means a temporary release of an accused person who has been arrested and held in detention for the commission of a criminal offence on conditions stipulated by the court to ensure his or her appearance in court;

'property bail' means movable or immovable property belonging to the accused person, or any other person on his or her behalf, that is pledged as security to ensure the accused person appears in court, but does not include, credit cards, loans, investment accounts, insurance policies, pension benefits, or government subsidised housing.

'special register' means a register in which property pledged as bail must be recorded containing the case number, name of the accused, date of release, name of the presiding officer, type and description of the deposited property, date the property was deposited, name of officer returning the property, name of the person to whom property is returned.

'sworn declaration' means an affidavit signed by the accused or person who owns property being pledged as security for bail on his or her behalf and filed with the clerk or registrar of the court containing, inter alia, the description of the property; ownership interest in the property; other encumbrances or court cases that may affect ownership.

- (iii) *Scrapping pre-trial detention in certain circumstances for certain offences and recognising indigence as basis for variation of bail decision and release of accused on own recognisance*

2.102 Two other measures that are not recognised in South African law, at least not explicitly, are the prohibition of pretrial detention for certain offences and the release of an accused person on the basis of indigence.

2.103 the statutory framework that exists in Armenia provides a perfect model of the former. Section 135(2) of the Armenia Criminal Code of Procedure provides that:

‘arrest and its substitute monetary bail, can be imposed against the accused only for crimes punishable by more than one-year imprisonment.’

2.104 Similar laws exist in other countries.¹⁹⁰

2.105 In India, accused persons who are unable to provide surety for bail within a week after arrest are considered indigent and are released on personal bond without surety.¹⁹¹

2.106 In New South Wales, the courts have the power, in terms of section 55 of the Bail Act 2013, to conduct a hearing, without application, of its own motion or at the request of the accused person or a police officer, if an accused granted bail has not been released because the bail condition has not been met.¹⁹² The purpose of the hearing is to review the bail

¹⁹⁰ De Ruiter and Hardy 15.

¹⁹¹ Section 436 of the Code of Criminal Procedure, 1973 of India reads:
‘436. In what cases bail to be taken.—(1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:
 Provided that such officer or Court, if he or it thinks fit, ¹[may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail] from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

²[*Explanation.*—Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.]

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 ³[or section 446A].

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.’

¹⁹² Section 55 of the Bail Act 2013 (NSW) provides:

‘55 Variation of bail decision if accused person remains in custody

(1) A court or authorised justice that has power to hear a variation application may conduct a hearing (without application) if an accused person granted bail has remained in custody because a bail condition has not been complied with.

(2) The purpose of the hearing is to review the bail conditions imposed on the grant of bail, not the decision to grant bail.

(3) The court or authorised justice may conduct the hearing of its own motion or at the request of the accused person or a police officer.

(4) A hearing under this section is not to be conducted at the request of a police officer unless the court is satisfied that the request was made—

(a) to benefit the accused person, and

conditions imposed on the grant of bail, not the decision to grant bail. This provision is expressly intended to benefit the accused and a hearing under it may only be conducted with the consent of the accused.

2.107 These principles seem to have been designed to deal with the challenges similar to the ones the South African criminal justice system is confronted with and could alleviate the plight of indigent accused persons if they were to be transposed into South African law. The Commission recommends that they be incorporated into section 60(2B) of the CPA.

(d) Commission's recommendations

2.108 Having considered the foregoing discussion and options, the Commission recommends:

1. That section 60(2B) of the CPA be substituted as follows:

(2B)(a) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.

(b) If, after an inquiry referred to in paragraph (a), it is found that the accused is-

(i) unable to pay any sum of money, the court must consider [-]

(aa) setting appropriate conditions that do not include an amount of money for the release of the accused on bail; [or]

(bb) [must consider] the release of the accused in terms of a guarantee as provided for in subsection (13) (b); or

(cc) must inquire from the accused whether he or she or anyone on his or her behalf is willing to pledge movable or immovable property, the value of which is equal to or more than the amount set for bail by the court, provided the accused or the person pledging the such property is the owner thereof, and provided further that if such person is indigent and is unable to provide bail security provided for in this section, he or she shall be released on warning in lieu of bail in terms of section 72; or

(ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances, provided that where such a person is unable to give bail within a week, the Court must presume that he or she is indigent and apply subsection (2B)(b)(i) above.

(iii) When real property is pledged in terms of this section, such pledge shall constitute a lien on the property concerned. The notice of lien shall be on a form prescribed in the regulations issued in terms of this Act. A person, other than the accused, who pledge property as security for bail may at any time apply to court to be discharged from his or her liability. A person who pledges property as security for bail must not dispose of such property, or cause or allow it to be disposed of, for the purpose of preventing bail security from being realised. A court may at

(b) with the consent of the accused person.

(5) If the court or authorised justice decides to conduct a hearing, this Act applies (subject to the regulations) as if the hearing were a hearing of a variation application, except that the powers of the court or authorised justice are the powers conferred by this section.

(6) The court or authorised justice may, after hearing a variation application of a kind referred to in this section—

(a) affirm the bail decision (as to the conditions of bail), or

(b) vary the bail decision, but not revoke or refuse bail.'

any time revoke bail if it appears that bail security has ceased to exist, its value has diminished or has ceased to be available for any reason.

2. That the following subsection, subsection (3), be inserted in section 63:

‘(a) A court may of its own accord or at the request of an accused person conduct an inquiry into the circumstances of an accused who has been granted bail, but has remained in custody because one or more bail conditions have not been complied with, and consider a variation of the bail conditions.

(b) The court may, after hearing the application for the variation of the bail conditions-

- (i) affirm the original bail conditions; or
- (ii) vary the bail conditions; or
- (iv) revoke and alternatively impose different bail conditions.’

3. The following provision be inserted into the chapter dealing with bail:

Special rules for certain offences

In respect of the following offences there is a right to release and the court may release the accused person without bail-

- (a) a fine-only offence;
- (b) offence for which more than two years’ imprisonment may not be imposed;
- (c) statutory offence for which a fine is prescribed as an alternative to imprisonment.’

4 Verification of the particulars of the accused

(a) Problem statement

2.109 An issue brought to the attention of the Commission by stakeholders, and borne out by research,¹⁹³ is that accused persons who live in informal settlements or in places where there are no street addresses, and whose addresses can thus not be verified by the authorities, are often denied bail. This category of accused persons therefore remains in remand detention for exceedingly long periods of time, which has led to a serious indictment on the state that it criminalises poverty.

(b) Significance of proof of address

2.110 Why is proof of address necessary and important? It is important for the court determining bail application of the accused to have all the relevant information such as the

¹⁹³ De Ruiter and Hardy 3, 4 and 17.

address of the accused, any past convictions and any other charges to enable it to assess how the accused is likely to behave if released on bail.¹⁹⁴

(c) Applicable law

(i) Section 60(6)(a) and (b) of the CPA

2.111 Firstly, section 41 of the CPA empowers a police officer to require from a person *whom he has the power to arrest or who is reasonably suspected of having committed an offence or who may be able to give evidence* to furnish full name and address. If the police officer suspects that the name or address is false, he or she may detain the person concerned for a period not exceeding twelve hours until the name or address has been verified. Failure to comply with police instruction or providing false information constitutes an offence punishable by a fine or imprisonment not exceeding three months.

2.112 This provision is helpful in the sense that the investigating officer is able to ascertain at the inchoate stage of the investigation whether a person has a fixed address. It would certainly be imprudent for the police official to release on bail or warning a person who would be impossible to trace.

2.113 Section 50 of the CPA which sets out procedure after arrest is reticent on the issue of residence of the accused. It does require though that the person who is arrested:

- (a) be brought to a police station
- (b) be informed of right to bail
- (c) if not released on police or prosecutorial bail, be brought before court within 48 hours after arrest
- (d) at his or her first appearance, be informed of reasons for detention, charged, and apply for bail
- (e) if not charged, be informed of reasons for further detention or be released.

2.114 This provision further provides that the arrested person may, for reasons stipulated therein, be remanded in custody by a court for a period not exceeding seven days a time.¹⁹⁵

¹⁹⁴ Wits Justice Project 15.

¹⁹⁵ Section 50(6)(d) of the CPA.

2.115 Section 60(6)(a) and (b) of the CPA¹⁹⁶ which lists the factors a court must consider when determining whether or not the accused is a flight risk and thus should not be released on bail is relevant in this regard. It provides:

- (6) In considering whether the ground in subsection (4)(b) [where there is likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial] has been established, the court may, where applicable, take into account the following factors, namely-
- (a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
 - (b) the assets held by the accused and where such assets are situated;

2.116 Firstly, the rationale for these provisions appears to be to ensure that the accused is traceable and contactable during bail.¹⁹⁷ Secondly, these factors are not *numerus clausus* as the court may consider any other factor which in its opinion should be taken into account.¹⁹⁸ It should therefore not come as a surprise that in practice, some courts demand proof of residential address before bail is considered, while others hold the decision over until a verified address is supplied.

2.117 Often, documentary evidence, an affidavit from the investigating officer, testimony of the accused's relative; or physical verification of the accused's address by the investigating officer, are some of the methods employed to verify the accused's residential address. Where the address cannot be verified, for example because the SAPS is unable to locate it or the

¹⁹⁶ Other paragraphs of this section - section 60(6) of the CPA - provide:

- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade trial;
- (f) the nature and gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and the enforceability of bail conditions which may be imposed and the ease with which such condition could be breached;
- (j) any other factor which in the opinion of the court should be taken into account.

¹⁹⁷ Jameelah Omar 'Penalised for Poverty: The Unfair Assessment of 'Flight Risk' in Bail Hearings' *SA Crime Quarterly* (September 2016) 30; Madi and Mabhenxa above 20.

¹⁹⁸ Section 60(6)(j) of the CPA.

accused lives in an informal settlement that is difficult to navigate, bail hearing is often postponed in terms of section 50(6)(d)(i) of the CPA.¹⁹⁹ In these circumstances, it becomes difficult, if not impossible, to persuade the court that the accused will attend trial.²⁰⁰

(ii) *Criticism of approach adopted by the courts*

2.118 The case of *Kgantlapane v S* exemplifies the State and the courts' approach to the issue of fixed residential address of the accused in bail proceedings. The court in this case stated:

The purpose of providing a fixed address is to assure the court that an accused trial attendance is secure. There is no comfort when a fixed address is not present. And the emphasis here is on fixed, not moving, address. Furthermore, I am in agreement with the State that it would be onerous to expect it to contact or monitor the appellant for the purposes of her trial. When taken cumulatively with other factors, it is not a surprise that the Magistrate was not persuaded that the appellant is not a flight risk. The Magistrate was correctly cautious that the existence of different addresses might well provide opportunity for the appellant to evade trial. It is also no wonder that the State argues that it would be difficult to monitor the appellant's movements as between the two addresses, which are not in the same location, even if it can be argued that they are in the same general region.²⁰¹

2.119 On literal reading of section 60(6), particularly paragraph (j) which empowers the court to consider any other factor it deems relevant when assessing whether or not an accused person is a flight risk, courts cannot be faulted for enquiring into the accused's residential status. Nevertheless, the courts' approach alluded to above has been slated on the basis that:²⁰²

- section 60(6) does not stipulate the verification of the fixed address of the accused as a prerequisite for granting bail;

¹⁹⁹ Section 50(6)(d)(i) of the CPA provides that: The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if- (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application.

²⁰⁰ Omar 27 and 30; Madi and Mabhenxa 19-21 and 26-27.

²⁰¹ 2023 ZAWCHC 194 (31 July 2023) para 24.

²⁰² Madi and Mabhenxa above.

- it results in pre-trial incarceration that is lengthier than sentences and exacerbates the already unacceptable levels of overcrowding in prisons;²⁰³
- it has potentially prejudicial effect on economically vulnerable and poor people;
- it runs counter international norms and standards;
- there must be something more that renders a person a potential flight risk in order for bail to be denied, the absence of a fixed address or assets cannot be the sole basis for that conclusion; and more importantly for our purposes on the basis that
- there is *limited law to guide presiding officers* on how the address of the accused must be verified, which creates uncertainty and lack of uniformity in how the law is applied.

2.120 The courts too, have acknowledged that the concept of fixed address is problematic in the South African context where many people live in informal settlements.²⁰⁴

2.121 Conversely, where the accused has close ties to a community or family; has permanent employment or owns assets this tips the scales in his or her favour in bail applications.²⁰⁵ In *S v Letaoana*²⁰⁶ the court stated that to take into account the minimal assets possessed by the accused as a factor for refusing bail is tantamount to imposing a penalty on poverty. However, where the accused has assets outside the country, these may point to a practical possibility that the accused would have somewhere to go should he or she evade trial.

(d) Proposed interventions

2.122 To address challenges occasioned by the interpretation and application of these provision, some have argued that attaching the bail conditions contemplated in section 60(12)²⁰⁷ would be sufficient. Others have submitted that:

²⁰³ It has further been argued that remand detainees are exposed to life-threatening diseases; suffer loss of employment; lose contact with family and friends; and have their constitutional rights violated daily.

²⁰⁴ Madi and Mabhenxa 21.

²⁰⁵ Omar 27.

²⁰⁶ 1997 (11) BCLR 1581 (W) as cited by Omar 31.

²⁰⁷ Section 60(12) of the CPA provides: 'The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.'

- (a) community members should be involved in bail hearings to enable the court to gather more evidence about the accused's assets and/ place of abode;²⁰⁸
- (b) the discretion granted to the police and judicial officers must be guided to ensure a level of consistency and fairness; and
- (c) the use of electronic monitoring system or electronic tagging that tracks and records the accused's movements and location while out on bail should be considered. The use of such devices is preferable than remand detention.²⁰⁹

2.123 It has been submitted that the implementation of these interventions will increase public confidence in the criminal justice system, reduce harm associated with detention and decrease the number of detainees.²¹⁰

2.124 Another proposal that has been put forward is that where the state is seeking a remand for verification of the accused's particulars, for example, residential address or criminal profile, a detailed explanation must be furnished to the court as to why this was not attended to before the accused's first appearance. It has been submitted that in these circumstances, the court must conduct an inquiry into the accused's personal circumstances and grant bail *mero motu* based on such inquiry.

(e) Comparative law

(i) Singapore

2.125 In Singapore, the provision of an address is itself a condition for release on bail. Section 4(4)(a) of the Goods and Services Tax Act Regulations 2019 provides that:

'...unless the Magistrate or arresting officer specifies otherwise, it is a condition of the bond executed under paragraph (1) or (2) that the released person —
(a) must provide an address where the released person can be served with any notice, direction, order, permit, receipt or other document under the Act'

²⁰⁸ Our courts have on numerous occasions underlined the fact that bail applications are *sui generis* proceedings which are characterised by the need for speedy resolution and truncated proceedings. Ordinary evidential procedural aspects are often veered away from. Furthermore, the courts have stressed the notion that bail proceedings should never be used as dress rehearsal for the trial proper.

²⁰⁹ Wits Justice Project 18.

²¹⁰ Madi and Mabhenxa 23-27.

(ii) Northern Territory of Australia

2.126 In contrast to our law, in terms of section 24(1)(a) of the Bail Act of 1982 of the Northern Territory of Australia, courts are required, when assessing the probability of whether or not the person will appear in court in respect of the offence for which he or she is being considered for bail, to consider the person's background and community ties as indicated by the history and details of the person's residence, employment and family situations and, if known the person prior criminal record. So, the requirement of residence is expressly included in the criteria for bail applications.

(iii) New Zealand

2.127 But the most innovative way of ensuring that an accused person is traceable during bail has been introduced to the bail framework in New Zealand. Section 30(2)(a) of the Bail Act 2000 authorises the courts to impose an electronic monitoring (EM), as further condition of the defendant's release.²¹¹ The purpose thereof is to ensure that the accused appears in court; does not interfere with witnesses or evidence; and does not commit offences whilst out on bail.²¹² Consequently, EM bail requires a person to remain at an approved address at all times and to be monitored by Correctional Services for up to 24 hours a day, seven days a week.

2.128 It is therefore necessary for a court granting bail with EM condition to specify the EM address. This does not necessarily have to be the accused's residential address because in terms of section 30G of this Act, the 'occupants' of the address provided or approved must consent to the accused remaining at this address. Furthermore, if the EM address becomes unavailable or unsuitable as a result of changed circumstances (ie, withdrawal of consent by relevant occupants), a temporary address may be approved and an application may be made in court for the variation of EM address. If there is no suitable temporary EM address, the accused and the police are notified and the accused must surrender himself or herself to police custody.²¹³

2.129 However, if less restrictive conditions would suffice, the courts are implored not impose EM and other bail conditions may be attached along EM condition.

²¹¹ In terms of section 30(1)(a) and (b) of the Bail Act 2000 (New Zealand) the general conditions of bail are that an accused release on bail must attend personally at the time and place at which the hearing is adjourned; and at every time and place which, during the course of the proceedings, the hearing may from time to time be adjourned.

²¹² Section 30A of the Bail Act 2000.

²¹³ Section 34N of the Bail Act 2000 (New Zealand).

(e) Legislative reform recommendations

2.130 In light of the foregoing discussion of the challenges pertaining to the verification of accused address and the analysis of the law, particularly comparative law, the Commission makes the following recommendations:

1. Firstly, that section 50 of the CPA, which prescribes the procedure after arrest, be amended by inserting a provision therein which *places a duty on the police to verify the address of the accused within 24 hours after arrest* to obviate what has been described as the alarming rate of postponements of bail proceedings to verify the address of the accused before granting bail.²¹⁴ As a result, consequential amendments would need to be made to section 59 of the CPA which regulates police bail. The following consequential amendments to section 59 are proposed:

'59(1)(a) An accused person who has been arrested and is detained without a warrant and is in custody in respect of any offence, other than an offence-

- (i) referred to in Part II or Part III of Schedule 2;
- (ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998;
- (iii) referred to in -
 - (aa) section 17 (1)(a) of the Domestic Violence Act, 1998;
 - (bb) section 18(1)(a) of the Protection from Harassment Act, 2011 (Act 17 of 2011); or
 - (cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, may before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of **[non-commissioned officer] Sergeant**, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official[.]; or
 - (iv) for which a warrant for the arrest of the accused has been issued by a court.

(b) The police official referred in paragraph (a) **[shall] must**, at the time of releasing the accused on bail, complete and hand to the accused a [recognizance] notice of bail on which the following particulars appear–

- (j) the accused's full name and address;
- (ii) the offence in respect of which bail is granted;
- (iii) conditions of bail, including the date, time and place of the trial;
- (iv) a receipt **[shall be given]** for the sum of money deposited as bail **[and on which the offence in respect of which the bail is granted and the place, date and time of the trial of the accused].'**

2. Secondly, for the sake of legal certainty, and because of the centrality the requirement of the person's residence in bail proceedings has assumed in practice, it is recommended that this requirement be expressly incorporated into section 60(6)(a) of the CPA as follows:

'In considering whether the ground in subsection (4)(a) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried as indicated by the history and details of the person's residence, occupation, and family'

3. Thirdly, to ensure that an accused who does not have a fixed and verifiable address is traceable and contactable while he or she is out on bail, the following law reform proposals are made:

3.1 to section 60(12)(a):

The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice, including electronic monitoring requirement in lieu of cash or property bail.'

3.2 **'61 Released person to give address**

(1) A person eligible for or released on bail must give the police official, prosecutor or court releasing him or her on bail an address for -

(a) service of any notice or process; or

(b) electronic monitoring requirement, should the court deem it appropriate to impose such a condition on the accused.

(2) If the person cannot be found at the address provided or the notice or process cannot be served on him or her for any other reason, any notice or process left for him or her at the address given is treated as duly served on him or her.

(3) A released person who knowingly furnishes a false or incorrect address is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding one year.

(4) When granting bail, a court may –

(a) authorise the accused's absence from the address contemplated in this section.

(b) the court must specify the time during which the accused may be absent; and the purpose for which he or she may be absent.'

3.3 **'61A Bail with electronic monitoring condition**

(1) In this section-

(a) an 'electronic monitoring condition' means a condition of bail imposed in terms of this section requiring the person on whom it is imposed to wear a device for detecting and recording by electronic means the accused person's location at specified times and while the condition remains in place to ensure compliance with any other requirement imposed on him or her as a condition for bail;

- (b) 'electronic monitoring address' means the address specified by the court where an accused subject to an electronic monitoring condition must remain;
- (2) A court may grant bail subject to an electronic monitoring condition if –
 - (a) without the electronic monitoring requirement, the accused would not be granted bail; and
 - (b) he or she is in custody on remand for failure to comply with one or more bail condition.
- (3) A court may grant electronic monitoring condition in lieu of cash or property bail.
- (4) A court must not grant bail subject to electronic monitoring condition if a less restrictive condition or a combination of conditions would suffice.
- (5) A court granting bail with an electronic monitoring condition must specify the electronic monitoring address to which the accused will be confined.
- (6) An accused on bail with an electronic monitoring condition is not in custody.²¹⁵
- (7) An accused person who discards, causes, permit damage or interference with the device-
 - (a) commits an offence punishable on conviction by a fine or imprisonment for a period not exceeding one year; and
 - (b) is in breach of release conditions and must be re-arrested by the police.
- (8) Nothing in this section limits the discretion of the court to remand the accused in custody if continued detention is in the interests of justice.
- (9) The Minister of Justice, in consultation with the Minister of Police, may make rules for –
 - (a) regulating the electronic monitoring condition; and
 - (b) the functions of persons responsible for such monitoring.'

5 Widening the powers of the police in bail matters

(a) *Relevant law*

(i) *Bail - section 59(1)(a) of the CPA*

2.131 Police bail is dealt with in section 59 of the CPA, which provides:

An accused who is in custody in respect of any offence [other than those specified in this section]... may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such police official.

²¹⁵ This proposal is intended to address a policy issue that has arisen in other jurisdictions on whether or how electronic tagging should count as time served in the same way as remand in prison is discounted. See Criminal Justice Inspection Northern Ireland *The Operation of Bail and Remand in Northern Ireland* (January 2023) 48.

(ii) Release on warning - section 72 of the CPA

2.132 Besides this provision, police officials may also release an accused person on warning in lieu of bail. However, this power may only be invoked in respect of offences other than those listed in Parts II and III of Schedule of the CPA. This power can thus only be used in respect of less serious offences. The accused released by a police officer under this provision must be given a written notice containing the offence allegedly committed by the accused; the court before which he or she is required to appear; and the date and time of his or her appearance in such court.²¹⁶

(b) Law reform proposals

2.133 An array of proposals have been made in respect of this provision. Firstly, that only police officials above the rank of sergeant should exercise the power contemplated in section 59(1)(a). Secondly, that:

- (i) police officials should have the power to release indigent accused falling within the ambit of this provision on warning and to set bail conditions for such release;
- (ii) each police station should have a designated bail officer to process and ensure that every arrested person is assessed for suitability to be released on bail; and
- (iii) that a police officer or designated bail officer should, where he or she decides that the accused must be released on bail, assess the ability of the accused to afford bail and fix the amount of bail the accused can afford (if the accused cannot afford to pay bail set, he or she should be released on warning).

(c) Evaluation

2.134 Firstly, there is no statutory obligation that requires the police to inform the accused that he or she may apply for bail or how such an application should be made; nor to record reasons for refusal to grant bail. Neither do the police have the power to impose conditions subject to which a person may be released on bail.

2.135 The spin-off, should the proposals and the deficiencies alluded to above be addressed, is that they would obviate the detention of indigent persons and expedite the consideration and granting of bail by the police. However, statutory provisions are as good as the mechanisms available for their enforcement. A concern has been raised that the bail powers granted to the police by the CPA are not used at all, and where they are, they are not

²¹⁶ Section 72(1)(a) and (3)(a) of the CPA.

consistently applied. The commission has been urged to include in the law reform proposal appropriate enforcement mechanism.

(d) Comparative jurisprudence

2.136 In other jurisdictions, for instance Australian Capital Territory;²¹⁷ New South Wales;²¹⁸ Namibia;²¹⁹ New Zealand²²⁰ a police officer:

- may release a person without bail, grant bail with or without conditions, or refuse bail;
- make bail decisions not only at a police station, but also at a hospital or mental facility if the accused is present at such institution and it is not reasonable to take him or her to a police station;
- who arrests or charges a person is required to tell the person concerned that he or she may apply for bail, communicate with a lawyer or someone else who may assist, and provide reasonable facilities to do so;
- is required, in the case of an offence against the person, to consult with the victim of that offence, if he or she is readily available, before releasing the accused on bail;
- in the case of rape or domestic violence, must inform the victim or complainant of the place, date and time of the accused's first appearance in court; and his or her rights and must prepare an affidavit stating whether these injunctions have been complied with which must be handed to the judge or magistrate presiding at proceedings relating to the offence and must form part of the record;²²¹
- who grants bail to an accused person charged with family violence, must make the need to protect victim of the alleged offence and any particular person or people in a family relationship with the victim his or her primary consideration; and
- may impose conditions that may be imposed by a judicial officer, which include wearing a tracking device (EM condition) or a condition that the accused must report to the police at time or place specified, or any other condition aimed at ensuring that the accused appears in court on the date to which his matter has been remanded, does

²¹⁷ See section 13 *et seq* of the Bail Act 1992 (Australian Capital Territory).

²¹⁸ See section 43 of the Bail Act 2013 No 26 (NSW).

²¹⁹ Section 62(1)(a) and (b) of the CPA 25 of 2004 (Namibia).

²²⁰ Section 21 of Bail Act 2000 (New Zealand).

²²¹ See section 64 of the CPA 25 of 2004 in its entirety.

not interfere with witnesses or any evidence, and does not commit any offence while out on bail.²²²

2.137 In New Zealand, a person released on police bail must appear in court not later than 14 days from the date of the notice.²²³

(e) Law reform recommendations by the Commission

2.138 The Commission recommends that the following provision be substituted for section 59 of the CPA:

Police bail

- (1) A police official of or above the rank of sergeant or in the absence of such a member, a member of the police in charge of the police station, may, if he considers it in the interest of justice to do so, grant bail to an accused person who is charged with an offence and has been arrested without a warrant, after-
- (a) consulting with –
 - (i) the police official charged with the investigation of the offence with which the accused is charged; and
 - (ii) in the case of an offence against the person, the victim or complainant of that offence; and
 - (b) having considered the applicable bail criteria and any other available relevant and reliable information.
- (2) The police officer referred to in subsection (1) must not release a person on bail if-
- (a) the accused has been arrested under a warrant;
 - (b) the accused has committed an offence –
 - (i) referred to in –
 - (aa) Part II or III of Schedule 2;
 - (bb) section 17(1)(a) of the Domestic Violence Act, 1998 (Act 116 of 1998);
 - (cc) section 18(1)(a) of the Protection from Harassment Act, 2011 (Act 17 of 2011);
 - (dd) any law that criminalises a contravention of any prohibition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused; or
 - (ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998);
- (3) A police officer may defer making a bail decision in respect of a person who is intoxicated, but only if the deferment does not cause delays in bringing the person before court.
- (4) In determining whether it would be in the interests of justice to release an accused on bail, the police official must consider, inter alia, whether there is a need to protect the victim, complainant or witness of the alleged offence or any particular person or people.

²²² See in this regard section 21B(2) read with 30(2) and (4) of Bail Act 2000 (New Zealand).

²²³ Section 21A(4) of the Bail Act 2000 (New Zealand).

- (5) A police official who grants bail in terms of this section –
- (a) must release the accused on condition that the accused must-
 - (i) attend court at a time, date and place specified in the notice of bail;
 - (ii) provide an address where the released person can be served with any notice, direction, order, receipt or any other document;
 - (iii) not commit any offence while released on bail; and
 - (iv) not interfere with the victim, complainant or witness; or
 - (v) otherwise obstruct the course of justice;
 - (b) may require as a further condition of the accused's release payment of a sum of money determined by the police official in accordance with applicable criteria or the entering into an agreement whether by the accused or any other person on the accused's behalf for the payment of such amount. Provided that the police official granting bail cannot -
 - (i) impose an electronic monitoring condition; or
 - (ii) require the accused person or any person on his or her behalf to pledge property as security for bail;
 - (c) In this section payment includes payment by cash or electronic funds transfer.
- (6) Whenever a police official grants or refuses bail he or she must state and record his reasons.
- (7)(1) A decision taken by a police official in terms of subsection (5) is reviewable by a senior police officer at the request of the accused or senior officer's own initiative or if –
- (a) Bail was refused; or
 - (b) Bail conditions were imposed with which the accused cannot comply.
- (2) A senior police officer may after reviewing bail decision-
- (a) affirm bail decision; or
 - (b) vary the bail decision.
- (3) In this section a 'senior police official' means a police officer at the police station who is senior to the police official who made the bail decision.
- (7) If the police official referred to in subsection (1) –
- (a) decides to refuse to grant bail to the accused or grants bail subject to one or more bail conditions, he or she must without unreasonable delay inform-
 - (i) the accused of his or her decision and the reasons thereof;
 - (ii) the victim of the offence or complainant
 - (b) is satisfied that –
 - (i) it is in the interest of justice to release the accused on bail and that it is not necessary to impose a bail condition, the police official must release the accused person on bail;
 - (ii) it is not appropriate to grant bail to the accused without imposing a condition, the police official must release the accused person subject to appropriate bail condition or conditions, as the case may be.
- (8) A police official releasing an accused person on bail pursuant to subsection (1) must-
- (a) complete and hand to the accused a notice of bail which must state:
 - (i) the accused's full name and address;
 - (ii) the particulars of the offence in respect of which the bail is granted;
 - (iii) the conditions of bail, including the date, time and place of the accused's first appearance in court;
 - (iv) receipt for the sum of money deposited as bail; and
 - (v) ensure that the accused authenticates the notice.
 - (b) ensure that the accused understands the contents thereof, including the bail conditions stipulated therein;
 - (c) immediately forward a duplicate original of the notice of bail to the clerk of the court having jurisdiction in the matter; and
 - (d) as soon as practicable, take all reasonable steps to inform the victim of the offence or complainant of the decision to release the accused; conditions of his

or her release, if any have been imposed; and date of appearance of the accused in court.

(9) An accused person who, having been released on bail by a police official under this section, fails without reasonable excuse to appear in court at the time and date specified in the notice of bail; or to observe and adhere to the conditions of bail specified in the notice of bail, commits an offence and is liable on conviction to a fine or imprisonment not exceeding one year.

(10) Bail granted under this section-

- (a) if in force at the time of the first appearance of the accused in court, it shall remain in force, subject to amendments of bail conditions deemed necessary by the court; and
- (b) if in force after such appearance, it shall be treated in the same manner as bail granted by the court.

6 Bail pending appeal

(a) *Problem statement*

2.139 In terms of section 309 (and 309B in the case of a person convicted and sentenced in a lower court), an accused person may apply for leave to appeal against conviction or sentence. Invariably, and section 309(4)(b) of the CPA expressly makes provision for this, such accused persons are often released on bail pending the outcome of the appeal unless there is no reasonable prospect of a successful appeal.²²⁴

2.140 The challenge faced by the Department of Correctional Services, is tracing persons placed under non-custodial system (bail) when their appeal is unsuccessful. In some cases, these appeals are not proceeded with, as a result convicted persons are sauntering the streets, and the authorities have a daunting task of locating them.

(b) *The law*

(i) *Bail pending review of conviction or sentence*

2.141 A magistrate or regional magistrate submitting proceedings for review by a judge in chambers *before sentence* is required by law to postpone proceedings and if the accused is in custody, to make an order concerning the detention or release of the accused as he or she may deem fit.²²⁵

²²⁴ JJ Joubert (ed) *Criminal Procedure Handbook* (2019) 223.

²²⁵ Section 304A(a) and (b) of the CPA.

2.142 A judge or court *reviewing a sentence* imposed by the magistrate court may make an order with regard to the suspension of the execution of the sentence against the person convicted or admit such person to bail.²²⁶

2.143 Where sentence has been imposed, the transmission of or obligation to transmit the record for review does not suspend the execution of the sentence unless the court which imposed the sentence releases the accused person on bail. If it does, it may, in terms of section 307(2) of the CPA:

- (a) If the person concerned was released on bail in terms of section 59 or 60, extend the bail either in the same amount or any other amount; or
- (b) If such person was not released on bail, release him or her on bail on condition that he or she deposits with the clerk of the court or with a member of the Department of Correctional Services at the prison where such person is in custody or with the police official at the place where such convicted person is in custody, the sum of money determined by the court in question; or
- (c) On good cause shown, permit such person to furnish a guarantee, with or without sureties, that he will pay and forfeit to the State the sum of money determined under paragraph (b), in circumstances under which such sum, if it had been deposited, would be forfeited to the State.

2.144 To ensure that the convicted person released on bail actually surrenders him or herself and starts serving the sentence, the legislature provided additional safeguards that it should be the condition of release that the convicted person shall at the time and place specified by the court and upon service of a written order at a place specified by the court, surrender himself in order that effect may be given to any sentence in respect of the proceedings in question.²²⁷ If the convicted accused cannot be found at the address given by him or her, bail should be provisionally cancelled and bail money forfeited and a warrant of his or her arrest issued.

2.145 If bail is granted, the court may add further conditions, including that the convicted accused:

- (a) must report at specified time and place to specified person or authority;
- (b) is prohibited to go to certain places; or

²²⁶ Section 304(2)(c)(vi) of the CPA.

²²⁷ See in general, section 307 of the CPA.

(c) any other matter relating to the conduct of such person.

2.146 Furthermore, the provisions of chapter 9 of the CPA apply to bail pending review.²²⁸

(ii) *Bail pending appeal against conviction and sentence*

2.147 As stated above, an accused may appeal against conviction and/or sentence in terms of section 309 and 309B of the CPA.

2.148 Where an accused person has been convicted of an offence but the sentence has not been imposed forthwith, the court may extend bail until sentence is imposed. However, if the accused has been convicted of a Schedule 5 or 6 offence, the court must, when considering whether to extend bail of the accused, consider whether the interests of justice permit or exceptional circumstances exist which in the interest of justice, justify the release of the accused on bail, as the case may be.²²⁹ In addition to these requirements, the court must take into account the fact that the accused has been convicted of a schedule 5 or 6 offence and the likely sentence which the court might impose.²³⁰

2.148 Furthermore, the execution of the sentence imposed by the high court is not suspended pending appeal (or reservation of question of law) unless the court concerned releases the accused on bail until appeal or question reserved is decided.²³¹ So implicit in this provision is the court's power to grant bail to the convicted accused.

2.150 Should the high court decide to release the convicted and sentenced accused on bail pending outcome of appeal, the provisions of chapter 9 relating to failure to observe conditions of bail and cancellation of bail; and 307(2) to (5) relating to grant of bail and recording of bail decision, apply.²³²

²²⁸ In terms of section 307(6) of the CPA, the provisions of section 63 (amendment of bail conditions), 64 (recordal of bail decisions), 65 (appeal against bail decision in superior court), 66 (consequences for failure to observe bail conditions), and 68 (cancellation of bail), apply to these proceedings.

²²⁹ Section 58 read in conjunction with section 60(11)(a) and (b) of the CPA.

²³⁰ Section 58(a) and (b) of the CPA.

²³¹ Section 321 of the CPA.

²³² Section 321(2) of the CPA.

(c) Comparative jurisprudence

(i) Scotland

2.151 In Scotland, the different scenarios allude to above are dealt with in one provision. It provides when a person has been convicted in any proceedings of an offence and the question of bail arises, whether before sentencing or pending appeal or otherwise, the convicted accused person and the prosecutor must be given the opportunity to make submissions in relation to this question.²³³

2.152 The prosecutor's attitude towards bail does not, however, restrict the court's exercise of its discretion in determining the issue in accordance with applicable rules.²³⁴

(ii) New Zealand

2.153 In New Zealand,²³⁵ the courts are prohibited from granting bail to an accused who is found, or pleads, guilty; is appealing against conviction, sentence or both; and is in custody, unless he or she shows cause on balance of probabilities that it would be in the interests of justice to do so. The responsibility to convince the court that bail should be granted falls on the accused. In considering whether the interests of justice permit the release of an accused found guilty or who has pleaded guilty, the court may take into account:²³⁶

- whether the accused is likely to receive a sentence of imprisonment;
- the likely length of time that will pass before the accused is sentenced;
- the personal circumstances of the accused and the accused's immediate family; and
- any other consideration the court considers relevant.

²³³ Section 32A of the Criminal Procedure (Scotland) Act 1995.

²³⁴ Section 32A(2) of the Criminal Procedure (Scotland).

²³⁵ Sections 13 and 14 of the Bail Act 2000 (New Zealand).

²³⁶ The language of section 13(3) of the Bail Act 2000 is permissive as the court may, if it chooses, consider section 8 of this Act which lists inter alia the following as considerations further detention: the nature of the offence; the strength of evidence and probability of conviction; the seriousness and severity of punishment likely to be imposed; the character and past conduct of the accused, in particular proven criminal behaviour; whether the accused has a history of offending while on bail; the length of time before the matter comes to hearing or trial; the possibility of prejudice to the defence in the preparation of the defence; any other special matter that is relevant in the particular circumstances.

2.154 If the accused is unlikely to receive a sentence of imprisonment, this counts against him or her being remanded in custody.

2.155 Where an accused is applying for bail pending appeal against conviction, sentence or both, the court must consider:

- the strength of the grounds of appeal;
- the length of the sentence imposed;
- the length of time that will pass before the appeal is heard;
- the personal circumstances of the accused and the appellant's immediate family;
- any other consideration that the court considers relevant.

2.156 No accused person with previous conviction for *serious offence* may, while waiting to be sentenced, be released on bail.²³⁷

(iii) Australia

2.157 In the Australian Capital Territory, the courts are barred from releasing a person who has been convicted and sentenced to a period of imprisonment and who has lodged an appeal against conviction or sentence unless it is satisfied that special or exceptional circumstances exist favouring the grant of bail.²³⁸

2.158 In New South Wales, section 22B of the New South Wales Bail Act 2013 provides:

Limitation regarding bail during period following conviction and before sentencing for certain offences

(1) During the period following conviction and before sentencing for an offence for which the accused person will be sentenced to imprisonment to be served by full-time detention, a court—

- (a) on a release application made by the accused person—*must not grant bail or dispense with bail*, unless it is established that special or exceptional circumstances exist that justify the decision, or
- (b) on a detention application made in relation to the accused person—*must refuse bail*, unless it is established that special or exceptional circumstances exist that justify the decision.

(d) Evaluation

2.159 One can deduce the following principles from the laws applicable in countries referred to in preceding paragraph:

- granting bail to a convicted accused is an exception not the rule;

²³⁷ Section 13(5) read with section 10(2) of the Bail Act 2000.

²³⁸ Section 9E of Bail Act 1992 (Australian Capital Territory).

- much turns on the gravity of the offence; previous convictions and conduct of the accused while out on bail on previous occasions;
- even in these circumstances the accused must be afforded the opportunity to argue his or her case;
- most importantly, the accused must prove the existence of special or exceptional circumstances that warrant his or her release on bail pending imposition of sentence or outcome of appeal; or that it would be in the interest of justice to release him or her.

2.160 And, besides weighing up the risk that the accused may abscond or attempt to defeat the ends of justice in some way, the court must, in exercising its discretion, also consider, inter alia, the nature of the offence; the seriousness or severity of punishment likely to be imposed; the character and past conduct of the accused; and any other special matter that is relevant in the particular.

2.161 Furthermore, a distinction between these provisions and section 58 of the CPA must be underlined. The latter is circumscribed and applies only to instances where the accused has been convicted of either a Schedule 5 or 6 offence. Whereas, the injunctions applicable in other jurisdictions, including section 22B of the New South Wales Bail Act, apply across the board.

(e) Recommendation

2.162 There are numerous options to address this problem that do not entail amendment to the law. For example, strengthening record keeping processes and enhancement of communication by the SAPS; imposing the condition that the accused must report at a police station or that he or she be placed under the supervision of a correctional official. Participants at the conference proposed that a software or app must be developed for use across government agencies to assist with checking issues.

2.163 However consideration could also be given to the adoption of the system that obtains in New Zealand and some Australian states. And there was support for the adoption of this approach at the conference hosted by the DOJCD and the Commission in February 2024.

2.164 In view of the preceding discussion, it is recommended that the following provision be inserted into the CPA:

Release of accused pending review or appeal against conviction or sentence

- (1) If an accused person-
 - (a) is found guilty of an offence;
 - (b) pleads guilty to an offence;
 - (c) is convicted and sentenced and appeals against-
 - (i) conviction;
 - (ii) sentence; or
 - (iii) both conviction and sentence; or
 - (d) whose matter is the subject of review, the court must not grant or extend bail unless it is satisfied on the balance of probabilities that it is in the interests of justice to do so.
- (2) The onus is on the accused to show cause why bail should be granted.
- (3) When considering whether it is in the interests of justice to release the accused on bail, the court must take into account:
 - (a) the nature of the offence committed by the accused, and whether it is a grave or less serious offence;
 - (b) the seriousness of the punishment imposed or likely to be imposed;
 - (c) the character and past conduct or behaviour of the accused, in particular proven criminal behaviour, of the accused;
 - (d) the length of time likely to pass before the finalisation of review or appeal proceedings; and
 - (e) any other factor the court deems relevant in the particular circumstances.
- (4) In deciding whether to grant bail to the accused to whom this section applies, the court must take into account-
 - (a) any views of a victim or complainant of the offence committed by the accused; and
 - (b) the need to protect the safety of the victim, complainant or the public.
5. If the accused is unlikely to be sentenced to imprisonment or if the sentence is unlikely to exceed a period of one year, this must weigh against remanding the accused in custody.

7 Foreign nationals

(a) Problem statement

2.165 There seems to be uncertainty about how illegal immigrants who are arrested and brought before court should be dealt with.²³⁹ Another concern is that they are not treated equitably as bail is often denied solely on the basis of their status and are thus perceived a flight risk.²⁴⁰ It has been averred that this factor *alone* should not be the basis to deny bail.²⁴¹

²³⁹ Ntwaagae Seleka 'Legal Confusion Over What to do With Illegal Immigrants Brought Before Court' *News24* (31 May 2022).

²⁴⁰ Busisiwe Kamolane 'Courts Should not Refuse Bail to Immigrants Without Good Reasons – Being Foreign does not Justify a Refusal of Bail' *Ground Up* (26 June 2019)

²⁴¹ *Ibid.*

(b) Evaluation

(i) The law

2.166 In our law, neither the Constitution nor Chapter 9 of the CPA differentiates between South African citizens and foreign nationals, whether they are in this country legally or illegally. Existing constitutional and statutory protections are accorded, and apply, to all. The CPA and the Immigration Act of 2002²⁴² which authorises the arrest, detention and deportation of foreign nationals, are both silent on the question of bail of foreign nationals.

2.167 However, in terms of sections 9 and 13(3) of the Extradition Act of 1962,²⁴³ an accused person who is the subject of extradition may apply and be released on bail. The provisions of the CPA relating to bail have been incorporated into this Act by reference.

(ii) Approach of the courts

2.168 Our courts have clearly ruled that an accused cannot be denied release on bail solely on the basis of their foreign citizen status; reiterated that they do not bear an increased onus in relation to bail applications than South African citizens; and have granted bail to foreign nationals, at times who are facing serious charges.²⁴⁴ The Constitutional Court decision in *Lawyers for Human Rights v Minister of Home Affairs and Others*²⁴⁵ epitomises this approach. In this case, the court declared section 34(1)(b) and (d) of the Immigration Act unconstitutional and ruled that illegal immigrants must be brought to court within 48 hours.

(iii) International human rights law

2.169 International human rights law guarantees citizens and non-citizens alike, the right not to be subjected to arbitrary arrest and detention.²⁴⁶ Detention is permissible where there is likelihood that the accused person would flee the jurisdiction of the state party. This approach was endorsed by the Human Rights Committee in the case of *Hills v Spain*. Even then, factual

²⁴² Act 13 of 2002.

²⁴³ Act 67 of 1962.

²⁴⁴ Department of Employment and Labour, Republic of South Africa 'JHB Magistrate Grants Bail to Seven Chinese Nationals Arrested for Alleged Human Trafficking and Violation of Labour Laws' (20 June 2020).

²⁴⁵ 2004 (SA) 125 (CC).

²⁴⁶ Universal Declaration of Human Rights of 1948; International Covenant on Civil and Political Rights, 1966; United Nations Standard Minimum Rules for Non-Custodial Measures; The African Charter on Human and Peoples' Rights; and many other instruments.

information must be provided to substantiate this and to show why this concern could not be addressed by setting an appropriate sum of bail and other conditions of release. Importantly, the court found that the mere fact that the accused is a foreigner does not in itself imply that he or she may be held in detention pending trial.²⁴⁷

(iv) *Comparative law*

2.170 In Tanzania, the court held that where an accused is a foreigner, bail conditions may be imposed that reflect that background.²⁴⁸ In South Korea, foreign national are kept in detention throughout the investigation and trial process and bail is not commonly granted and they are generally deported after their sentences have been carried out.²⁴⁹

2.171 The UK Immigration Act 2016 makes provision for *immigration bail* (bail granted to a person liable for removal or detention pending deportation, for example).²⁵⁰ The following salient features of this Act are worth mentioning:

- (a) If immigration bail is granted, it *must* be granted subject to the following conditions:
 - (i) a condition requiring the person to appear before the Secretary of State or tribunal at a specified date and time;
 - (ii) a condition restricting the person's work, occupation or studies in the UK;
 - (iii) a condition about the person's residence;
 - (iv) a condition requiring the person to report to the Secretary of State or such other person as may be specified;
 - (v) an electronic monitoring condition; and**
 - (vi) such other conditions as the person granting the immigration bail thinks fit.
- (b) The Secretary of State or tribunal *must* have regard to the following factors when considering to grant immigration bail to a person:
 - (i) the likelihood of the person failing to comply with a bail condition;
 - (ii) whether the person has been convicted of an offence (whether in or outside the UK);**
 - (iii) the likelihood of a person committing an offence while on immigration bail;

²⁴⁷ Ballard 19.

²⁴⁸ Victory Attorneys 'The Court Pronounces New Bail Conditions for Foreigners and Co-accused' (March 2022).

²⁴⁹ <https://travel.gc.ca/travelling/advisories/korea-south/criminal-law-system> (accessed January 2024).

²⁵⁰ Schedule 10 of the Immigration Act 2016 (UK).

- (iv) the likelihood of the person's presence in the UK, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order;
 - (v) whether the person's detention is necessary in that person's interests or for the protection of any other person; and
 - (vi) such other matters as the Secretary of State or the tribunal thinks relevant.
- (c) A person must not be granted bail if:
- (i) Directions for his or her removal are in force;
 - (ii) Directions require the person to be removed from the UK within the period of 14 days beginning with the date of the decision on whether the person should be granted immigration bail; and
- (d) A financial condition may be imposed. It must specify the sum of money to be paid and the form and manner in which it is to be paid. The person liable under it has to be given the opportunity to make representations to the person to whom it is to be paid.²⁵¹

(c) Recommendation

2.172 The principles currently in force regarding bail seem adequate to deal with foreign nationals, including those that are undocumented. More so, because section 60(4)(b) of the CPA expressly provides that the court could deny if the accused will abscond.

2.173 If provisions similar to those contained in the UK Immigration Act are deemed necessary, the Immigration Act would be the most suitable framework in which to incorporate them.

2.174 Consequently, no recommendations are made in this regard.

²⁵¹ Ibid.

BIBLIOGRAPHY

Australian Law Reform Commission *Informing Victims About Bail Decisions* (10 November 2011)

Busisiwe Kamolane 'Court Should not Refuse Bail to Immigrants Without Good Reason – Being Foreign does not Justify a Refusal of Bail' *Ground Up* (26 June 2019)

Christo Botha *Statutory Interpretation* Third Edition (1998)

Clare Ballard and Ram Subramanian 'Lessons from the Past: Remand Detention and Pre-trial Services' *SA Crime Quarterly* (June 2013)

Clare Ballard Research *Report on Remand Detention in South Africa: An Overview of the Current Law*

Code of Judicial Conduct

Code of Judicial Conduct for Magistrates

Criminal Justice Inspection Northern Ireland *The Operation of Bail and Remand in Northern Ireland* (January 2023)

Desmond Francke 'Improving the Legal System and Resources for Victims of Domestic Violence' *De Rebus* (December 2022)

District Court of Pennsylvania *Requirements for Bail Bond Secured by Property*

Edwin Cameron 'The Crisis of Criminal Justice in South Africa' *South African Crime Quarterly* No. 69 (2020)

Georgina Ryan-White *Statutory Time Limits in other Jurisdictions – Northern Ireland Assembly Briefing Paper* (March 2021)

Government of Canada *Canadian Victims Bill of Rights – Public Engagements on the Federal Government's Criminal Justice System Review* (November 2017)

Government of Canada Office of the Federal Ombudsman for Victims of Crime *Bail Reform - Getting Fair Outcomes for Victims in Canada's Criminal Justice System* (November 2012)

Government of the Republic of South Africa *Victim Support Services Bill (2023)*

Government of the Republic of South Africa, Department of Employment and Labour, Republic of South Africa *JHB Magistrate Grants Bail to Seven Chinese Nationals Arrested for Alleged Human Trafficking and Violation of Labour Laws* (20 June 2020)

Government of the Republic of South Africa, Department of Justice *Minimum Standards on Services for Victims of Crime*

Graham Bursey '-Time for a Return to Sanity' *De Rebus* (September 1999)

Helene Combrinck 'He's Out Again: The Role of the Prosecutor in Bail of Persons Accused of Sexual Offences' *Law, Democracy and Development* Vol 5 (2001)

Helene Combrinck *Chapter Five: Bail*

International Covenant on Civil and Political Rights, 1966

Jameelah Omar 'Penalised for Poverty: The Unfair Assessment of 'Flight Risk' in Bail Hearings' *SA Crime Quarterly* (September 2016)

JICS Annual Report 2021-2022

JJ Joubert (ed) *Criminal Procedure Handbook* (2019)

Law Answer Online *Victim has the Right to be Heard at Every Stage from Investigation to Culmination of Trial in Appeal/Revision*

New South Wales Supreme Court *Lodging Property as Bail*

Nicola de Ruiter and Kathleen Hardy *Study on the Use of Bail in South Africa* (May 2018)

Norms and Standards for the Performance of Judicial Functions Government Gazette (28 February 2014)

Ntwaagae Seleka 'Legal Confusion Over What to do With Illegal Immigrants Brought Before Court' *News24* (31 May 2022)

Office of the Federal Ombudsman for Victims of Crime *Bail Reform – Getting Fair Outcomes for Victims in Canada's Criminal Justice System* (November 2017)

Palesa Rose Madi and Lubabalo Mabhenxa 'Possibly Unconstitutional? The Insistence on Verification of Address in Bail Hearings' *SA Crime Quarterly* (December 2018)

Singapore Government *What can be Pledged as Security for Bail*

South African Law Reform Commission *Project 107: Sexual Offences Process and Procedure*

South African Law Reform Commission *Project 82: Sentencing (A Compensation for Victims of Crime) Report* (April 2004)

The African Charter on Human and Peoples' Rights

United Nations Standard Minimum Rules for Non-custodial Measures

United Republic of Tanzania Judiciary of Tanzania *Bail Guidelines* (September 2020)

Universal Declaration of Human Rights, 1948

Victory Attorneys *The Court Pronounces New Bail Conditions for Foreigners and Co-accused* (March 2022)

Wits Justice Project *Innocent but Incarcerated: An Analysis of Remand Detention in South Africa*

Wium de Villiers 'An Accused 's Right to Information in the Police Docket for Purposes of a Bail Application – S v Green 2006 1 SACR 603 (SCA)' *THRHR* (2007)

CASES

India

Jagjeet Singh & Ors vs. Ashish Misshra alias Monu & Anr (2022) 9 SCC 321

Saleem v The State of NCT Dehli & Anr 2023 DHC: 2622

South Africa

Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA)

Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC)

Kgantlapanne v S 2023 ZAWCHC 194 (31 July 2023)

Lawyers for Human Rights v Minister of Home Affairs and Others 2004 (SA) 125 (CC)

National Director of Public Prosecutions Rebuzzi 2000 (2) SA 869 (W)

S v Baloyi 1981 (2) SA 227 (T)

S v Bapela 1978 (2) SA 22 (BH)

S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC)

S v Lepale 1979 (1) SA 117 (B)

S v Letaoana 1997 (11) BCLR 1581 (W)

S v Liberty Shipping and Forwarding (Pty) Ltd and Others 1982 (4) SA 281 (D)

S v Maelane 1978 (3) SA 528 (T)

S v Maredi 2000 (1) SACR 611 (T)

S v Msiza 1979 (4) SA 473 (T)

S v Tlame 1982 (4) SA 319 (B)

S v Wildschut 1983 (4) SA 604 (C)