

The state's legal responsibility for the social reintegration of sexually abused children

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Speech by President Nelson Mandela at the launch of the Nelson Mandela Children's Fund held at Mahlamba'ndlopfu, Pretoria, 8 May 1995.

There can be no keener revelation of a society's soul than the way in which it treats its children. We come from a past in which the lives of our children were assaulted and devastated in countless ways. It would be no exaggeration to speak of a national abuse of a generation by a society which it should have been able to trust. As we set about building a new South Africa, one of our highest priorities must therefore be our children. The vision of a new society that guides us should already be manifest in the steps we take to address the wrong done to our youth and to prepare for their future. Our actions and policies, and the institutions we create, should be eloquent with care, respect and love. This is essentially a national task. The primary responsibility is that of government, institutions and organised sectors of civil society. But at the same time we are all of us, as individuals, called upon to give direction and impetus to the changes that must come. Our actions should declare, in a practical and exemplary way, the importance and the urgency of the matter.

ACKNOWLEDGMENTS

No path is ever travelled alone. On my journey of discovery I was carried by many. Thank you is such a small word but means more to me than I can say.

I would like to give thanks to my Almighty Father. Without his unconditional love and support I would not have been able to accomplish this.

To my cherished wife, Daleen, that provided me with her wisdom, support and her encouragement. Thank you Princess.

My supervisors, Ms Chantelle Feldhaus and Adv. René Koraan, thank you for your guidance and support. You made the journey exciting and sometimes terrifying. To Mrs Van der Walt, thank you for your assistance in making this dissertation readable. Isaiah 57:13-14.

ABBREVIATIONS

ACA	Accident Compensation Act
ACC	Accident Compensation Corporation
ACRWC	African Charter on the Rights and Welfare of the Child
CC	Constitutional Court
Constitution	Constitution of South Africa, 1996
CPA	Criminal Procedure Act
CRC	United Nation's Convention on the Rights of the Child
NGOs	Non-Government Organisations
NICRO	National Institute for Crime Prevention and Rehabilitation of Offenders
NPA	National Prosecuting Authority
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South Africa Journal for Human Rights
SALRC	South Africa Law Reform Commission
SAPS	South African Police Service
SCA	Supreme Court of Appeal
United Nations Declaration Of Basic Principles	United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
UPVM	Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences
VEP	Victim Empowerment Program
Victim's Charter	The Service Charter for victims of crime in South Africa

ABSTRACT

Title: The State's legal responsibility for the social reintegration of sexually abused children

Key terms: Sexually abused; Social reintegration; State's responsibility; Constitutional rights; International Law

Section 28(1)(d) of the *Constitution* guarantees a child the right to be protected against abuse. When a child's constitutional rights are violated by an offender by means of sexual abuse and degradation, the state has a legal responsibility to restore that right. In determining whether the state is adhering to its legal responsibility to socially reintegrate sexually abused children, the *Constitution*, the VEP, the Victims' Charter, the UPVM, legislation and one-stop centres were explored. It was found that none of these programs, charters and documents places an obligation on the state.

Section 39(1)(b) of the *Constitution* states that the court must consider international law when interpreting the Bill of Rights. The CRC, ACRWC, United Nations Declaration of Basic Principles were studied. It was found that although South Africa is a signatory to everyone, it does not adhere to the principles stated in the respected document.

Section 39(1)(c) of the *Constitution* states that the court may consider foreign law when interpreting the Bill of Rights. The dissertation does not consist of a comparative study. Each of Canada, Australia and New Zealand's legislation was studied relating to compensation schemes in order to determine what lessons can be drawn from the three countries. It was found that each country has a unique compensation scheme. Although South Africa can learn from the way in which these schemes are administered and funded, the schemes of the three countries are not beyond critique. South Africa can therefore also take note of the negative aspects of the compensation schemes of the three countries so as to improve on it.

It was found that through a literature study the state does not adhere to its legal responsibility to socially reintegrate sexually abused children. It is recommended that the state should consider implementing a state-funded compensation scheme to assist the children that have fallen victim to sexual abuse and degradation.

SAMEVATTING

Titel: Die Staat se wetlike verantwoordelikheid om seksueel mishandelde kinders sosiaal te herintegreer.

Sleutel woorde: Seksuele mishandeling; Sosiale herintegrasie; Staat se wetlike verantwoordelikheid; Grondwetlike regte; Volkereg

In gevolg artikel 28(1)(d) van die *Grondwet* het elke kind die reg om teen mishandeling beskerm te word. Wanneer 'n kind se grondwetlike reg deur middel van seksuele mishandeling deur 'n oortreder geskend word, het die staat 'n wetlike verantwoordelikheid om die geskende reg te herstel. Ten einde vas te stel of die staat sy verantwoordelikheid om seksueel mishandelde kinders sosiaal te herintegreer, na kom is die VEP, die Victims' Charter, die UPVM, wetgewing en een-stop sentrums bestudeer. Daar is gevind dat nie een van die programme, verdrae of dokumente 'n regsplig op die staat plaas nie.

Artikel 39(1)(b) van die *Grondwet* bepaal dat 'n hof volkere in ag moet neem met die uitleg van die Handves van Regte. Die CRC, ACRWC en United Nations Declaration of Basic Principles is bestudeer. Daar is gevind dat alhoewel Suid-Afrika 'n ondertekenaar van elkeen is, dit nie aan die beginsels van elke dokument voldoen nie.

Artikel 39(1)(c) van die *Grondwet* bepaal dat 'n hof buitelandse reg in ag kan neem met die uitleg van die Handves van Regte. Die verhandeling het nie ten doel om 'n vergelykende studie te wees nie. Kanada, Australië en Nieu-Seeland se regstelsel met betrekking tot vergoeding skemas is bestudeer ten einde te bepaal of Suid-Afrika enige lesse daaruit kan leer. Daar is gevind dat elke land 'n unieke vergoeding skema het. Alhoewel Suid-Afrika van die lande kan leer hoe om die skema te administreer en befonds, is die skemas van die drie lande nie verhewe bo kritiek nie. Suid-Afrika kan derhalwe ook kennis neem van die negatiewe aspekte van die drie lande se skemas ten einde daarop te verbeter.

Daar is tydens die literatuurstudie gevind dat die staat nie sy wetlike verantwoordelikheid deur middel van sosiale herintegrasië teenoor seksueel mishandelde kinders na kom nie. Daar word voorgestel dat die staat oorweging moet skenk aan 'n vergoeding skema wat deur die staat befonds word ten einde kinders wat slagoffers is van seksuele mishandeling te kan help.

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CHAPTER 1: INTRODUCTION AND PROBLEM STATEMENT

1.1 Introduction

A child is defined by article 1 of the United Nation Convention on the Rights of the Child¹ as well as by section 28(3) of the *Constitution of South Africa, 1996*² as a person being under the age of 18 years. Section 28(1)(d) of the *Constitution* states:

Every child has the right to be protected from maltreatment, neglect, abuse or degradation.

The protection of the rights of children is addressed in the *Constitution* and in legislation.³ The South African government has a legal responsibility in terms of Section 28(1)(d) of the *Constitution* to protect a child from sexual abuse and degradation. When that child's right has been violated it will be argued that the government should have legislative measures in place to restore the rights of that child and ensure that the child can be socially reintegrated. Social reintegration means *inter alia* to restore the human dignity of a victim that has been emotionally, physically, psychologically and morally injured by a crime committed against the victim.⁴ For purposes of the study only compensation will be looked into as a means to social reintegration. Compensation consists of pecuniary and non-pecuniary compensation.⁵

South Africa has been described as the rape capital of the world due to the high percentage of sexual offences being committed.⁶ It is said that crime statistics

1 Resolution 44/25 of 20 November 1989. Hereafter referred to as the CRC.

2 Hereafter referred to as the *Constitution*.

3 See Chapter 2 for a discussion on s28(1)(d) of the *Constitution* and on s2(b) of the *Children's Act* 38 of 2005.

4 Bolivar 2010 *Conceptualising Victims* 248. Butler 2012 *Modern-day Slavery* 235.

5 In Antkowiak 2011 *An Emerging Mandate for International Courts* 281;296 the author states that non-pecuniary compensation responds more to victims' demand for restoration, accountability and recognition. Rehabilitation includes *inter alia* medical and psychological treatment. Also see Hollander-Blumoff 2011 *Intrinsic and Extrinsic Compliance* 65 wherein the author states that non-pecuniary compensation has an impact on how victims think of resolving their disputes.

6 www.sabc.co.za/southafrica/world-rape-capital/interpol [Date of use 22 Jan 2013].

typically are a reflection of a portion of the crime committed due to under-reporting.⁷ There may be several reasons why acts of sexual assault are never reported to the police. Children may refuse to either disclose the sexual abuse or the identity of the perpetrator due to a feeling of shame, guilt, loyalty to the family, financial pressure or that the family feels they do not want to expose the child to further trauma once the matter is in the criminal justice system.⁸

According to van Niekerk Childline experienced a 400% increase of reported child sexual abuse matters in eight to nine years.⁹ In 2002 the age of sexually abused children decreased. At the KwaZulu-Natal Childline centre 50% of the children that attended the therapy after they had been sexually abused were under the age of 7 years.¹⁰ The Crime Report of the South African Police Service reported a decrease of 3,7% of reported rape cases for the period 2011/2012. However, there was an increase of all sexual offences in the North West, Free State and Limpopo Provinces.¹¹ Of all sexual offence cases 40,1% are child victims.¹² It is even more disturbing to note that 29,4% of these sexual offences involved children aged 0 – 10 years.¹³

From the available statistics it appears that there is indeed an increase in the number of children being sexually abused and the child victims are becoming younger and younger. Due to the problematic increase of reported cases regarding sexually abused children, it will be submitted that the state should consider the protection of the rights of children not to be abused and further degraded, as a first priority.

7 Holtmann and Domingo- Swarts 2008 *Current Trends and Responses* 107.

8 See van Niekerk 2003 *At the Coalface* 264.

9 Van Niekerk 266. The author refers to the period of 1991-2002.

10 Van Niekerk 266.

11 www.saps.gov.za/statistics/reports/2011/2012 36 [Date of use 17 June 2013].

12 www.saps.gov.za/statistics/reports/2011/2012 38 [Date of use 17 June 2013].

13 www.saps.gov.za/crimereport 11 [Date of use 22 March 2012].

1.2 *A child's constitutional rights to be protected*

The *Constitution*, being the supreme law of the Republic, guarantees that every child has a constitutional right to be protected against abuse, which includes sexual abuse and degradation. This is in addition to the general obligation on the state that it must respect, protect, promote and fulfil the rights entrenched in the Bill of Rights.¹⁴ The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.¹⁵ This implies that all spheres of the government must adhere to the *Constitution*.

Section 2 of the *Children's Act* 38 of 2005,¹⁶ states that the object of the Act is to give effect to the constitutional rights of children, which includes the protection against neglect, maltreatment, abuse and degradation. Its aim is to provide for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children.¹⁷ The *Children's Act*, like the *Constitution*, places an obligation on the state to see to it that the rights of a child not to be abused and degraded, is protected. A child becomes a victim if his/her rights are not protected. The State through government departments does however have certain programs and charters in place that are supposed to assist victims such as sexually abused children once their rights have been violated.

In 1999 the *Victim Empowerment Program*¹⁸ was launched by the Department of Social Development.¹⁹ The purpose of this program is to ensure that services are easily available to victims of crime.²⁰ Several government departments play a key role in the implementation of the program through the establishment of

14 S7(2) of the *Constitution*.

15 S8(1) of the *Constitution*.

16 Hereafter referred to as the *Children's Act*. Some of the sections commenced on 1 July 2007 and the rest of the Act commenced on 1 April 2010. It is important to look at the Act for purposes of this study because the Act gives effect to certain rights of children as contained in the *Constitution*. The Act stipulates that the state must respect, protect, promote and fulfil these rights and if necessary change existing laws in order to afford the necessary protection and assistance to children.

17 S2 of the *Children's Act*.

18 Hereafter referred to as the VEP.

19 www.victimsupport.issafrica.org 126 [Date of use 15 Jan 2013].

20 www.dsd.gov.za/vepguidelines 3 [Date of use 20 Jan 2013].

forums.²¹ Although in theory the VEP seems to contribute positively to the reintegration of victims, it will be argued during the course of this study, and specifically in Chapter 2, that the VEP falls short of its aims.

In 2004 The *South African Service Charter for Victims of Crime*²² was approved by Cabinet.²³ It refers to the rights of victims to compensation and restitution. A five-year implementation plan was introduced in 2007 by government bodies to implement the Victims' Charter. The charter, however, is not an act and cannot be enforced by law.

During 2005 the National Prosecuting Authority of South Africa²⁴ drafted the *Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences*²⁵ which refers to the rights of victims of crime and emphasises the importance of protecting them.²⁶ In the draft document it is stipulated that registered service providers must ensure victims receive treatment when such need arises.²⁷ Although there are service providers that do render these services, the state still has a responsibility to provide funding to the service providers, and monitor and evaluate the services provided by the service providers. This draft is also not enforceable. The VEP, Victims' Charter and the UPVM focus on the victim of a crime and how victims can be socially reintegrated.

In criminal matters a court may make a compensation order in terms of the *Criminal Procedure Act*.²⁸ The purpose of this order is to ensure the convicted offender pays compensation to the complainant.²⁹ When an offender is sentenced to life imprisonment in terms of the *Criminal Law Amendment Act*,³⁰

21 For a discussion on the VEP see Chapter 2.

22 Hereafter referred to as the Victims' Charter.

23 See discussion on Victims' Charter in Chapter 2.

24 Hereafter referred to as the NPA.

25 Hereafter referred to as the UPVM.

26 www.npa.gov.za/upvm 2 [Date of use 20 Jan 2013]. The document refers to crimes of sexual offences and domestic violence.

27 For discussion on the UPVM see Chapter 2.

28 S300 51 of 1977. Hereafter referred to as the CPA.

29 For a discussion on s300 see Chapter 2.

30 S51 of the CPA.

the convicted offender would usually not be in a financial position to ensure that the child receives the necessary counselling, or therapy to rehabilitate from the trauma experienced during the sexual abuse and degradation. Civil litigation may be instituted, usually when damages are not measurable in financial terms, for example, psychological harm.³¹ This remedy is not accessible to underprivileged children and in matters where the convicted offender is serving long imprisonment terms. Despite the fact that section 300 can be enforced, it does not guarantee the social reintegration of a child. Furthermore, no monitoring takes place that, if a court should grant such an order, that the pecuniary benefits would be used to assist the child victim to be socially reintegrated.

1.3 Aspects of International law

Section 39(1)(b) of the *Constitution* stipulates that a court, tribunal or forum must consider international law. The *Children's Act* further stipulates that the state has an obligation concerning the well-being of children in terms of international instruments that bind the Republic.³² South-Africa ratified the CRC on 16 June 1995.³³ Article 39 of the CRC states:

States Parties shall take all appropriate measures to promote physical and psychological recovery and *social reintegration*³⁴ of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the *child*³⁵.

The protection and promotion of the rights of children are also protected by the *African Charter on the Rights and Welfare of the Child*.³⁶

31 www.justice.gov.za/victimscharter 8 [Date of use 20 Jan 2013].

32 S2(c) of the *Children's Act*.

33 For a discussion on the CRC see Chapter 3.

34 Own emphasis.

35 Own emphasis. The International law specifically makes mention of children in article 39 and thus places an obligation on state parties to protect children

36 Hereafter referred to as the ACRWC. For a discussion on the relevant sections of the ACRWC see Chapter 3.

1.4 Lessons to be learned from foreign law

In terms of section 39(1)(c) of the *Constitution* a court may consider foreign law when dealing with the interpretation of the Bill of Rights. Although this will not be a comparative study,³⁷ lessons could be drawn from other countries such as Canada, Australia and New Zealand that already have legislation in place to address this issue. The Canadian law, for example, has a *Compensation for Victims of Crime Act*.³⁸ This particular Act provides for a Board that was established by the state. It is the duty of this Board to pay out money or render services to victims of crime after an investigation has been conducted and certain findings have been made. In appropriate circumstances the Board may attempt to recover the money from the offender.

The three countries were chosen because their legal systems are based on English Common law. South Africa has a hybrid legal system that consists of Roman-Dutch law, English Common law and Customary law. All the countries deal with restorative justice as part of their attempt to address the needs of victims of crime.³⁹

1.5 Research methodology

The study will be based on a literature study, wherein reference will be made to legislation, electronic sources, books, case law and journal articles. Reference will be made to foreign law as far as it relates to compensation acts to indicate the relevance, importance and achievability of a similar act. A full comparative study will not be undertaken. Legislation of Canada, Australia and New Zealand

37 Zweigert and Kötz 1998 *Comparative Law* 2-5. According to Zweigert and Kötz, comparative law consists of comparative lawyers that compare different legal systems either on a large scale (also referred to as "macro-comparison") wherein the different ways of resolving conflicts adopted by different legal systems are studied or on a smaller scale. The latter (also referred to as "micro-comparison") refers to the study of specific legal problems or conflict. The authors further argue that these comparisons may be used simultaneously in order to determine how a foreign system resolves a certain legal problem.

38 R.S.O. 1990 c C.24. The Act was promulgated in Ontario. For a discussion on the Canadian law see Chapter 4.

39 Richards 2009 *Taking Victims Seriously* 304. Archibald 2008 *Let My People Go* 86. Umbeit *et al* 2007 *Restorative Justice* 521.

will be studied to determine what lessons, if any, South Africa can learn. Zweigert and Kötz rightly argue that to provide information of different countries' legal systems can at most be called descriptive comparative law.⁴⁰ To only compare, without comment to the different legal systems cannot be seen as comparative law.⁴¹ The proposed study will *inter alia* critically explore the viability of section 28(1)(d) of the *Constitution* but limited to the responsibility of the state to ensure that a child's right to be protected against sexual abuse and degradation is adhered to. The question arises as to what the state has done to adhere to their legal responsibility to restore the rights of children affected by sexual abuse and degradation?

1.6 Layouts

If it is found that the state through the national, provincial and local government, is neglecting its responsibility to restore the rights of sexually abused children, it must be determined whether legislation is in place to force the state to adhere to its obligations as stated in the *Constitution*.

The dissertation consists of 5 chapters. In Chapter 1 the legal problem is stated and an overview is given of the dissertation.

Chapter 2 is the assessment of current legislation such as the *Constitution*, the *Children's Act*, the CPA, programs such as the VEP, charters such as the Victims' Charter, the UPVM and case law to determine a child's constitutional rights to be protected against sexual abuse and degradation.

Thereafter Chapter 3 addresses aspects of international law that places an international duty on states to uphold and protect the rights of children. Article 39 of the United Nations' CRC will be critically scrutinised as well as the ACRWC. It

40 Zweigert and Kötz 6.

41 Zweigert and Kötz 43. The authors further state that when one considers adopting a foreign legal system (or part of it as the case may be) two questions arise. Firstly ask whether the legal system is working successfully in the country of origin and secondly whether it will work in the country that is considering adopting the legal system.

will also look into the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse*.

Chapter 4 analyses foreign law of countries such as Canada, Australia and New Zealand that have a compensation act in place to determine what lessons can be drawn from their existing acts.

In conclusion, Chapter 5 will address the legal problem stated in Chapter 1 by discussing the positive and negative aspects identified in South African law, International law and foreign law. The obligations placed on the state especially by international law will be discussed and what lessons the state can learn from looking at existing compensations schemes in foreign countries. By identifying the weaknesses in the South African law and existing compensation schemes the state can therefore take necessary steps to safeguard against similar weaknesses. Possible recommendations will be made with regard to addressing the shortcomings and what the way forward should be. It will be suggested that the state should implement a compensation scheme to assist sexually abused children by not only looking at pecuniary compensation but also non-pecuniary compensation in the form of services rendered by NGOs and government departments.

CHAPTER 2: A CHILD'S CONSTITUTIONAL RIGHTS TO BE PROTECTED

2.1 Introduction

A child's best interests are of paramount importance.⁴² The Constitutional Court concluded in *C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 2 SA 208 (CC)⁴³ that the best interests of a child must prevail in every decision that includes a child.⁴⁴

In *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) the court discussed the meaning of section 28(2) of the *Constitution* and held that:

The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).⁴⁵

The best interests of a child are therefore the benchmark in assessing any matter concerning a child. In order to determine whether a child is a victim of sexual abuse one will have to scrutinise the definitions of victims of sexual abuse. Although the *Constitution* does not define what a victim of a sexual offence is, several definitions can be found in legislation as well as policies.⁴⁶

42 Ss28(1) and (2) of the *Constitution*. Also see s9 of the *Children's Act*.

43 Hereafter referred to as *C and Others*.

44 *C and Others* 250 par 114. In Burman 2003 *The South African Child* 28-33 the author is of the opinion that although South Africa has adopted the standard of "best interests of the child" for all legal decisions on children, the concept is foreign to most people in South Africa. The reason for this she argues is due to cultural differences because the standard is applied irrespective of the values of the different religions. Some cultures would rather look at what is in the best interests of the family rather than what is in the best interests of the child.

45 *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) 430 par 17. See also *S v M* (Centre for Child Law as Amicus Curiae) 2008 3 SA 232 (CC) and *Fraser v Naudé* 1999 1 SA 1 (CC) wherein reference is made to the importance of applying section 28(2) of the *Constitution* in all matters that concerns children.

46 See discussion in 2.2.4–2.2.6.

The *Children's Act* defines sexual abuse as follows:

Sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted; encouraging, inducing or forcing a child to be used for the sexual gratification of another person; using a child in or deliberately exposing a child to sexual activities or pornography; or procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child;⁴⁷

Sexual abuse on children encompasses sexual violation and sexual penetration. Sexual violation entails touch of any part of the body with the subjective intention to violate someone sexually. Sexual penetration includes vaginal, oral and anal insertion of any kind of object including a genital organ. The new *Criminal Law (Sexual Offences and Related Matters) Amendment Act* redefined the meaning of rape by broadening the meaning of the word 'penetration'.⁴⁸

The state's legal responsibility to compensate children that have been victims of sexual abuse and degradation in order to help them to reintegrate socially, will be assessed. During the examination of legislation, programs and charters that address the rights of children, the best interests of a child must always be borne in mind.

2.2 Children's rights contained in legislation, charters, policies and programs

To secure the recovery of the rights of sexually abused children, legislation needs to be in place to ensure that the state is compelled to assist sexually abused children to socially reintegrate. The state's role in attempting to make it a reality will be examined.

47 S1 of the *Children's Act*.

48 See s1 of The *Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007*. The *Criminal Law (Sexual Offences and Related Matters) Amendment Act* does not define sexual abuse but instead defines sexual penetration and sexual violation.

2.2.1 Constitution

Section 28(1)(d) of the *Constitution* states:

Every child has the right to be protected from maltreatment, neglect, abuse or degradation;

This section binds the state to adopt legislative and other measures designed to protect children from neglect or abuse.⁴⁹ When investigating a matter relating to a child section 28(2) of the *Constitution* sets out the guideline that should be followed.⁵⁰ The *Constitution* does not state what the consequences would be if the rights of a sexually abused child victim are violated.⁵¹ The *Constitution* neither makes reference to the wording "compensation" as far as it relates to children nor to the steps that should be taken in order to restore their rights.

In *Government of the Republic of South Africa and Others v Grootboom*⁵² the court was faced with the state's obligation to adhere to section 26 of the *Constitution*. It was argued on behalf of the respondents that the state had to provide housing for children and this argument was based on section 26 and section 28(1)(c) of the *Constitution*.⁵³ The court held that the interpretation of a right in its context required the consideration of two types of context. On the one hand, rights had to be understood in their textual setting, which required a consideration of the Bill of Rights and the *Constitution* as a whole.⁵⁴ On the other

49 *C and Others* 249 par 112.

50 S28(2) of the *Constitution* states: "A child's best interests are of paramount importance in every matter concerning the child".

51 S38 of the *Constitution* stipulates that anyone listed in the section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened and the court may grant appropriate relief. The Bill of Rights, however, neither refers to a child victim nor to the accountability of the state when a child victim's rights have been violated. It has to be borne in mind that the state has an obligation in terms of s7(2) which states that the state must fulfil the rights in the Bill of Rights.

52 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) 47-53 (hereafter referred to as *Grootboom*).

53 S28(1)(c) of the *Constitution* states: "every child has the right to basic nutrition, shelter, basic health care services and social services".

54 *Grootboom* 49.

hand, rights also had to be understood in their social and historical context.⁵⁵ The interlink between the rights and the *Constitution* as a whole had to be taken into account in interpreting the socio-economic rights and, in particular, in determining whether the state had met its obligations in terms of them.⁵⁶

It was further held that section 26 of the *Constitution* does not place an absolute or unqualified obligation on the state, but that the state should take reasonable legislative and other measures to ensure that the needs are met within available resources.⁵⁷ It was emphasised that this was a progressive process as stipulated in section 26(2) of the *Constitution*.⁵⁸ This in essence means that no one can request housing on demand. For purposes of this study it is very important to note that the court held in regard to section 28 of the *Constitution* as follows:

The state did, however, have to provide the legal and administrative infrastructure necessary to ensure that children were accorded the protection contemplated by section 28 and its obligation in this regard would normally be fulfilled by passing laws creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation and other forms of abuse and in addition, providing families with access to land, adequate housing and services.⁵⁹

The court therefore confirmed that the state indeed had an obligation to ensure that legislation is in place to see to it that the rights of children not to be abused are protected. This is quite significant as it appears that the state is primarily accountable for the fulfilment of the right as contemplated in section 28(1)(d) of the *Constitution*.⁶⁰ The court held that the obligation in section 28(1)(c) of the *Constitution* to provide shelter was imposed primarily on the parents if children are being cared for by the parents and families.⁶¹ It is Sloth-Nielsen's⁶² opinion that the judgment implies that:

Children have no *a priori* claim to basic provisioning that derives from section 28. However, the court does refer directly to child maltreatment,

55 *Grootboom* 49.

56 *Grootboom* 49 61H-62E par 22-24.

57 *Grootboom* 49.

58 *Grootboom* 70G-71B par 46.

59 *Grootboom* 81H-82A, 82B-C and 82D-F.

60 See *Grootboom* 81 H-82 and s7 and s28 of the *Constitution*.

61 *Grootboom* 81H-82A.

62 Sloth-Nielsen 2001 *The Child's Right to Social Services* 210-231.

abuse and degradation- the right provided for in section 28(1)(d). The state appears to be directly responsible for ensuring fulfilment of this right, whether children are in parental, familial or alternative care. Section 28(1)(d) does not, on the face of it, create a right which is subject to progressive realisation. In the court's view, the scope of the obligation normally includes passing laws and creating enforcement mechanisms to ensure the protection of children from abuse, neglect or degradation, and to provide for the prevention of such occurrence.⁶³

The Constitutional Court⁶⁴ judgment in *Grootboom* places a positive direct obligation on the state to ensure the implementation of legislation in order to adhere to the provisions of section 28(1)(d). The judgment in *Grootboom* concurs in what was stated in *C and Others* wherein the court held that:

Section 28(1)(d) confers on every child the right to be protected from maltreatment, neglect, abuse or degradation. This section binds the state to adopt legislative and other measures designed to protect children from neglect or abuse.⁶⁵

In both judgments the courts were *ad idem* that the state has an obligation to put in place legislation to firstly ensure that a child's rights entrenched in section 28(1)(d) of the *Constitution* are protected and secondly prevent the infringement of the said rights. The purpose of the legislation is to confirm the state's obligation by putting in place measures that would protect children's rights.⁶⁶ In order to determine whether the courts' decision was met by the state, current legislation, programs and policies will be explored.

2.2.2 *Children's Act*

The *Children's Act* confirms what is stated in the *Constitution* and is therefore not in conflict with the provisions of the *Constitution*. The state again stipulates its intention through this legislation to uphold the rights of children as entrenched in

63 Sloth-Nielsen 226-227.

64 Hereafter referred to as the CC.

65 *C and Others* 249 par 112.

66 Von Bonde 2010 *Victims of Crime in International Law* 198-199. The author states that if the state cannot fulfil the rights enshrined in the *Constitution* including the right to be free from violence, then according to international trends, the state will have to accept responsibility.

the *Constitution*. The *Children's Act* has the same guidelines in regard to upholding the rights of children as set out in the *Constitution*.⁶⁷

Subsection 2(b)(iii) and (iv) states that children do have rights and formulates it as follows:

The objects of this act are-
(iii) protection from maltreatment, neglect, abuse or degradation; and
(iv) that the best interests of a child are of paramount importance in every matter concerning the child;⁶⁸

The *Children's Act*⁶⁹ uses the terminology 'sexual abuse' and 'sexual molesting' but does not define it. The *Criminal Law (Sexual Offences and Related Matters) Amendment Act*, however, defines the Act of sexual penetration and sexual violation but does not define 'sexual abuse' and makes no reference to the word 'sexual molesting'. From the *Children's Act* it is uncertain which acts by an offender will constitute sexual abuse as the *Children's Act*, although endeavouring to protect the rights of children, fails to explain the meaning of a sexually abused child. Section 15 of the *Children's Act* refers to the enforcement of rights. Section 15 and section 38 of the *Constitution* is *verbatim* the same and therefore not in conflict with each other. A child thus has the right to approach a court to request relief where a right stipulated in the *Children's Act* has been infringed or threatened.⁷⁰

Section 8(2) of the *Children's Act* states that all organs of state in any sphere of government must protect the rights of children contained in the act.⁷¹ The section therefore places a duty on the state to see to it that a child's rights stipulated in the Act are not infringed. Even though section 2(d) of the *Children's Act* states as

67 Ss7 and 9 of the *Children's Act*. S7(1)(l) stipulates that the need to protect the child from any physical or psychological harm that may be caused by subjecting a child to abuse or exposing a child to abuse, is factors that must be taken into consideration when investigating the best interests of a child.

68 *Children's Act* 38 of 2005.

69 S1 of the *Children's Act*.

70 S14 of the *Children's Act* states that every child has the right to bring and to be assisted in bringing a matter to a court. The Act does not state against whom recourse can be instituted.

71 See discussion on s4 below.

one of its objectives that the Act is to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children, section 4 of the *Children's Act* places a duty on all organs of state in the national and provincial sphere and where applicable, local sphere to take reasonable measures to achieve the realisation of the objectives of this act. Sections 2(d) and 4 of the *Children's Act* are formulated in such a manner that organs of state can raise the lack of resources, unreasonable measures and lack of manpower as excuses not to adhere to the implementation of the act. The *Children's Act* does not address the state's accountability to children that have been sexually abused. The Act furthermore remains silent in regard to the issue of state liability towards the social reintegration of sexually abused children.

The implementation of the National Child Protection Register in the Children's Act is commendable.⁷² Part two deals with the administration and purpose of the register.⁷³ The purpose of part A of the register is to *inter alia* have a record of 'abuse or deliberate neglect inflicted on specific children' and to 'monitor cases and services to such children'.⁷⁴ The term 'specific children' are not defined in the act. It is uncertain whether the monitoring would only refer to children that went through the children's court or whether sexually abused children would also be monitored in regard to services rendered to them. The deficiency in the Act is not addressed by any other legislation.

The *Children's Act* can qualify as one of the state's responsibilities to adopt legislation as part of its measures to ensure that children's rights as set out in section 28(1)(d) of the *Constitution* are met.

2.2.3 *Victim Empowerment Program*

72 Chapter 7 of the *Children's Act*.

73 S111-128 of the *Children's Act*.

74 S113 38 of the *Children's Act*.

The National Crime Prevention Strategy created the Victim Empowerment Program (VEP).⁷⁵ The program that has been implemented since 1999 is led by Department of Social Development and is currently in its fifth draft.⁷⁶ The purpose of the program is to facilitate access to services for victims irrespective of whether they are victims of crime, natural disasters or even suffered harm through socio-economic conditions. The aim of the program, however, focuses on the victim that was affected by a criminal act and the aim is to restore the loss or damage caused and the consequences the crime had on the victim's life.⁷⁷ It appears that the aim of the program and the purpose of the program do not correlate. The National Policy guidelines contained in the program defines a victim as:

Any 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 the criminal law. Victim includes, where appropriate, indirect victims such as the immediate family or dependants or even neighbours or colleagues of a direct victim. A person may be considered a victim regardless of whether the perpetrator is identified; apprehended; prosecuted or convicted; and regardless of the familial relationship between the perpetrator and the victim.⁷⁸

The objectives stipulated in the National Policy Guidelines are:

Give strategic direction on the development of management structures for effective co-ordination of the program at all government levels; identify and clarify sector specific roles and responsibilities at all government levels of the management structures; guide to process of monitoring, evaluation and reporting by the implementing structures; serve as a framework for the development of sector policies and strategies; identify roles and responsibilities of relevant government departments; create a common understanding of victim empowerment amongst various state departments, victims, perpetrators, non-profit organisations, including non-government organisations⁷⁹ and community-based organisations and individual members of the community.⁸⁰

75 www.victimsupport.issafrica.org 126 [Date of use 15 Jan 2013].
76 www.victimsupport.issafrica.org 126 [Date of use 15 Jan 2013].
77 www.victimsupport.issafrica.org 126 [Date of use 15 Jan 2013].
78 www.dsd.gov.za/vepguidelines 2 [Date of use 20 Jan 2013].
79 Hereafter referred to as NGOs.
80 www.dsd.gov.za/vepguidelines 3 [Date of use 20 Jan 2013].

Already in 1997 it was Camerer's⁸¹ opinion that the implementation of the program had been slow. She attributes the problems with the implementation of the program to the manner in which committees were structured and the internal conflicts between departments over provinces to work in.⁸² This resulted from the way in which funds for projects were allocated.⁸³ Several years later it was Faull and Mphuthing's opinion that despite the fact that the VEP has been revised several times it still remains in draft form.⁸⁴ In 2008 the United Nations Office on Drugs and Crime took over the management of the VEP due to the fact that Department of Social Development made no significant progress.⁸⁵

It is quite alarming to note that the program states that although services are offered by government as well as non-government organisations, the services are inadequate and not all victims have the same access to the services throughout the country.⁸⁶ It further states that the services are inequitable, especially in poor communities and rural areas.⁸⁷ The objectives should be in line with the services rendered. The services, however, fall short of the objectives stated in the VEP. The objectives stipulated in the National Policy Guidelines eloquently refer to words such as: 'give direction; identify roles and responsibilities; guide the process; create a common understanding'. The objectives do not refer to the states or to organs of states' responsibility to implement sustainable services either themselves or with the help of NGOs to victims of crime.

VEP is not enforceable and therefore places no obligation on the State to assist with compensation. The purpose of state compensation is not to substitute the

81 Camerer 1997 *Crime, Violence and Punishment* 47.

82 Camerer 47.

83 Camerer 47.

84 www.victimsupport.issafrica.org 130 [Date of use 15 Jan 2013].

85 www.victimsupport.issafrica.org 128 [Date of use 15 Jan 2013]. See www.unodc.org 11 [Date of use 3 Aug 2013], wherein it says that the United Nations Office on Drugs and Crime were given a mandate to work in collaboration with DSD. Due to certain problems they were only able to start with the implementation of their plans regarding the VEP in the middle of 2008. It is stated that according to the audit done by the United Nations work plans were not effectively implemented by DSD as there were problems with stakeholders' coordination.

86 The SA Law Commission came to the same conclusion. See discussion below.

87 www.dsd.gov.za/vepguidelines 5 [Date of use 20 Jan 2013].

arrest and prosecution of offenders, but rather to assist child victims. Compensation should be seen as an administrative procedure whilst the arrest of offenders is a criminal procedure. The VEP makes reference to the rights of victims. One of the rights of a victim is the right to compensation.⁸⁸

The VEP defines the term 'compensation' as follows:

Compensation refers to a payment that makes up for a loss that has been suffered and, in the context of victims of crime and violence, to money paid to victims of violent crimes by the state. Victim compensation does not require the apprehension and conviction of the offender.⁸⁹

Currently the only way in which a victim can require compensation from an offender is through criminal court proceedings and only after an offender has been convicted.⁹⁰ The state brings an application either in terms of section 297 or section 300 of the CPA. The definition of compensation as defined by the VEP that victim compensation does not even require apprehension of the offender, is infeasible. No indication is given as to which department would render its services to a victim in order to claim the compensation as guaranteed. The VEP attempts to address the issue of providing services to victims of crime by the Department of Health, Department of Social Development and Department of Justice and Constitutional Development. By including different role players, the VEP broadened its range of groups in need of special attention.⁹¹

To ensure that all role players work towards reaching the same goal, minimum standards are set out in the VEP.⁹² The minimum standards in the VEP are

88 www.dsd.gov.za/vepminimumstandards 10 [Date of use 3 Jan 2013].

89 www.dsd.gov.za/vepguidelines 26 [Date of use 20 Jan 2013].

90 Rucic 2012 *Rhetoric or Realisation* 7-13. She states that NGOs are forced to rely on funding from the state but the irony is that the state is supposed to provide the services to victims. She further states that Department of Social Development's failure to provide sufficient support means no service delivery to victims by NGOs. She concludes that despite the fact that some NGOs took Department of Social Development to court and the court found in their favour, upholding the rights guaranteed in the *Constitution* is a different process. See *National Association of Welfare Organisation and Non-Governmental Organisation and Others v Member of the Executive Council for Social Development, Free State and Others* case no 1719/2010 FS Judgment given on 5 August 2010 JOL 26056 FB.

91 Frank 2007 *Quality Services Guaranteed* 44.

92 www.dsd.gov.za/vepminimumstandards [Date of use 3 Jan 2013].

divided into four levels for service delivery and recognise the nature of support services that need to be provided and the extensive role expected of society.⁹³ In the first standard level the VEP wants victims to know what services are available to address their needs as victims of crime. It further states what is expected of service providers. Service providers receive policies and guidelines to assist them with the implementation of programs. It is expected of service providers to inform victims of available programs. To ensure that service providers adhere to the VEP, referral mechanisms must be in place.⁹⁴

Level 2 provides for early intervention. The minimum standard stated in level 2 concentrates not only on the victim but also on the perpetrator. It is expected of service providers that have been provided with policies and guidelines to provide both victim and perpetrator with enough information to make an informed decision when either the victim and/or the perpetrator engage into the system. NGOs such as the National Institute for Crime Prevention and the Reintegration of Offenders⁹⁵ and Khulisa Social Solutions assist with diversion programs for young offenders.

The minimum standards referred to in level 3 concentrates on the rights of a victim or witness that comes into contact with a court. It is expected of the service providers to assist victims and witnesses by empowering them with information as to what can be expected when they participate in court proceedings. The NPA appointed court preparation officers to assist in the preparation of children and specifically child complainants to prepare them for testifying in court through the help of an intermediary and the closed circuit camera.⁹⁶ The officers do not provide the child victim with any help except to prepare them to testify. They therefore do not play a therapeutic role.⁹⁷

93 Frank 49.

94 www.dsd.gov.za/vepminimumstandards 10-13 [Date of use 3 Jan 2013].

95 Hereafter referred to as NICRO.

96 S170A of the CPA deals with intermediaries. For the purpose of this study reference to it will only be made and the contents of the section will not be discussed.

97 www.dsd.gov.za/vepminimumstandards 18-20 [Date of use 3 Jan 2013].

Level 4 relates to the continuum of care. As part of the program practice, service providers must ensure that victims have access to forms of assistance such as police and other involved professionals. Services must be rendered in a safe environment. It seems that level 4 only focuses on the range of care but neglects to give detailed information as to what that range of service would entail. It appears to be simply one of the objectives the program visualised. The VEP, however, attempted to improve on their objectives for the period 2006-2008.⁹⁸

As part of the newer objectives the state anticipated donor funding from the European Union of which Department of Social Development would be the primary beneficiary.⁹⁹ The probability that the European Union would either not give funding or would only fund for a limited period of time, was apparently not catered for.¹⁰⁰ Therefore the anticipation that the European Union would provide funding *per se* was based on unsupported expectations. Frank¹⁰¹ addresses the strengths and weaknesses of the VEP. She concludes that the VEP expounds a framework of services which is accompanied by a set of minimum standards.

The service delivery provided is much broader than for example the Victims' Charter and encompasses the Department of Health, Department of Social Development and the Department of Justice and Constitutional Development.¹⁰² There are specific target groups for services; the VEP identifies intervention settings where services to victims should be provided and identifies specific roles different government departments should fulfil.¹⁰³ The VEP applies to all victims of crime and to all service providers.¹⁰⁴ It is the most comprehensive policy in South Africa.¹⁰⁵

98 www.dsd.gov.za/vepminimumstandards 21-23 [Date of use 3 Jan 2013]. See Frank 53 wherein she argues that as an interim solution the state applied for donor funding from the European Union as part of their objectives for the period 2006-2008. They however do not indicate how the victim services will be funded thereafter.

99 Frank 26.

100 Frank 40.

101 Frank 39.

102 Frank 31.

103 See www.victimsupport.issafrica.org 139 [Date of use 15 Jan 2013] wherein Faull and Mphuthing are of the opinion that there are inconsistencies in the way government departments engage and partner with civil society service providers. Also see Frank 39.

104 Frank 41. In www.victimsupport.issafrica.org 139 [Date of use 15 Jan 2013] the authors say that victim support systems are reliant upon volunteers for their implementation

It is, however, open for criticism. It is currently in its fifth draft. The VEP is not a national policy and still needs to be approved by cabinet. Due to this lack of status it is only an interdepartmental document that cannot be enforced.¹⁰⁶ It addresses government departments' responsibilities but fails to address the state's accountability when victims do not receive the services as specified in the VEP.¹⁰⁷ Although it refers to service providers that would ensure service delivery there is no indication as to what type of service could be expected for a victim of crime. In addition it fails to hold the state accountable if NGOs are not appointed to attend to specific service delivery. While the services of NGOs as service providers are profoundly expressed, they are primarily dependent on funding from the state and the relationship between government departments and NGOs is very poor.¹⁰⁸

After scrutinising the VEP document one is left with a vague impression as to what the VEP really offers to sexually abused children. The latter is not specifically catered for. On the one hand the VEP applies to all victims of crime but ironically, what is supposed to be seen as a positive attribute could on the other hand be seen as its downfall as it does not state what services are available to sexually abused children. It does not state by whom the services would be rendered. It does not state what the role of the state would be in the absence of services not being rendered. Neither the government departments as representatives of the state nor NGOs are being held accountable when they fail to provide services to children that have been sexually abused.

including the VEP. Service providers are responsible for the implementation of the VEP but Faull and Mphuthing further states that in order to prevent unsuitable and untrained people from becoming involved in the system it should have regulations in place to govern the appointment of trained volunteers.

105 Frank 40.

106 Frank 39.

107 www.victimsupport.issafrica.org 130 [Date of use 15 Jan 2013]. It is said by Faull and Mphuthing that the police attempted to adhere to the VEP by establishing victim-friendly rooms at police stations. Volunteers from NGOs attend to victims at these rooms but do not provide counselling services.

108 Frank 50.

The VEP can be seen as part of the state's attempt to commit to the obligation that is bestowed upon them by the *Constitution* in terms of section 28(1)(d). However, due to the lack of enforceability it is merely a document that frustrates the process of attending to a child's constitutional right to be protected against sexual abuse and degradation. It does not address the right of a child to not be sexually abused nor does it guarantee a child the right to hold the state accountable for providing specific services such as long-term therapy, counselling and state compensation in order to ensure the social reintegration of a sexually abused child. It is further argued that the VEP does not provide much guidance concerning what prioritisation means in practical terms and although it states that the guidelines should be implemented, the latter has never been forthcoming.¹⁰⁹

2.2.4 *The Service Charter for Victims of Crime in South Africa*

The *Constitution* provides for the adoption of charters. Section 234 of the *Constitution* states as follows:

In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.

The Service Charter for Victims of Crime in South Africa is also known as the Victims' Charter.¹¹⁰ The Victims' Charter emanated from the Victim Empowerment Policy developed by the VEP National Management Team.¹¹¹ In order to be in line with the United Nations Declaration of Basic Principles,¹¹² South Africa had to develop its own victims' charter.

109 Vetten 2012 "Paradox and Policy: Addressing Rape in Post-Apartheid South Africa" 176.

110 www.justice.gov.za/victimscharter [Date of use 20 Jan 2013].

111 Nel and Judge 2008 *Exploring Victims* 29.

112 United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 (hereafter referred to as the United Nations Declaration of Basic Principles). South Africa became a signatory to United Nations Declaration of Basic Principles. See discussion on the United Nations Declaration of Basic Principles in Chapter 3.

The Victims' Charter dates back to 1996 during the approval of the National Crime Prevention Strategy by government but was only approved by cabinet in 2004.¹¹³ It is the responsibility of the Department of Justice and Constitutional Development for the successful implementation and execution of the Victims' Charter.¹¹⁴ In order to further explain the purpose of the Victims' Charter, the Minimum Standards on Service for Victims of Crime¹¹⁵ were developed. The Minimum Standards describes a victim 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 omission that are in violation of our criminal law. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim. A person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.¹¹⁶

In the discussion paper¹¹⁷ the Department of Justice and Constitutional Development further defines 'secondary victimisation':

Secondary victimisation refers to the attitudes, processes, actions and omissions that may intentionally or unintentionally contribute to the re-victimisation of a person who has suffered or experienced a traumatic incident as a victim through failure to treat the victim with respect and dignity; disbelief of the person's account; unsympathetic treatment; blaming the victim; and lack of (or insufficient) support services to assist the victim at interpersonal, institutional and broad social level.¹¹⁸

It is the responsibility of the Department of Public Service and Administration, Department of Education and the Department of Home Affairs to ensure the implementation of the Victims' Charter.¹¹⁹ Although the Justice Department leads the implementation of the Victims' Charter, Department of Social Development is

113 Frank 30.

114 www.justice.gov.za/victimscharter 13 [Date of use 20 Jan 2013].

115 Hereafter referred to as the Minimum Standards.

116 www.justice.gov.za/victimscharter 3 [Date of use 20 Jan 2013]. The definition is the same as the definition stated in the National Policy Guidelines of the VEP. See www.dsd.gov.za/vepguidelines 2 [Date of use 20 Jan 2013].

117 [www.doj.gov.za/Understanding the South African Victims Charter](http://www.doj.gov.za/Understanding%20the%20South%20African%20Victims%20Charter) [Date of use 20 Jan 2013].

118 [www.doj.gov.za/Understanding the South African Victims Charter](http://www.doj.gov.za/Understanding%20the%20South%20African%20Victims%20Charter) 25 [Date of use 20 Jan 2013].

119 www.justice.gov.za/victimscharter 11 [Date of use 20 Jan 2013].

responsible for providing emotional and practical support services to victims of crime.¹²⁰ NGOs provide the majority of the services but rely on funding from state departments and international organisations.¹²¹ Due to a lack of resources the survival of the NGOs are under threat.¹²²

The Victims' Charter contains seven rights that victims of crime are entitled to when they enter the criminal justice system. These rights are: The right to be treated with fairness and with respect for one's dignity and privacy; The right to offer information; The right to receive information; The right to protection; The right to assistance; The right to compensation; The right to restitution.¹²³ The rights stipulated in the Victims' Charter are not new rights – they are rights that have already been addressed in legislation and the Victims' Charter simply echoes the existing rights.¹²⁴ The right to compensation and restitution are already covered by legislation that can be enforced, unlike the rights cited in the Victims' Charter.¹²⁵

Apart from the rights contained in the Victims' Charter, the Minimum Standards contain a set of activities.¹²⁶ It sets out what a victim can expect from the moment a matter is reported to the South African Police Services¹²⁷ until an offender is convicted and sentenced. Although the Minimum Standards gives a detailed explanation as to what can be expected, it is in fact nothing more than an information booklet. The Victims' Charter on the one hand provides a victim with rights but these rights are not enforceable. Moran¹²⁸ rightly noted that the Victims' Charter 'contains a number of vague promises of improved service delivery without really detailing how to access these or what to do if they are not provided'.

120 www.justice.gov.za/victimscharter 11 [Date of use 20 Jan 2013].

121 Hargovan 2007 *Restorative Approaches to Justice* 118.

122 Hargovan 118.

123 www.victimsupport.issafrica.org 127-128 [Date of use 15 Jan 2013].

124 Frank 17.

125 S300 and s297 of the CPA.

126 Frank 43.

127 Hereafter referred to as SAPS.

128 Moran Key Issues in Victim Empowerment as referred to by Frank 38.

Apart from the rights bestowed upon victims of crime by the Victims' Charter, it equally places responsibilities on the victims. Webster states that the promise by the government for a better life is "rooted in 'people-centred' approach."¹²⁹ She argues that a right cannot be claimed if people do not play an active role in asserting their rights because each right is accompanied by a duty.¹³⁰ According to the Victims' Charter - a victim has a right to compensation and restitution but a victim has duties in regard to these rights.¹³¹ The victim has the duty to inform the prosecutor of his/her damage or loss to property or injuries sustained as a result of a crime.¹³² It is expected of the victim to make follow-ups with the prosecutor on his/her claim for compensation. It is further the duty of the victim to inform the police or prosecutor about property the offender took from him/her and request the prosecutor that the offender should return the goods in the same condition as when he/she took it.¹³³ One has to wonder if this can be expected of a child victim.

It is uncertain whether the injuries referred to are related to personal physical injuries or malicious injury to property. Be that as it may, neither the right to compensation nor the right to restitution makes provision for a sexually abused child to claim for loss of self-worth and the right to receive help in order to be socially reintegrated. It rather seems that Webster is shifting the responsibility from the state to an individual to take action to restore his/her right that was violated. The problem, however, arises when one deals with children that cannot fend for them.

The Victims' Charter refers to other departments such as SAPS, NPA and Department of Correctional Services that also play a vital role in the implementation of the Victims' Charter. Even though the Victims' Charter refers to the above-mentioned departments' role in the implementation of the Victims'

129 Rights and Responsibilities in our Democracy – a case study of the Victims Charter Webster 2007 www.justice.gov.za 1 [Date of use 20 June 2012].

130 Rights and Responsibilities in our Democracy – a case study of the Victims Charter Webster 2007 www.justice.gov.za 2 [Date of use 20 June 2012].

131 www.justice.gov.za/victimscharter 8 [Date of use 20 Jan 2013].

132 www.justice.gov.za/victimscharter 8 [Date of use 20 Jan 2013].

133 Rights and Responsibilities in our Democracy – a case study of the Victims Charter Webster 2007 www.justice.gov.za 4 [Date of use 20 June 2012].

Charter, it is expected of each department to give its own implementation plan which can lead to overlapping or duplication of services or non-rendering of services.¹³⁴

The NPA through the Sexual Offences and Community Affairs Unit rolled out the Thuthuzela Care Centres which provides *inter alia* consultation services with victims of rape prior to enrolling the case for trial. Sexual Offence prosecutors would again consult with the rape victim before commencing with the trial. The latter is essential to ensure that the victim is ready to testify in the rape trial. The overlapping of services such as consultations, within the NPA itself, leads to secondary victimisation. Not to mention the fact that it is expected of the rape victim to relate the ordeal to several SAPS members as well, despite the fact that SAPS indicated that they have trained members to assist rape victims in taking down their statements in a secure and safe environment. SAPS consider this to be part of their initiative to adhere to the Victims' Charter. The unique plan of each department therefore does not complement each other.¹³⁵

The Victims' Charter and the Minimum Standards were only approved by cabinet on 1 December 2004 and as yet still needs to be adopted by Parliament. Since it cannot be enforced by law as it is not legislation and only binds government departments, it appears to be merely an interdepartmental document. Furthermore, the Charter is interpreted differently by each government department according to its unique implementation plan. The Victims' Charter *per se* seems to have more status than the VEP, as it has already been approved by cabinet. It still needs to be adopted by Parliament.¹³⁶ The rights contained in the Victims' Charter come into play only when a victim intends to make use of the criminal justice system, despite the definition of a victim that stipulates that a person is a victim even if the perpetrator is not apprehended. It appears that this definition defines a person as a victim without rights according to the Minimum Standards of the Victims' Charter. The reasoning behind this statement can be found in the fact that the role of the state only comes in-to play

134 Frank 60.

135 Frank 61.

136 Once adopted, the Charter will become part of legislation and thus enforceable.

after a crime has been reported.¹³⁷ Not every sexually abused child reports the crime. It is stated by Delmeiren, that there is a general belief within the country that most rape cases go unreported because of the stigma and shame attached to it.¹³⁸

Vulnerable children therefore cannot make use of any services offered or seek recognition of their rights stipulated in either the Victims' Charter or the Minimum Standards and has no right to seek compensation from the state. According to Vetten, the state still has not stepped up to the plate to expand existing services as mentioned in the Victims' Charter.¹³⁹ The South Africa Law Reform Commission in its report¹⁴⁰ states that the Victims' Charter does not provide a victim of crime with a right to compensation from the state. The only right the victim has to request compensation is from the offender. At the time of the completion of the report the Victims' Charter had not yet been approved by cabinet. The situation in terms of the right to compensation and restitution has still not changed despite the approval by cabinet.

*2.2.5 The Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences*¹⁴¹

The UPVM is a document drafted by the Sexual Offences and Community Affairs Unit within the NPA together with other government departments and the non-government sector. It is a document wherein government departments and the private sector were able to make suggestions to address the needs of victims of crime.¹⁴² The purpose of the document is to set standards that would ensure a high level of service delivery and restore the dignity, self-respect, integrity and

137 Frank 37. In a shadow report on Beijing +15, Criminal Injustice, Violence against Woman in South Africa March 2010 that was compiled by People Opposing Woman Abuse it is stated that the Victims' Charter only speaks to victims' rights as they relate to criminal justice system and the state services offered to victims.

138 Delmeiren 2009 Rape Troubles Nearly All in South Africa www.gallup.com [Date of use 19 May 2012].

139 Vetten 176.

140 Hereafter referred to as SALRC. South Africa Law Reform Commission Report 91 Project 82 2004 Sentencing 215.

141 www.npa.gov.za/upvm [Date of use 20 Jan 2013].

142 www.npa.gov.za/upvm 2 [Date of use 20 Jan 2013].

safety of victims.¹⁴³ The UPVM's definition of what a victim is has been borrowed from the Victims' Charter. The document does not replace the Victims' Charter or the VEP but rather compliments them. The reason why the UPVM was created was to accommodate for the absence of a framework in the Victims' Charter for the regulation of services provided by service providers such as NGOs.¹⁴⁴

Government realises that there should be a 'victim-centred approach' and in order for this to materialise government undertakes to uphold and protect the rights of victims of domestic violence and sexual offences as they engage the criminal justice system.¹⁴⁵ If government fails in doing so it might lead to secondary victimisation.¹⁴⁶ It happens too often that complainants either do not report the crime or withdraw cases once they come in contact with the criminal justice system.¹⁴⁷ To prevent this from happening it is the mission of the UPVM to create uniformity in service delivery in order to *inter alia* address the issue of secondary victimisation and ensure effective service delivery to victims.¹⁴⁸

The UPVM sets out obligations, objectives and standards to guide a victim through the criminal justice system and in the process empower victims with information and support victims.¹⁴⁹ The UPVM recognises the importance of meeting the rights of children as set out in the *Constitution* and legislation as well as the role international law plays as far as it relates to the protection of the rights of children and women.¹⁵⁰ The UPVM contains objectives¹⁵¹ and a set of

143 www.npa.gov.za/upvm 2 [Date of use 20 Jan 2013]. Also see www.victimsupport.issafrica.org 131 [Date of use 15 Jan 2013] which the authors reiterate the purpose of the UPVM document to address the "accountability and professionalism" of government departments and NGOs.

144 www.npa.gov.za/upvm 1 [Date of use 20 Jan 2013].

145 www.npa.gov.za/upvm 3 [Date of use 20 Jan 2013].

146 www.npa.gov.za/upvm 3 [Date of use 20 Jan 2013]

147 www.npa.gov.za/upvm 3 [Date of use 20 Jan 2013]

148 www.npa.gov.za/upvm 3 [Date of use 20 Jan 2013].

149 www.npa.gov.za/upvm 3 [Date of use 20 Jan 2013].

150 www.npa.gov.za/upvm 4 [Date of use 20 Jan 2013].

151 www.npa.gov.za/upvm 5 [Date of use 20 Jan 2013]. The objectives of the UPVM are promoting the education of victims in relation to their rights and responsibilities; promoting the education and awareness of service providers in relation to their duties and the legal process; promoting an attitudinal change in the treatment and understanding of these victims and addressing the gender imbalances; empowering victims to make informed decisions; further entrenching the need to uphold and promote the rights enshrined in the *Constitution* so as to instil confidence in the criminal justice

minimum standards for service delivery.¹⁵² Specific standards set out in the UPVM will be looked at as far as it relates to the purpose of this study.

Standard I, section 1.02 states:

Service providers shall ensure that all victims receive equal treatment according to their specific needs, inclusive of equal access to medical, legal and social services.¹⁵³

The standard places a duty on a service provider to see to it that a victim of a sexual offence receives equal treatment as set out in the section. Neither the section nor the document, however, refers to what social service ought to be provided to a victim. The service provider can either be the NPA, SAPS, a crisis centre such as the Thuthuzela Care Centres and/or NGOs such as Khulisa Social Solutions, NICRO etcetera. It is unclear which service provider should be held accountable for ensuring that services are rendered to victims. The document does not cater for steps that should be taken in case of non-compliance of the obligation placed on a service provider.

system; bringing qualitative uniformity to these services and providing equal access to services.

152 www.npa.gov.za/upvm 6-13 [Date of use 20 Jan 2013]. The minimum standards of the UPVM states that service providers shall not discriminate against any victims on any of the following grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth in or out of wedlock; service providers shall respect the dignity of the victim; service providers shall uphold the victim's right to privacy; service providers shall uphold and respect the victim's right to freedom and security of the person; service providers shall ensure that the best interests of victims are taken into consideration when referring to a registered therapist; service providers shall strive to eliminate secondary victimisation; service providers shall inform victims about the justice processes, cycle times of cases, the victims' rights, roles, responsibilities and/or opportunities to participate in all processes; service providers shall inform victims of services available and relevant to the victim in order to provide a holistic victim support service; service providers shall ensure that information provided by the victim is recorded and/or processed appropriately and at all times maintain the integrity of such information; service providers shall uphold an applicable code of ethics and conduct; service providers shall ensure that there are victim-safety measures in places; service providers shall promote knowledge and skills development; service providers shall implement mechanisms for monitoring and evaluation as determined by an authorised governing body; service providers shall satisfy all requirements imposed on them by this document; service providers shall seriously, expeditiously and without reprisal address concerns and complaints by victims about any of their services; all service providers shall, where applicable, adhere to the procedures and guidelines, as set out in their respective policies or instructions, laws, the Service Charter for Victims of Crime and the Minimum Standards attached thereto and the Victim Empowerment Policy and Minimum Standards attached thereto and other relevant policies when providing Victim Assistance and Preparation (VAP) services.

153 www.npa.gov.za/upvm 7 [Date of use 20 Jan 2013].

Standard II, section 2.04 states:

Service providers shall improve the self-esteem and confidence of the victim.¹⁵⁴

It creates an obligation that is placed on a service provider without clearly defining either the obligation or the right. The UPVM concentrates on a victim's rights within the criminal justice system.¹⁵⁵ The self-esteem and confidence that a victim should have according to this standard is only applicable as far as it concerns the criminal justice system. It negates the purpose of empowering victims irrespective of whether or not they report a sexual offence. Neither the section nor the document stipulates what should be done to improve the self-esteem of a victim. It is submitted that the section is essentially meaningless.

Standard IV, sections 4.04 and 4.05 states:

Section 4.04 Service providers shall, where it is evident that the victim requires professional counselling and/or therapeutic services not provided for by that service provider, uphold and respect the victim's right to mental and psychological integrity by referring the victim to the relevant registered role players(s). Section 4.05 where a service provider has referred a victim as per clause 4.04, such service provider shall ensure a follow through of such referral.¹⁵⁶

The professional assistance is in the form of counselling and/or therapy and the purpose of rendering the service is to ensure that the victim's right to mental and psychological integrity is addressed. It further places an obligation on the service provider not to only refer the victim where necessary but to see to it that it is followed through. Standard IV should have been ground-breaking and long-awaited news for victims that wanted help but had no access to such help. However, the sections are not beyond critique. Again the UPVM functions within

154 www.npa.gov.za/upvm 7 [Date of use 20 Jan 2013]. As stated, it is the responsibility of not only the state departments but also NGOs to adhere to the UPVM. It was mentioned that part of the reintegration is to assist in the recovery of a victim's emotional and psychological wellbeing. See Chapter 1 in this regard.

155 Frank 3.

156 www.npa.gov.za/upvm 8 [Date of use 20 Jan 2013].

the criminal justice system. The services rendered to victims are limited to those victims that choose to get involved in the criminal justice system. If a victim makes use of the services it will undoubtedly have consequences.¹⁵⁷ Yet again, there is no indication as to what steps can be taken by a victim when a service provider does not adhere to the obligations set out in the standard.

Standard V, sections 5.01 and 5.02 states:

Service providers shall ensure that the best interests of victims are taken into consideration when referring to a registered therapist.

Section 5.01 Service providers shall at all times, take the therapeutic needs of the victim into consideration

(a) In doing so:

(i) The impact of the provision of therapy on a potential criminal proceeding, must be taken into consideration

(ii) The consequences for the victim either proceeding with the therapy or deciding not to must be taken into consideration.

(b) Therapeutic services by professionals must be registered with the relevant authority/professional council.

Section 5.02 Where a decision to refer a victim has been made, the following should be considered.

(a) The likely consequences for the criminal trial in these instances;

(b) That these cases are dealt with expeditiously;

(c) The qualifications and/or expertise of the persons that would be conducting the professional service.

(d) Safeguarding the confidentiality of the information forthcoming from the professional service provider, taking into account the rights to fair trial of an accused and that the accused and the court should be made aware of information that may undermine the prosecution's case or assist the defence.¹⁵⁸

The sections stipulate some of the consequences that might exist if a victim decides to avail him/herself of the services. The sections do not indicate the purpose of the referral. Victims are usually referred to professionals in order to obtain a victim-impact report, a forensic assessment report, or a competency report.¹⁵⁹ None of these reports contain information regarding any therapy the victim may receive. The victim-impact report usually contains information as to what influence the crime had on the victim. The report is used during the

157 The consequences will be addressed in standard v and standard viii.

158 www.npa.gov.za/upvm 8 [Date of use 20 Jan 2013].

159 Mnisi 2010 *Social Work Competency Report* 1.

sentencing phase of the court proceedings. The defence and the court are entitled to have access to the report and the victim is once again exposed to secondary victimisation.

Standard VIII, section 8.01 and section 8.03 states:

Section 8.01 Service providers shall inform victims of legal, medical, social, psychological services and safety mechanisms and other professional services available to the victim. Section 8.03 Service providers shall inform the victim of the importance of accessing and utilising legal, medical, social, and psychological or other professional services whenever the need for referral to such services arises.¹⁶⁰

Currently, no implementation plan is in place to ensure that service providers adhere to the obligation placed on them by the standard. The obligation again is only applicable to those that choose to approach the criminal justice system for assistance in order to benefit from any services. The services that are supposed to be accessible to victims are defined in neither the standard nor the UPVM document. It is uncertain who is supposed to deliver the professional service and who determines when it is necessary for a referral.

Standard IX, section 9.03 states:

Section 9.03 Service providers shall, when assessing the victim's needs, take into account all relevant information such as amongst others referral for professional counselling and using the victim as a witness.¹⁶¹

It appears that the section concentrates on what a service provider should take into consideration when receiving information regarding a victim. An example of such a consideration would be using a forensic assessment report to determine whether a victim will be able to testify in a trial matter. Such a report, however, would not assist a victim to socially reintegrate. The report would only assist prosecution in deciding whether or not to proceed with the criminal matter.

160 www.npa.gov.za/upvm 10 [Date of use 20 Jan 2013].

161 www.npa.gov.za/upvm 10 [Date of use 20 Jan 2013].

The UPVM is still in its draft phase and deals only with sexual offence and domestic violence cases as far as it relates to court proceedings.¹⁶² The UPVM applies to the criminal justice system as well as to all service providers and seeks to hold the government departments and NGOs accountable.¹⁶³ Although the UPVM, for purposes of this study, specifically addresses sexual offence cases, it has to be borne in mind that it is an initiative by the NPA of which the core function is prosecution of cases. It attempts to address the needs of victims of crime by stipulating their rights on the one hand and giving them responsibilities on the other. It appears that before a right can come into play the victims should first take action by informing the relevant government department about their loss, damage or injury. It does not address the state's responsibility to ensure that a child that falls victim to a sexual crime receives adequate treatment on state's cost. The purpose of the treatment is to ensure social reintegration. The implementation thereof, however, is shifted to service providers that are mostly NGOs.¹⁶⁴ The UPVM cannot be enforced as it is not part of legislation. The UPVM lacks uniformity and consistency in the provision of services.¹⁶⁵ The NPA attempts to determine therapeutic services on the grounds that such services may interfere with the evidence of the child.¹⁶⁶ This indicates how the interests of the criminal justice system take precedence over the victim's interests.¹⁶⁷

2.2.6 One-stop centres

One-stop centres have been established across the country and some of them are known as the Thuthuzela Care Centres.¹⁶⁸ This can be seen as the state's attempt to address the recovery process of the victims. These centres provide services to victims in one facility.¹⁶⁹ The aim of the centres is *inter alia* to reduce

162 Frank 3.

163 Frank 27.

164 Hargovan 118.

165 Vetten 177.

166 Vetten 186.

167 Vetten 186.

168 The first Thuthuzela Care Centre was established in July 2000 at the GF Jooste Hospital in Cape Town. See www.hrw.org/reports/2003/84 [Date of use 7 Aug 2013].

169 Waterhouse 2008 *The Impact of Changing Criminal Justice* 20.

secondary trauma for victims.¹⁷⁰ The Thuthuzela Care Centres are headed by the NPA under the supervision of the Sexual Offences and Community Affairs Unit.¹⁷¹ Thuthuzela Care Centres deliver a medico-legal service to victims.¹⁷² Part of the service is to examine the child victim and provide treatment if necessary after a case has been reported.¹⁷³ A Victim Assistance Officer attends to a victim to ensure he/she receives information regarding the criminal and medical procedure and treatment and has a mandate to keep in contact with service providers that assist the victims.¹⁷⁴ These services are available to the victims 24 hours a day.¹⁷⁵ Children receive immediate crisis counselling from councillors at the centre.¹⁷⁶ From the information provided it seems that assistance is only rendered once the victim or his/her family decides to report the sexual crime. It further appears that counselling is given upon arrival of the victim at the centre and that follow-up counselling or therapy is only given upon receiving a referral letter.¹⁷⁷ Furthermore, it seems an overlapping of services occurs, because consultation is done by SAPS, member of Thuthuzela Care Centre as well as the prosecutor that will be dealing with the criminal case.¹⁷⁸ It has also been argued that the counselling victims do receive at hospitals are often limited to urban areas. A factor that may play a role is that most victims are from a rural area and are too poor to afford transport.¹⁷⁹

2.2.7 Court-ordered compensation

The *Criminal Procedure Act* 51 of 1977 is indeed an act and forms part of our legislation. Unlike the VEP, Victims' Charter and UPVM, it can be enforced by a court of law. Reference was made to section 297 and section 300 of the CPA in this study. Section 297 relates to the passing of sentence whereby the court may

170 www.unicef.org/southafrica/hiv_aids_2 [Date of use 6 Aug 2013].

171 www.npa.gov.za/tcc_5 [Date of use 20 Jan 2013].

172 Mullick *et al* 2010 *Women and Sexual Violence* 55. Medico-legal services, includes services from medical doctors, social workers, prosecutors and councillors.

173 www.unicef.org/southafrica/hiv_aids_2 [Date of use 6 Aug 2013].

174 Reyneke and Kruger 2006 *Sexual Offences Courts* 83.

175 www.npa.gov.za/tcc_5 [Date of use 20 Jan 2013].

176 Waterhouse 20-21.

177 www.npa.gov.za/tcc_6 [Date of use 20 Jan 2013].

178 www.unicef.org/southafrica/hiv_aids_2 [Date of use 6 Aug 2013].

179 Van der Merwe 2007 *Addressing Victims' Harm* 393.

conditionally or unconditionally postpone or suspend the sentence. The court cannot apply section 297 in offences where the law prescribes a minimum sentence for example in rape cases.¹⁸⁰ Section 300 deals with compensation orders wherein a court may upon application from the prosecutor order an offender to pay compensation for loss or damage of property caused to the complainant.

The *Criminal Law Amendment Act* deals with prescribed minimum sentences for certain offences.¹⁸¹ The minimum sentence for raping a child under the age of 16 years, depending on the circumstances of each case, could be life imprisonment if the court cannot find any substantial and compelling circumstances to deviate from the prescribed minimum sentence. The *Criminal Law Amendment Act* also refers to section 297 of the CPA. Section 51 (5)(a) of the *Criminal Law Amendment Act* states as follows:

The operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the *Criminal Procedure Act* 51 of 1977.

Notwithstanding the provisions of section 297 of the CPA, the *Criminal Law Amendment Act* specifically excludes imposing the provisions of section 297 of the CPA. In fact it makes use of the word 'shall' which places an obligation on the courts.¹⁸²

The Act states that an order made by a court in terms of section 300 would have the same effect as a civil judgment.¹⁸³ The court may make an order on request

180 S297 of the CPA deals with conditional or unconditional postponement or suspension of sentence, and caution or reprimand. The court may only impose such a sentence in regard to offences where there is not a prescribed minimum sentence. The court may only impose a sentence in terms of section 297 for a maximum period of five years. One of the conditions for the sentence may be that the offender should pay compensation to the victim or render a service to the victim. If the court sentenced an offender on an offence where there is a prescribed minimum sentence the court may only suspend part of the sentence for a maximum period of five years.

181 Ss51 and 52 of 105 of 1997.

182 The only exception is if the offender was at the time of committing the offence, 16 years or 17 years old. Even then the court may only suspend a part of the sentence as long as it is not more than half of the sentence.

183 S300(3)(a) of the CPA.

of the injured person or the prosecution that acts on behalf of the injured person.¹⁸⁴ The order would be a pecuniary reward.¹⁸⁵

The *Criminal Law (Sexual Offences and Related Matters) Amendment Act* makes no reference to either compensation for victims of crime or to restitution. It is, however, an offence to gain financial or other reward, favour or compensation from exploiting children sexually.¹⁸⁶ The court must take into consideration the fact that a convicted offender benefitted financially from the sexual exploitation of children as an aggravating factor when passing sentence.¹⁸⁷ The court, however, cannot seize the financial gain from the convicted offender and order that it be paid over to the victim.

In the matter *Van Zijl v Hoogenhout* 2005 2 SA 93 (SCA)¹⁸⁸ the 4 plaintiffs sought damages from their uncle who sexually abused them. The damages were for mental illness, psychological disturbance and other injuries sustained as a result of the childhood abuse. Even though the court a quo found that the plaintiff was sexually abused by her uncle the court did not grant the order in light of the *Prescription Act* 18 of 1943.¹⁸⁹ Due to the fact that the court a quo did not grant the order they had to approach the Supreme Court of Appeal¹⁹⁰. However, the SCA held that there is a difference between child sexual abuse cases and ordinary damages. The SCA was willing to make an exception by "re-contextualising prescription laws through the constitutional prism of the Bill of Rights".¹⁹¹ It therefore entails that the prescription begins once the complainant becomes aware of the fact that she is not to blame for the sexual assault but indeed the perpetrator. In the above-mentioned case the plaintiffs had to

184 S300(1) 51 of the CPA.

185 The order would be for the convicted offender to pay compensation to the injured person for damages to or loss of property (including money). The court has discretion whether or not to grant the application. The amount would be determined by the court after hearing evidence on the application.

186 S17 32 of 2007.

187 S56(7) 32 of 2007.

188 *Van Zijl v Hoogenhout* 2005 2 SA 93 (SCA) 94.

189 S3 of 18 of 1943. The claim expired three years after she attained majority.

190 Hereafter referred to as SCA.

191 Taylor 2005 *Removing the Prescription Blindfold* 241.

approach a civil court for compensation and had to do so at own cost.¹⁹² This avenue would not be available to all sexually abused children but only to a privileged few that can afford to seek compensation from the offender himself. The judgment assists victims that often do not disclose immediately.

Section 3 (d) of the *Probation Services Act* 116 of 1991¹⁹³ as amended by Act 35 of 2002 stipulates as follows:

The Minister may, in respect of different categories of persons, establish or cause to be established programs or services which are aimed at (d) The assessment, care and treatment, support referral for and provision of mediation in respect of the victims of crime;

It therefore appears that the *Probation Services Act* provides some legislative basis for the treatment of victims of crime.¹⁹⁴ The SALRC was of the view that this act does not provide for victims of crime in a comprehensive way and suggested that the Act be supplemented.¹⁹⁵ They argued that the role government ought to play in establishing a victim compensation scheme should be clearly identified and addressed. The SALRC recommended that a comprehensive package be adopted to deal with the needs of victims of crime.¹⁹⁶ No special or additional information is provided to specifically address the needs of sexually abused children. The *Probation Services Act* consequently does not address the needs of compensation to children whose constitutional right not to be sexually abused, have been violated.

192 See *N v T* 1994 1 SA 862 (C). The plaintiff instituted a claim against the defendant after he had raped her 8 year-old girl. She claimed for emotional and psychological injuries for herself being the biological mother of the child as well as for the child. The court found that the child did not only suffer physical injuries but also severe emotional and psychological injuries. The application was granted and defendant ordered to pay both claims. The case is a further example of the courts' willingness to grant compensation to abused children as in the Van Zijl case. The actions taken by the plaintiffs, however, were out of their own accord and they, again had to approach the civil courts.

193 116 of 1991.

194 Report 91 Project 82 2004 Sentencing 56.

195 Report 91 Project 82 2004 Sentencing 57.

196 Report 91 Project 82 2004 Sentencing 56-57.

2.3 *Victim Compensation Schemes*

South Africa does not have a victim compensation scheme.¹⁹⁷ In 2001 the South African Law Commission requested the Centre for the Study of Violence and Reconciliation to compile a report in regard to the feasibility of a victim compensation scheme in South Africa.¹⁹⁸ The report concluded that the services available to victims are inadequate and not accessible to all. The services were rendered mainly by NGOs.¹⁹⁹ The report also refers to the VEP and found that the service it delivers is limited to only a certain group of people in a certain area; largely in major cities where professional services are available. They also found that no interconnection exists between policy-making and implementation.²⁰⁰ Reference is made in the discussion paper to other existing state compensation schemes such as the one regulated by the *Road Accident Fund Act 56 of 1996*.²⁰¹ The fund governed by legislation is compelled to pay compensation to injured third parties involved in a motor vehicle accident.

The *Promotion of National Unity and Reconciliation Act 34 of 1995*²⁰² provides for recommendations made by the Truth and Reconciliation Committee to the State President in regard to granting of reparation to people who have been affected *inter alia* by a politically motivated gross violation of human rights between 1960 and May 1994 in South Africa.²⁰³ Reparation could be in the form of "compensation, *ex gratia* payment, restitution, rehabilitation or recognition".²⁰⁴ Despite the fact that the Truth and Reconciliation Committee recommended payments to people that qualified, it was still not a compensation scheme that catered for all victims of crime but rather to a specific group of people during a

197 Von Bonde 192.

198 Discussion paper 97 project 82 15 Feb 2001 Sentencing.

199 Discussion paper 97 project 82 15 Feb 2001 Sentencing 24.

200 Discussion paper 97 project 82 15 Feb 2001 Sentencing 25. Also see reference to Vetten and Motelow 2004 *Creating State Accountability to Rape Survivors* 51.

201 The discussion paper also refers to other schemes such as *The Fund Raising Act*, the South African Defence Force Fund, the Refugee Relief Fund, the State President's Fund and the Social Relief Fund 37. All of these funds are governed by legislation.

202 34 of 1995.

203 Discussion paper 97 project 82 15 Feb 2001 Sentencing 42.

204 Discussion paper 97 project 82 15 Feb 2001 Sentencing 40.

certain period. It is argued that none of the existing schemes focus on compensation for victims of crime.²⁰⁵

What is important to note is that all the schemes are regulated by legislation; therefore it is the state's legal responsibility to ensure that a victim compensation scheme is drafted and promulgated by parliament. It is further argued that the state has an obligation to maintain law and order. Although the state does not act as a 'surrogate' offender, it does at least have a duty to act in kindness towards victims whose constitutional right as guaranteed by the *Constitution*, was violated. By contributing to the compensation of victims, victims might feel that someone acknowledges that the crime was not their fault; they are not to blame, and by receiving compensation it indicates that they were innocent. It would provide them with a sense of empowerment.²⁰⁶ The compensation would then assist them in meeting their needs such as therapy, counselling etcetera.²⁰⁷

A counter argument was also raised as to why the state should once again step up to the plate to provide for yet another group of unfortunates. Cane²⁰⁸ is of the opinion that the question should not be who should benefit from a victim compensation scheme but rather why the state should be responsible for a victim compensation scheme. He argued that the state already provides the citizens with benefits such as medical treatment and access to courts.

205 Discussion paper 97 project 82 15 Feb 2001 Sentencing 40. Also see Von Bonde 188-189. He discusses the judgment in the matter *Azation Peoples Organisation (AZAPO) and Others v The President of South Africa and Others* 1996 8 BCLR 1015 (CC) par 21 wherein the court also dealt with the provisions of the *Promotion and National Unity and Reconciliation Act*. It was asked what recourse do victims have if a perpetrator receives amnesty, because it means that there is not criminal prosecution or civil liability. The Constitutional Court ruled that the state is the primary "grantor of reparation". He is therefore of the view that the court's contention that the state has the duty to provide reparation is an example of state-funded victim compensation.

206 Discussion paper 97 project 82 15 Feb 2001 Sentencing 47.

207 Discussion paper 97 project 82 15 Feb 2001 Sentencing 60.

208 Cane 1993 "Compensation for Criminal Injuries" 250.

In considering what the rationale would be behind the implementation of a compensation scheme the commission examined the legal liability theory, the social contract theory, accountability theory and the utilitarian theory.²⁰⁹

An ideal theory would be a combination of all the above.²¹⁰ The purpose of a scheme should primarily be to attempt to restore a victim in the same position he/she was before he/she became a victim of crime. For purposes of this study, the golden rule would be to determine what would be in the best interests of the child and specifically for a sexually abused child.

The fact of the matter is that the state has an obligation towards children as stipulated in the *Constitution*. The state cannot be held accountable for the crime that was committed to the sexually abused child but needs to be accountable for failing to protect that right and needs to be responsible for restoring that right. It was recommended in the discussion paper that a pilot-targeted compensation scheme be implemented.²¹¹ However, this never materialised. In the follow-up report by the SALRC the commission does not even consider a compensation scheme but concedes that there should be some assistance for victims of crime.²¹²

209 Discussion paper 97 project 82 15 Feb 2001 Sentencing 47. Legal liability theory: this approach is based on the assumption that the State has a legal duty to compensate victims for all damages and losses suffered as a result of the commission of an offence because the State is considered responsible for allowing the crime to be committed. Social contract theory: this theory is founded on the philosophy of moral duty and in terms of this approach victims of violent crime have the privilege of receiving compensation as opposed to the right. Compensation is granted on the grounds of sympathy, goodwill and humanitarian reasons because the State cannot be held liable for all crimes. Accountability theory: this theory would argue that the State makes contributions available to victims of crime and, in so doing, a partnership is formed with the State in combating crime. The best analogy for understanding this approach is that of an insurance scheme whereby the population pay taxes as their assurance and the state offers compensation in return. To try to reduce pay outs, the State attempts to maintain a society with minimal crime, and the citizens, in turn, act responsibly to keep their tax payments to a minimum. Utilitarian theory: this theory argues that the successes of a compensation scheme will benefit the judicial system and, therefore, assist in restoring relationships within the community. The victims know compensation is available and will, therefore, co-operate with the criminal justice system and may even get involved in combating crime.

210 Von Bonde 186. According to the author the social contract theory is internationally supported while in *Carmichele v Minister of Safety and Security and Another* 2001 10 BCLR 995 (CC) the court favoured the legal liability theory.

211 Discussion paper 97 project 82 15 Feb 2001 Sentencing 202.

212 Report 91 Project 82 2004 Sentencing 80-82.

A report was compiled by the SALRC in April 2004.²¹³ It deals mostly with the same issues as the discussion paper but added two possible draft bills. The SALRC was of the opinion that the rationale behind a victim compensation scheme was the following:

Particular emphasis is beginning to be placed on the need to restore victims to a position comparable to that which they occupied prior to their victimisation. This is part of a more general need to empower and support victims and to recognise and address their particular needs. Proposals to restore victims to their prior positions often include reference to the payment of compensation as a way to compensate them for the wrong done to them both materially and symbolically. Such proposals, which are based on similar programmes in other parts of the world, include references to the need to establish a Victim Compensation Scheme in SA, through which the state would offer financial compensation to victims or their dependents for the harm done by offenders.²¹⁴

It appears from the SALRC's expectations that they lean more towards a social contract theory wherein the state is not seen as the villain but in conjunction with the victim build a partnership towards the healing process of the victim. If the state follows the social contract theory, not all victims of crime will benefit from a victim compensation scheme. This will not be in line with the rights entrenched in the *Constitution*. The SALRC concludes by saying that indeed there is no legally recognised right to compensation from the state.²¹⁵ The only right to compensation is from the offender and only after he/she has been convicted. The only other solution is to make use of the civil court.

From this study and statistics it appears the right to be protected against abuse is violated. The experience of being a crime victim can be highly intense, touching all areas of life.²¹⁶ Victims need answers to questions such as why the offender decided to rape him/her. The psychological effects may be more

213 Report 91 Project 82 2004 Sentencing.

214 Report 91 Project 82 2004 Sentencing 10.

215 Report 91 Project 82 2004 Sentencing 11.

216 Zehr 1990 *Changing Lenses* 24.

serious than the physical loss.²¹⁷ Victims need to express their feelings and need to know that their emotions are being validated.²¹⁸ Zehr states that:

Being victimised by another person generates a series of needs which, if met, can assist in the recovery process. For the unattended victim, however, healing may be very difficult and incomplete.²¹⁹

A victim therefore needs more than just retribution but needs to heal from the injustice that has been done to him/her. Part of the healing process is to be heard and to express emotions. Children do not have the power to express themselves. They rely on adults to help them. Children are dependent on adults and the smaller they are, the greater the obligation on the adult to protect the child.²²⁰ According to Spies "time does not cure the effects of sexual abuse on children but rather the way their healing process was facilitated".²²¹ It is the viewpoint of authors such as Spies and Zehr that victims need more than a court process.²²² To be involved in the criminal justice system might lead to further trauma.²²³ Alternative measures must be looked at to help sexually abused children to be socially reintegrated. From this study it seems that the state is failing child victims not only in regard to protecting their rights not to be abused but also in assisting them to restore their rights once it has been violated. There is currently no legislation in place to hold the state accountable for social reintegration of sexually abused children. Vetten and Motelow conclude by stating:

Policies and laws intended to advance women's gender interests are nothing but paper promises if public officials cannot be held accountable for ineffectual implementation.²²⁴

The state's response to the sexual abuse of children remains 'knee-jerked' and resulted in poorly planned processes.²²⁵ Van Niekerk suggests that more

217 Zehr 25-26.

218 Zehr 27.

219 Zehr 29.

220 Spies 2009 *Restorative Justice* 15.

221 Spies 22.

222 See Louw 2000 *Child Sexual Abuse* 24. Louw suggests intervention plans to assist children that have been sexually abused and advocates a multidisciplinary approach.

223 Van Niekerk 264.

224 Vettten and Motelow 51.

emphases should be placed on programs that assist sexually abused children. She further recommends that therapy needs to be offered to abuse children.

2.4 Conclusion

A child's constitutional rights to be protected against sexual abuse are defined in section 28(1)(d) of the *Constitution*. Subsection 2(b) of the *Children's Act* provides the same protection. A child has a right to be protected against abuse and that right has been violated because the child was raped or sexually violated.

Even though the sexually abused child has the right to be protected against abuse, the right to be socially reintegrated is not stipulated by the legislature and therefore it appears to be a meagre attempt on the part of the legislature to guarantee such a right. A child needs to be part of the criminal justice system before he/she can request a compensation claim in terms of the CPA. The latter cannot be applicable in matters where the child is a victim of a sexual offence as stipulated in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* and the *Criminal Law Amendment Act*.²²⁶

Legislation was analysed to determine whether any remedies are available for sexually abused children to compel the state to assist them in their recovering process. The CPA, the *Criminal Law Amendment Act* and the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* were critically scrutinised in order to find suitable answers for the shortcomings in the *Constitution* and the *Children's Act*. Nowhere is it stated in the CPA, *Criminal Law (Sexual Offences and Related Matters) Amendment Act* or in the *Criminal Law Amendment Act* that a child has the right to be protected against sexual abuse. The *Criminal Law (Sexual Offences and Related Matters) Amendment Act* does not provide for compensation, restitution or any physical, mental or

225 Van Niekerk 2003 *Failing Our Future* 11.

226 Also see Report 91 Project 82 2004 Sentencing 48.

psychological treatment for a sexually abused child, either by the offender or by the state.

The *Criminal Law Amendment Act*, however, specifically states that no order shall be imposed in terms of section 297 where an offender was found guilty of contravening an offence as stipulated in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* where section 51(1) of the *Criminal Law Amendment Act* is applicable. A section 300 order does not assist a sexually abused child. In matters where the child was raped, the *Criminal Law Amendment Act* prescribes a minimum sentence. The offender would therefore not be in a position to pay any compensation towards the social reintegration of the sexually abused child. In most cases the convicted offender does not have the means to pay compensation.²²⁷ No mention is made of the state's responsibility towards compensation to children's social reintegration who fall prey to sexual abuse. It appears that legislation does not provide any mechanism for a child to seek help from the state to assist them in their recovering process.

Other resources were investigated to find out if a child has any remedy to compel the state to assist him/her with the reintegration process through compensation. Policies, charters and programs were analysed. In this chapter the VEP, Victims' Charter and the UPVM were investigated.

The VEP is a program that is run by Department of Social Development and is still in draft. It therefore cannot be enforced by a court of law. The Victims' Charter is run by Department of Justice and Constitutional Development. It has been approved by cabinet but still needs to be adopted by parliament. It too has no status. The UPVM is a brain child of the NPA and has no legal status. The VEP, Victims' Charter and the UPVM are documents that bind interdepartmental organisations and in some cases service providers such as NGOs. None of

227 Report 91 Project 82 2004 Sentencing 63.

these documents are enforceable as it does not form part of legislation. The SALRC rightly noted that the VEP is doomed to fail without a legislative basis.²²⁸

Although centres such as the Thuthuzela Care Centres provide rape victims with counselling they only provide their services once the case has been reported. According to Van Niekerk, Childline's research found the following:

Childline's research indicates that male victims of childhood abuse and neglect are more likely to develop abusive behaviour during both child and adulthood.²²⁹

From this research abused children do suffer from the harm that was done to them. This staggering conclusion makes it even more imperative for abused children to receive therapy as soon as possible. In their report the SALRC stated that the services that are available to victims of crime are "limited, fragmented, uncoordinated, reactive in nature and therefore ineffective".²³⁰ They argued that the reason for this conclusion was because either services overemphasised a certain group of people for example woman or it was not accessible to all for example to rural areas. They concluded that the result of poor service delivery violence themselves. Regrettably it appears from the report that victims do not receive adequate support thus they remain traumatised.²³¹

It was mentioned that the rationale behind the existence of a victim compensation scheme should be based on one of the theories as discussed. The SALRC is of the view that victims do need assistance in some way or another and especially in instances where the perpetrator could either not be identified or where the offender could not be traced. It would then be expected of the state on compassionate and moral grounds, to compensate those victims²³². Their reasoning fits in with the so-called social contract theory.²³³

228 Report 91 Project 82 2004 Sentencing 277.

229 Van Niekerk 16.

230 Report 91 Project 82 2004 Sentencing 266.

231 Report 91 Project 82 2004 Sentencing 4, 266 and 353.

232 Report 91 Project 82 2004 Sentencing 278-279.

233 Report 91 Project 82 2004 Sentencing 278.

Even though there are policies, charters, programs, legislation and care centres in place in South Africa, they do not provide sufficient professional service to sexually abused children in order to enable them to return to their communities as a whole person again. According to the SALRC the likelihood of a victim of crime fund ever being established is very remote due to limited financial resources.²³⁴ Other avenues should be explored as well. NGOs and the private sector already play an important role in providing services to and on behalf of the state. It is submitted that, as part of the state's responsibility to provide non-pecuniary compensation to victims, the state can through legislation delegate their responsibilities including funding to NGOs that will in return provide the necessary support services to victims. According to the SALRC one should also explore international experiences in searching for an answer relating to a victim compensation scheme:

Whilst South Africa has experience in the sphere of awarding compensation to victims, none of this experience focuses directly on compensating victims of crime. International experience is, therefore, instructive in understanding different approaches to the basis for, and consequences of, providing compensation to crime victims specifically.²³⁵

In the next chapter international law will be looked into in the search for solutions to see whether South Africa is not bound to what is stated in the international law. Section 39(1)(b) of the *Constitution* stipulates that a court, tribunal or forum must consider international law.

Even though international instruments will be examined it still needs to harmonise with the provisions of the *Constitution* and legislation of South Africa. Again, a crucial point to bear in mind is that the best interests of a child are of utmost importance when considering any issue relating to a child.

234 Report 91 Project 82 2004 Sentencing 32.

235 Report 91 Project 82 2004 Sentencing 50.

CHAPTER 3: ASPECTS OF INTERNATIONAL LAW

3.1 Introduction

Section 39(1)(b) of the *Constitution* specifies that a court, tribunal or forum must consider international law. However, in considering international law the court must still promote the purport, spirit and object of the Bill of Rights.²³⁶ In line with these provisions in the South African *Constitution* it is further stated in section 233 of the *Constitution* that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

The *Constitution* consequently lays an obligation on the courts, tribunals and forums to consider international law but only in as far as it is consistent with the provisions of the *Constitution* and simultaneously must promote what the Bill of Rights embodies.²³⁷ In the *Makwanyane* case for example, the court depended on international human rights instruments to substantiate their judgment.²³⁸ The court therefore not only considered international law as required by section 233 of the *Constitution* but also applied it.

The CRC²³⁹ and the ACRWC²⁴⁰ will be evaluated as far as it relates to the purpose of this study. These instruments are some of the guidelines in the search to establish whether South Africa adheres to international and regional standards. The possibility will be explored as to whether any international and

236 S39(2) of the *Constitution*.

237 It should be borne in mind that s231(2) and s231(3) of the *Constitution* states that international agreements bind South Africa only after it has been approved by resolution in the National Assembly and in the National Council of Provinces except if the agreement is of a technical, administrative or executive nature and need not be ratified or accessed. It still, however, needs to be tabled in both the Assembly and the Council within a reasonable time.

238 *S v Makwanyane and Another* 1995 3 SA 391 (CC) par 304. See also Von Bonde 197.

239 www.un.org/treaties [Date of use 18 Sept 2012].

240 www.crin.org/treaties [Date of use 18 Sept 2012]; www.acrwc.org [Date of use 18 Sept 2012].

regional treaties²⁴¹ exist that place a legal responsibility on the state to provide compensation in order to see to the social reintegration of sexually abused children.²⁴² South Africa provides for international agreements in the *Constitution*. In terms of section 231(4) of the *Constitution*:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Consequently international law only becomes binding on the country that adopts it once it has been legislated.²⁴³ South Africa follows a dualist approach²⁴⁴ when it comes to the incorporation of international instruments.²⁴⁵ As discussed, section 231 of the *Constitution* requires parliamentary ratification of treaties.

Children were considered to have needs opposed to having rights.²⁴⁶ The adoption of the CRC, however, changed the way in which the world sees

241 Dugard 2005 *International Law* 28. He defines a treaty as a written agreement between states operating within the field of international law.

242 McGlynn 2009 *Rape, Torture and the European Convention* 586. The author interestingly discusses the government of Great Britain's responsibility for rape, particularly by private individuals. She asks the question who constitutes the state and refers to case law wherein it was found that the state is responsible where an individual has raped a person in the capacity as a government official in order to intimidate her and obtain information from her. Although the facts of the case do in essence not contribute to this study it is important to note that a state, in case Great Britain, can be held accountable.

243 See Von Bonde 196-197 wherein he refers to the *Velásques Rodriguez* matter (*Velásques Rodriguez v Honduras, Merits Inter-American Court of Human Rights Series C no 4 judgment on 29 July 1988 par 172-177*) wherein the court states that when a human right has been violated even if not initially by the state but by a private person, the state can still be held responsible. The reason is based on a lack of due diligence for not preventing the violation. Von Bonde argues that the state should be held accountable because of an act of omission and not because of liability towards victims of harm. He further argues an act of omission means that the state fails to protect a victim from harm. He is of the view the manner in which the state can discharge their liability is through pecuniary payment.

244 A dualist approach means that a country such as South Africa needs to incorporate international instruments such as the CRC into its legislation before it becomes binding on the state. See discussion on dualist and monist approaches under 3.2.3.

245 According to Dugard, there are three methods that the legislature may follow in order to incorporate a treaty into municipal laws. The first is to embody the treaty into the text of an act of parliament. The second is to introduce the treaty into a statute or thirdly an enabling act of parliament may give the executive power to bring a treaty into effect in municipal law by means of a proclamation or notice in the government gazette 61.

246 Memzur 2008 *The African Children's Charter* 1.

children.²⁴⁷ According to the *Geneva Declaration of the Rights of the Child* 1924²⁴⁸ there was a need to "extend particular care to the child". Prinsloo concurs by stating that:

Children as a vulnerable group should be protected against the negative effects of the criminal justice system and the trauma associated with giving testimony as well as secondary traumatisation.²⁴⁹

The CRC in its preamble states:

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance²⁵⁰

The CRC came into existence out of need for an international document that would cater specifically for the needs of children's rights. The CRC recognises that children do have rights and articulates these rights. The CRC came into force on 2 September 1990 and consists of 54 articles and two optional protocols.²⁵¹ Part 1 deals primarily with the rights of the children.²⁵² Part 2 deals primarily with the administrative responsibilities of the CRC and the state parties that form part of the CRC.²⁵³ It is regarded as one of the most "comprehensive compilation[s]" of children's rights and is described as the most successful despite the fact that it is only the second youngest of the seven human rights treaties.²⁵⁴ The CRC is a unique human rights treaty as it protects a child's civil, political, economic, social, cultural and humanitarian rights.²⁵⁵

Although there are other human right treaties that cover the same rights as those entrenched in the CRC, the CRC emphasises the rights of the children by

247 Memzur 1.

248 www.un.org [Date of use 18 Sept 2012]. See League of Nations, the Official Journal Special Supplement 21 October 1924 wherein the committee on page 43 indicates the reason for the declaration.

249 Prinsloo 2012 *Rights of Child Victims* 74.

250 www.ohchr.org [Date of use 18 Sept 2012].

251 www.ohchr.org [Date of use 18 Sept 2012].

252 See art 1-41.

253 See art 42-54.

254 Memzur 3.

255 Cohen 1989 *United Nations* 1448.

restating it.²⁵⁶ By signing the CRC in terms of article 46 and also ratifying it in terms of article 47, state parties accept the obligation to respect, protect and fulfil all the rights as stated in the CRC.²⁵⁷ Once ratified, the state party is bound to the provisions of the CRC. The CRC currently comprises 140 signatories and 193 parties which South Africa forms part of.²⁵⁸

The ACRWC does not enjoy the same support as the CRC. After seventeen years since date of adoption, 41 parties have ratified the ACRWC.²⁵⁹ The ACRWC consists of 48 articles. Part 1 deals with the rights and welfare of the child.²⁶⁰ Part 2 deals with establishment and organisation of the committee on the rights and welfare of the child.²⁶¹ In its preamble the ACRWC notes that children do need special safeguards and care due to a child's unique physical and mental immaturity; therefore the child requires legal protection in conditions of freedom, dignity and security.

In considering whether the international community through the use of international and regional instruments such as the CRC and the ACRWC contributes to the protection and enforcement of the rights of abused children, Levesque is of the opinion that:

The international community has failed to appreciate children's basic right to be free from sexual maltreatment and has not addressed the increasing exploitation of children.²⁶²

He is of the view that when one looks at international law, the individual rights of children need to be respected, since sexual use of children violates their right to human dignity.²⁶³ According to him, sexual exploitation can be considered to be

256 Cohen 1450. Also see Lowe 2009 *Human Rights Treaty* 78. Treaties are important as they assist states in their compliance with international standards and acts as a mechanism of review in international human rights systems.

257 Art 3 of CRC. See Cohen 1459.

258 Dugard 62. He states that a treaty that has been signed and ratified but not enacted into local law is binding on South Africa regarding international issues.

259 Memzur 6.

260 See art 1-31.

261 See art 32-48.

262 Levesque 1994 *Sexual Use Abuse* 978.

263 Levesque 978-979.

maltreatment for economic gain by people all over the world.²⁶⁴ Due to the fact that sex tourism involves many countries, it is a necessity to encompass international instruments because international law prohibits sexual exploitation of children.²⁶⁵ It is because of the dilemma faced by sexually abused children that international instruments must take cognisance of a child's right to be protected against sexual abuse.²⁶⁶

The *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*²⁶⁷ will also be looked into as it is considered to be the most noteworthy document dealing with restitution and compensation internationally.²⁶⁸

3.2. United Nation's Convention on the Rights of the Child (CRC)

The CRC as an international instrument was signed by South Africa on 29 January 1993²⁶⁹ and was ratified on 16 June 1995.²⁷⁰ It came into force on 16 July 1995.

3.2.1. Obligations on State Parties

When South Africa ratified the CRC they did so with the child's welfare as their main priority.²⁷¹ The CRC places an obligation on South Africa, being a state party to the CRC, to take steps either through legislation or administratively to

264 Levesque 959.

265 Levesque 981. He indicates that all nations should agree to the prohibition of sex tourism but states that "international responses remain inadequate". He adds that even though it may at times be inadequate, the international community has at least recognised that children have a basic human right not to be sexually abused. 996. Although this study does not concentrate on sex tourism it is interesting to note that children's rights to not be exploited in the sex industry are recognised by international treaties. If the state recognises such a right it is argued that the state therefore has a legal obligation to restore the right once it has been violated.

266 Levesque 998.

267 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* General Assembly Resolution 40/34 of 29 November 1985

268 Von Bonde 191.

269 See s46.

270 See s47.

271 Prinsloo 74.

comply with the CRC.²⁷² Article 4²⁷³ of the CRC stipulates this obligation. The implementation of the CRC must be done in accordance with the 'best interests of the child' principle.²⁷⁴ This theory is continuously applied to urge state parties to take account of all interests at stake and that includes "psychological and physical well-being and legal, social and economic interests of the child".²⁷⁵ State parties should then act towards these rights to ensure that children's rights are respected at all times.²⁷⁶

According to Robinson,²⁷⁷ article 4 serves as a general measure of implementation. He cautions that the second sentence of article 4 indicates that the implementation thereof would depend on for example finances and resources of each state party, but notes that article 4 expresses the need for state parties to work collectively.²⁷⁸ As stated in Chapter 2, South Africa protects the rights of children in the *Constitution*.²⁷⁹ According to Davis and Snyman, the purpose of the CRC is to improve victims' right to have access to justice and fair treatment, restitution, compensation and support and to take steps to prevent victimisation linked to abuse of power.²⁸⁰ Memzur, however, is of the view that the purpose of the CRC is to ensure that victims have a right against non-discrimination (article 2), the right to have their 'best interests' be 'a primary consideration' in all actions concerning them (article 3), the 'inherent right to life'

272 Dugard 69-70. He notes that there are several statutes that specifically state that a statute must be interpreted in such a manner that it coincides with international law, for example the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 wherein it states that one should be "mindful" of international law when interpreting the act.

273 www.crin.org [Date of use 18 Sept 2012]. Art 4 stipulates that State parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present convention. With regard to economic, social and cultural rights, the parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

274 Cohen 1450.

275 Prinsloo 85.

276 Prinsloo 85. South Africa through s28(2) of the *Constitution* stipulates "A child's best interests are of paramount importance in every matter concerning the child". See discussion on s28 in Chapter 2.

277 Robinson 2012 *Child Victims of Armed Conflict* 72-73.

278 Robinson 77.

279 S28. Also see Chapter 2. Prinsloo further states that s28 serves as a benchmark for the treatment of any child-sensitive case. He says that courts are bound to the section and must consider it when dealing with any matter where a child is involved. See Prinsloo 74.

280 Davis and Snyman 2005 *Victimology* 5.

(article 6) and the right of a child 'who is capable of forming his/her own views (article 12).²⁸¹

Despite the differences between the authors in their interpretation of the foundation of the CRC, it still appears that there is a corresponding theme that children have rights that the CRC stipulates and needs to be protected by those who are privy to it. The CRC and specifically the articles related to this study will be looked into and discussed.

3.2.2 Article 39 of the CRC

Article 39 of the CRC refers to the reintegration and recovery of a child victim.²⁸² A child is defined as a person under the age of 18 years unless the laws of that country specify a different age.²⁸³ In all actions concerning children, the best interests of the child shall be a primary consideration.²⁸⁴ Children should be protected against *inter alia* sexual abuse while in care of their parents or guardians.²⁸⁵ The protection of children against sexual exploitation and sexual abuse is addressed in the CRC.²⁸⁶

A brief overview of article 19 of the CRC will be looked at as it coincides with article 39 of the CRC. Article 19 relates to the state party to take appropriate measures to protect a child against *inter alia* sexual abuse while in the care of the parents, guardians or others. Article 19 in essence states that the best way of protecting children is by supporting their family.²⁸⁷ It further places a duty on the state to ensure that appropriate measures are taken to establish a framework of support and programs to secure reintegration. However, Levesque is of the view that the approach is "neither predominantly punitive nor does it designate

281 Memzur 3-4.

282 Cohen 1470. For the purpose of this study only article 39 will be critically examined.

283 Cohen 1459. See art 1 of the CRC.

284 Cohen 1459. See art 3 of the CRC.

285 Cohen 1463. See art 19 of the CRC.

286 Cohen 1469. See art 34 of the CRC. It further includes prevention of and the inducement of a child in any unlawful sexual activity; the exploitative use if a child in prostitution or any unlawful practices; the exploitative use of a child in pornography.

287 Levesque 995.

responsibility to a singular state agency".²⁸⁸ It again casts doubt on the implementation value of the provisions of the CRC in countries such as South Africa that follow a dualist approach regarding treaties. There is nevertheless a monitoring system incorporated into the CRC.

3.2.2.1 Interpretation of article 39 of the CRC

Article 39 of the CRC states:

State parties shall take all appropriate measures to promote physical and psychological recovery and *social reintegration* of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.²⁸⁹

Article 39 is not specific but is formulated in general.²⁹⁰ Robinson argues that by formulating the article in broader terms allows for an "accommodation of ideological divisions" between the state parties.²⁹¹ So despite the fact that each party may have a different political point of view they can still agree to the provisions of the article. It is important to note that none of the state parties to the CRC, including South Africa, had any reservations to article 39.²⁹² Robinson again notes that article 39 as well comprises two parts and says that part one relates to the recovery and reintegration of the child victim while part two addresses the environment in which the recovery and reintegration ought to take place.²⁹³ He rightly argues that neither the committee nor the CRC itself defines either the protection that should be provided to a child victim or the manner in which the state party should fulfil their obligation towards the child victim.²⁹⁴

288 Levesque 995. He states at note 2 that the measures should include procedures to establish social programs. The programs must provide support to children as well as to those that must take care of the children. The program must further provide for the identification of abuse, the report and referral thereof and how it should be treated. It is also important to ensure that follow-up treatments should exist.

289 www.un.org/treaties [Date of use 18 Sept 2012].

290 Robinson 46.

291 Robinson 46. He states that art 39 is influenced by various factors because the provisions of the CRC per se cannot be enforced.

292 Nylund 1998 *International Law and the Child Victim* 27.

293 Robinson 79.

294 Robinson 80.

He further argues that in order to ensure psychological recovery and reintegration the "actual experience of the child must be established". He states:

It is self-evident that the child needs a safe environment within which he/she will be able to recover psychologically. Such an environment may be provided by enabling the child to be reunited with his/her family through an alternative environment within which he/she can feel safe.²⁹⁵

The second part of article 39 is thus of great importance to ensure that the first part can be executed. It clearly states that the state party must provide a safe environment and must see to it that the child victim is reintegrated whilst in that safe environment. It is in line with the provisions of article 3 of the CRC.

The CRC, through article 39, places an obligation on South Africa to take appropriate measures to ensure that a child that is a victim of sexual abuse is socially reintegrated in an encouraging environment.

3.2.3 *Comments on the CRC*

In light of the plight many children face, it is no surprise that the CRC is considered to be the most successful human rights treaty with regard to the number of nations that had ratified it.²⁹⁶ The CRC is the first legally binding instrument that incorporates the full range of human rights for children.²⁹⁷ The implementation of the rights contained in the CRC would depend on the system that is in place.

Robinson mentions two possible systems for implementation to wit a monist or dualistic system.²⁹⁸ He explains that in essence it entails that if a state party has a monist approach its municipal system and the international legal system

295 Robinson 83. The sentiments of Robinson was also concurred by Asquith and Turner 2008 *Recovery and Reintegration* 295 wherein they state that the assistance of social workers, counselling of families of child victims and the understanding of what the child victim had experienced is necessary in order to ensure successful implementation of recovery and reintegration programs.

296 Rutkow and Lozman 2006 *Suffer the Children* 162.

297 Seitles 1997-1998 *Effect of the Convention* 166.

298 Robinson 64-69.

constitute one legal order that is mostly similar. Therefore no changes are required when international law is applied on a national level.²⁹⁹ A dualistic approach, on the other hand, entails two independent legal orders. The constitution of a state must expressly authorise the application of international law on a national level. The significance for child victim is that if the state follows a monist approach the victim may enforce his/her rights in terms of the treaty on national level against that specific state.³⁰⁰ In a dualist system, however, it is the legislation of the state that forms the basis for the child's rights and not the CRC as is the case if it is a monist system.³⁰¹

The CRC is not beyond critique. Robinson raises two concerns, namely that many of the rights in the CRC are "moral claims rather than 'juridical' rights and therefore too vague to be incorporated into domestic law."³⁰² The second concern relates to the lack of enforcement of a right in terms of the CRC as state parties are only directed to see to it that, amongst others, appropriate legislation is in place to implement the rights entrenched in the CRC.³⁰³ According to Levesque, the CRC is a welcome attempt to clarify the nature of sexual exploitation and the international duties involved.³⁰⁴ He is of the view that despite the CRC's intention to oblige state parties to take all "national, bilateral and multilateral measures" to fight the struggle against sexual exploitation, the "extensive protections remains unsatisfactory."³⁰⁵ According to Burman,³⁰⁶ the adoption of the CRC in countries where the values of the society are not based on individual but on group rights, can lead to social and legal conflict. It is clear that the CRC has its own challenges. The biggest concern though is that the provisions of the CRC do not *per se* grant a child the right to enforce his/her rights in terms of the CRC against

299 Robinson 66.

300 Robinson 68.

301 Dugard 58-61. The author states that it is unfortunate that South Africa follows a dualist approach because an act of parliament or legislation is required in addition to the ratification for the treaty to be incorporated into municipal law.

302 Robinson 64.

303 Robinson 64 fn 47.

304 Levesque 984.

305 Levesque 984-985. Levesque further argues that although the CRC is a remarkable achievement the CRC's wording is of such a nature that it does not prohibit sexual exploitation where a child would consent to the sexual act or does not prohibit children from becoming prostitutes once they reach the age of sexual emancipation. See 986.

306 Burman 38.

the state in which he/she lives.³⁰⁷ One has to wonder how the provisions of the CRC would assist a sexually abused child that lives in South Africa when a child can only hold the state legally accountable for psychological recovery and reintegration once the state has incorporated article 39 of the CRC into South African legislation. There is unfortunately no indication in legislation or in the *Constitution* of the incorporation of the provisions of article 39.³⁰⁸

3.2.4 Monitoring the CRC

In terms of section 44 state parties undertake to submit written reports to the CRC committee indicating what measures they have adopted to give effect to the rights contained in the CRC. Once a state party has entered into the CRC, its first report must be submitted within two years. Thereafter the state party must submit its reports every five years. This tool is regarded as a teaching tool to explain to children their rights as well as a platform for mobilising people to support and demand justice for the children.³⁰⁹ South Africa's date of entry into the CRC was on 16 July 1995. South Africa submitted their first supplementary CRC report to the CRC committee in 1999.³¹⁰ This was the *first and only* report ever submitted. It is submitted that South Africa is not adhering to the provisions of the CRC in regard to the status of their implementation plans to ensure that legislation is in line with the provisions of the CRC.

The weakness of the monitoring system is that no enforcement mechanism is in place. State parties that do not adhere to the provisions of section 44 do not get penalised. The committee cannot address a petition that they might receive alleging that a state party had violated the provisions of the CRC and so appears to be playing a minor role in the protection and promotion of the provisions of the CRC.³¹¹ The CRC lacks a mechanism of "individual petition" and many countries are behind schedule, having failed to meet their deadline for submitting their

307 Robinson 64, 67, 86.

308 See discussion by Sloth-Nielsen 2002 *Children's Rights in South African Courts* under 3.3.

309 Seitles 168-170.

310 www.crin.org/SA reports [Date of use 18 Sept 2012].

311 Seitles 172.

reports.³¹² Even if countries do submit their reports, the information is often inadequate as well as neutral information regarding the condition of the children's rights.³¹³ In the South African report mention is made of the National Protection Action Committee and the National Child Rights Committee. However, no information on either of these committees could be obtained.

3.3 African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC came into force on 29 November 1999 but was signed by South Africa only on 10 October 1997³¹⁴ and ratified on 7 January 2000.³¹⁵ The ACRWC is not as widely held as the CRC.

3.3.1 Obligations on State Parties

The ACRWC is a regional convention adopted shortly after the CRC. By adopting it, African countries indicated their intention to support the universal cause of children's rights.³¹⁶ It has been questioned what the purpose of the ACRWC is in light of the already existing CRC and if the ACRWC is not just a duplication of the CRC.³¹⁷ The African countries' reason behind the ACRWC is that the latter can address the issues relating to African children better.³¹⁸ The ACRWC, once it has been ratified, is just as binding as the CRC. The ACRWC states in article 1(2) as follows:

Nothing in this Charter shall affect any provisions that are more conducive to the realisation of the rights and welfare of the child contained in the law of a state party or in any other international Convention or agreement in force in that state.

The ACRWC therefore does not attempt to belittle the standard of the CRC but as stated in article 1(2) of the ACRWC the highest protection must be followed.

312 Ramesh 2001 *Inherent Weaknesses* 1948-1950.
313 Van Bueren 1995 *Safe the Children* 384.
314 S47(1) of the ACRWC.
315 S47(2) of the ACRWC.
316 Brems 2001 *Human Rights* 137.
317 Memzur 2.
318 Brems 137.

Despite the fact that the objectives of the ACRWC and the CRC are similar there are, however, a few differences.³¹⁹ Article 1(1) of the ACRWC set forth the obligations of state parties:

Member State of the Organisation of African Unity Parties to the present Charter shall recognise the rights, freedom and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

The ACRWC in its preamble concedes with concern that the situation of most African children remains critical. This can be attributed to their unique factors such as their socio-economic, cultural, traditional and developmental circumstances. Furthermore, hunger, exploitation, armed conflict and natural disasters are factors that necessitate special safeguards and care.³²⁰ The African child's place in the African community is recognised and the child's right to grow up in a family environment that is safe and happy is emphasised. The ACRWC moreover acknowledges that a child requires special care with regard to health, mental, moral and social development in order to meet his/her physical and mental needs.³²¹ The ACRWC recognises which rights a child is entitled to and that a child has a right to protect his/her rights legally. It is submitted that South Africa through the ACRWC has a similar obligation to recognise the rights, protect the rights and restore the rights of sexually abused children.

319 Brems 138-140. She discusses the similarities and differences between the two instruments, for example both refer to the 'the best interests of the child ' in art 4 of the ACRWC and art 3 of the CRC; both define a child in art 2 of the ACRWC and in art 1 of the CRC. However, the ACRWC is the only instrument that refers to the 'protection of the family' in art 18 and to the 'protection against harmful social and cultural practices' in art 21.

320 www.acrwc.org/preamble [Date of use 18 Sept 2012].The ACRWC notes with concern that the rights of an African child have to be looked at differently due to unique circumstances, for example cultural differences.

321 www.acrwc.org/preamble [Date of use 18 Sept 2012]. The ACRWC recognises that an African child has a unique position in its family hierarchy. Also see Van der Zalm 2008 *Protecting the Innocent* 901. The author states that customary law occasionally is in conflict with rights guaranteed in the *Constitution*. She is of the view that those rights relating to Children's rights are more prone to such conflict.

3.3.2 Comments on the ACRWC

Article 2 defines a child as a person under the age of 18 years.³²² Article 4 of the ACRWC, states that in all actions concerning the child, the best interests of the child shall be the primary consideration by any person or authority. Article 4 further indicates that the state and any other person are obliged to the provisions unlike its counterpart article in the CRC.³²³ By using the wording 'the primary consideration' in the ACRWC instead of 'a primary consideration' in the CRC, the ACRWC "elevates its role in the advancement of children's rights".³²⁴ This statement is supported by Skelton³²⁵ wherein she states that the CRC's interpretation competes equally with other rights on the same footing but the ACRWC's interpretation suggests that the principle 'best interests of the child' must be given a "heavier weighting where there are competing rights".³²⁶

Article 4(2) deals with the judicial or administrative proceedings where a child is involved and that child is old enough to communicate his/her views.³²⁷ The fact that the ACRWC acknowledges the right of a child to express his/her views indicates that the ARWC is "sincerely committed to the rights of the child".³²⁸ Chirwa surmises, however, that he is of the belief that article 4(2) are narrowly defined. By using the terminology 'communicating' it could imply that children that can form an opinion but cannot communicate it would not receive the same

322 The equivalent article in the CRC is art 1 that has the same denotation except to add that it depends on whether the law of a specific country stipulates a different age of majority. The definition, however, coincides with the definition stated in the South African *Constitution* under s28(3).

323 Chirwa 2002 *Merits and Demerits* 159-160. Art 3 states that social welfare institutions, courts of law and administrative authorities shall consider the best interests of a child. It therefore refers to the state only.

324 Memzur 18.

325 Skelton 2009 *Fledgling Child Rights* 486.

326 Also see Chirwa 160. He is of the opinion that by using the word 'the' instead of 'a' offers "better protection for children since the best interests principle under the ACRWC is the overriding consideration".

327 The article does not stipulate an age but leaves it up to the authorities to decide whether the child is old enough to verbalise his/her opinion. The equivalent article in the CRC is art 3. However, the latter does not stipulate that the views of a child must be considered. However, it is dealt with in art 12 of the CRC. S10 of the *Children's Act* 38 of 2005 states that a child also has the right to express his/her views and that should be considered. However, it does not attach an age to the child but rather states that the child must be of such an age, maturity and stage development as to be able to participate in the proceedings.

328 Brems 145.

benefit under this article as those who can communicate. In this instance he suggests that article 12 of the CRC is better suited as it states that a child who can express his/her views must be heard.³²⁹ Article 16 of the ACRWC states:

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse.
2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

Article 39 of the CRC bequeaths a child victim with the specific right to physical and psychological recovery and social reintegration after being sexually abused but there is no corresponding article to be found in the ACRWC. Article 16(2) of the ACRWC seems to attempt to address this issue but was formulated in such a way that it does not specifically provide for either recovery and/or reintegration of sexually abused children.

The ACRWC should be seen as an instrument that compliments the CRC instead of being opposed to it.³³⁰ The ACRWC enjoys regional accolade from African countries. It is, however, deplorable that the ACRWC does not receive the same attention as the CRC.³³¹ Unlike the CRC the ACRWC does not contain a "general prohibition of exploitation" or a "general prohibition of torture and cruel inhuman or degrading treatment of children".³³² The ACRWC provides a broader protection when one considers the definition of a child. It entails that all children

329 Chirwa 161. He further states that Article 34 of the CRC uses the terminology 'exploitative' and 'unlawful' whilst these two words are not used in either article 16 or article 27 of the ACRWC. If an action as stipulated in article 34 should not be either exploitative or unlawful, it would imply that a child who gives permission to be part of pornography or prostitution would not benefit from the rights as entrenched in article 34 of the CRC.

330 Olowu 2002 *Protecting Children's Rights* 128.

331 See Sloth-Nielsen 2010 *Running on a Treadmill* 538 wherein she discusses the low reporting of African countries to the ACRWC committee on their initial and first periodic report. 13 countries complied with the provisions of s 43 of the ACRWC.

332 Brems 140. She refers to art 16 and art 17(2)(a) of the ACRWC when it is compared with art 36, art 19 and art 37(a) of the CRC. In her argument she does not consider the articles in the sexual or labour context.

under 18 years of age are protected under the ACRWC unlike the CRC that indicates that it can also depend on each country's legislation as to the age when majority is reached.³³³ Skelton describes the ACRWC as "African child rights jurisprudence".³³⁴ The ACRWC is the only instrument that provides for children in cases where the mother has been incarcerated.³³⁵ The ACRWC has the "normative upper hand" over the CRC because the ACRWC's was tailor-made for African countries and situations.³³⁶ The ACRWC emphasises cultural activities and family protection and responsibilities within the African community.³³⁷ Both the CRC and the ACRWC not only set out the rights of children but also has safety measures in place which state parties should provide for.³³⁸

The ACRWC is not beyond critique. Brems is of the opinion that the ACRWC does not "invoke international responsibility of Africa's children" but rather has "systematically omitted" references in the CRC to the need for international co-operation.³³⁹ She concedes that there might be reasons for this, for example the importance of family and cultural beliefs. Therefore those family members would attend to a matter themselves rather than involving the international community because it is in conflict with their cultural beliefs. Ofodile concludes that the ACRWC lacks effective implementation.³⁴⁰

333 Brems 145. She also refers to the ACRWC's definition of the 'best interests of the child' principle as one of the reasons why it can be considered to be providing a broader protection.

334 Skelton 490.

335 See *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC). The accused was a mother of three children and was sentenced to 4 years' imprisonment after having been convicted of several counts of fraud. On appeal, however, the sentence was altered and the court held that the provisions of the ACRWC, specifically article 30, should be considered in light of the fact that the mother was the primary caregiver and the rights of the children therefore play an integral part.

336 Memzur 28.

337 See art 12, 18 and 20 of the ACRWC.

338 Olowu 135.

339 Brems 145. She is also of the view that the ACRWC places limitations on children's rights to freedom of expression and privacy as it gives the impression that "children are less considered as complete and autonomous human beings" in the ACRWC than in the CRC.

340 Ofodile 2010 *Progress or Problems* 53.

3.3.3 *Monitoring of the ACRWC*

The ACRWC provides for a committee that would promote and protect the rights contained in the ACRWC.³⁴¹ Unlike the CRC committee, the ACRWC committee has a broader interpretive and promotional mandate.³⁴² Article 44 (1) provides for communication from any group or person. The committee may investigate any concerns and even request information for any state party. The committee thus has a stronger enforcement mechanism.³⁴³ Chirwa concurs but has three concerns to wit the clause in article 44(2) in regard to confidentiality that may hamper transparency; the admissibility of communication and thirdly the lack of a monitoring body specifically for children's rights.³⁴⁴

The ACRWC committee consequently plays a stronger role than the CRC committee in regard to protecting and promoting children's rights. Despite the good intentions of the ACRWC, it still remains silent in the South African *Constitution* and legislation. South Africa has not handed in any reports in accordance with the provisions of the ACRWC.³⁴⁵

3.4 ***United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power***

Although not a treaty and therefore not binding on members of state, the United Nations Declaration of Basic Principles serves as a guideline to states.³⁴⁶

341 Art 42 to art 45 contains the mandate and procedure of the committee.

342 Olowu 131.

343 Brems 145.

344 Chirwa 170.

345 See Mezmur 2006 *African Committee of Experts* 560 fn 45. The author lists the names of the countries that are party to the ACRWC but did not hand in any reports. One of these countries is South Africa. He further states that it appears that state parties do not take reporting to the ACRWC very seriously. www.acrwc.org [Date of use 18 Sept 2012]. See art 43(1) of the ACRWC wherein it states that all state parties to the ACRWC which includes South Africa shall submit reports within two years after becoming party to the ACRWC and thereafter every three years. The purpose of the reports is to ensure that the state party adheres to the provisions of the ACRWC.

346 Dugard 34-37. The author refers to declarations as "soft law". The latter is seen as sets of standards that states may use to assist them in their conduct but it has no legal power.

South Africa is a signatory to the United Nations Declaration of Basic Principles.³⁴⁷ The United Nations Declaration of Basic Principles does not define a child but a victim.³⁴⁸ Articles 8-11 deals with restitution and states *inter alia* that an offender should be responsible for fair restitution to a victim including return of property or payment for harm or loss suffered.³⁴⁹ States should align their laws to include restitution as a form of punishment.³⁵⁰ Where the offender is a government official that acted in such capacity when he/she committed the crime, the particular state should be held accountable for restitution to the victim.³⁵¹

The United Nations Declaration of Basic Principles further deals with compensation. It states that when an offender cannot fully compensate the victim, the state should assist with financial compensation to the victim that has suffered significant injuries due to a serious crime.³⁵² Furthermore to provide compensation to the family of a victim in cases where the victim dies or becomes incapacitated.³⁵³ The United Nations Declaration of Basic Principles encourages states to set up a national fund for victims of crime and to consider other funds in cases where the state is not in a position to assist a victim financially.³⁵⁴ It further states that victims should receive *inter alia* medical and psychological assistance provided by governments and volunteers.³⁵⁵ Victims should be informed of the availability of these services.³⁵⁶

347 Report 91 Project 82 2004 Sentencing 58. Also see Ramagaga 2012 www.issafrica.gov [Date of use 9 Feb 2013].

348 Arts 1 and 18 define a victim as a person or persons who has suffered physical, mental, emotional, economic harm or loss due to acts or omissions that are in conflict with the law of the member state. Article 2 further states that a person is considered a victim irrespective of the apprehension or conviction of the offender. See www.un.org/declarations [Date of use 4 Feb 2013].

349 Art 8 of the United Nations Declaration of Basic Principles.

350 Art 9 of the United Nations Declaration of Basic Principles.

351 Art 11 of the United Nations Declaration of Basic Principles.

352 Art 12(a) of the United Nations Declaration of Basic Principles.

353 Art 12(b) of the United Nations Declaration of Basic Principles.

354 Art 13 of the United Nations Declaration of Basic Principles. Von Bonde 209. South Africa subscribes through the Department of Safety and Security to the United Nations Declaration of Basic Principles. South Africa to date has not implemented such a fund.

355 Art 14 of the United Nations Declaration of Basic Principles.

356 Art 15 of the United Nations Declaration of Basic Principles.

When South Africa subscribed to the principles of the United Nations Declaration of Basic Principles it *ipso facto* stated that it will adhere to the requirements and therefore the assistance of state-funded compensation.³⁵⁷

3.5 Conclusion

South Africa ratified both the CRC and the ACRWC. Both these instruments are binding on South Africa;³⁵⁸ the CRC internationally and the ACRWC on a regional level. It is submitted that South Africa does not take reporting to international treaties as a priority when considering that they only handed in one supplementary report to the CRC committee and has yet to hand in any report to the ACRWC committee.³⁵⁹

In light of the fact that South Africa makes use of a dualist approach regarding treaties, the provisions of both the CRC and the ACRWC need to be incorporated into South African legislation. South African legislation would have to formally incorporate the provisions of the binding treaties in order to obtain legal status.³⁶⁰

Section 28(1) of the *Constitution* refers to the protection of the rights of a child. The *Constitution* provides specifically for the principle of 'the best interests of the child' in section 28(2) and states that it is of paramount importance to consider it when dealing with any matter that involves a child.³⁶¹ The CRC in article 3 and the ACRWC in article 4 also refers to this. In essence the content of the provisions of both the CRC and the ACRWC as far as it relates to the 'best interests' principle has been constitutionalised.

357 Von Bonde 209.

358 See s 231(4) and 231 (5) of the *Constitution*.

359 See Sloth-Nielsen 2010 538. She indicates that South Africa was supposed to hand in their initial report to the ACRWC on 07/01/2002 and the periodic report on 07/01/2005 but has not submitted any report. This aspect is further stated by Mezmur 560 at Fn 45.

360 Sloth-Nielsen 2002 138.

361 See Sloth-Nielsen 2002 139.

Due to the fact that the rights contained in the *Constitution* are justiciable by a court, the CRC has obtained legal significance *via* the *Constitution*.³⁶² Another reason for the heightened status is the specific provisions in the *Constitution* which requires that a court must consider international law in their deliberation.³⁶³ Article 39 of the CRC specifically refers to the physical and psychological recovery and social reintegration of a child victim. What was supposed to be considered the most crucial part of the provisions of the CRC was not even addressed in the *Constitution*.³⁶⁴

The United Nations Declaration of Basic Principles was signed by South Africa wherein it stipulates that a state should provide state compensation where it is not available from the offender. Most offenders of sexually abused children do not have the means to compensate the victim due to the minimum sentence act that is applicable to sexual offences.³⁶⁵ Victims can, however, not hold the state accountable to the United Nations Declaration of Basic Principles as it is not enforceable.

Article 39 of the CRC was never formally incorporated into the *Constitution* or legislation and the United Nations Declaration of Basic Principles does not have a binding effect on South Africa. International law does not provide a "general licence for intervention" but should be considered to be the first step towards exposing those countries that do not adhere to the provisions of the CRC.³⁶⁶ When state parties confirm their intention to work hand in hand with the CRC and the ACRWC this should be more than lip-service but an unpretentious willingness to take action in order to address the issues raised in the international and regional instruments by incorporating it into local legislation.

362 Sloth-Nielsen 2002 139. She states that a child's right to have his/her best interests be considered is a constitutional right independent of other constitutional provisions.

363 Sloth-Nielsen 2002 139.

364 Although there are vast differences between the *Constitution* and the provisions of the CRC and the ACRWC mentioned in the international and regional instruments but not in the *Constitution*, those differences are beyond the scope of this study.

365 S51 105 of 1997.

366 Levesque 997.

South Africa's lack of adhering to the request of supplying reports as indicated in the CRC and the ACRWC may be interpreted as reluctance on the part of South Africa to address the rights of children as far as it relates to international standards and norms. There is no purpose of ratification if it is not incorporated into local law. Robinson correctly argues:

States Parties have ratified the CRC, but have not incorporated it into their domestic law. Such States have obligations towards other contracting States Parties in terms of the CRC and also in terms of article 18 of the Vienna Convention. However, child victims in the jurisdiction of such States are not endowed with legally enforceable rights.³⁶⁷

Even though South African courts must consider international law when confronted with a matter where a child is involved and indeed has considered it, one has to wonder how much weight it carries if it does not form part of our law. The *Constitution* states that a court must consider it, not follow it. In Chapter 4 foreign laws will be scrutinised in order to determine whether there are any lessons to be learned from other countries that may assist in addressing the question as to whether the state has a legal responsibility regarding the social reintegration of sexually abused children.

367 Robinson 86.

CHAPTER 4: LESSONS TO BE LEARNED FROM FOREIGN LAW

4.1 Introduction

In regard to foreign law, section 39(1)(c) of the *Constitution* states that:

When interpreting the Bill of Rights, a court, tribunal or forum *may* consider foreign law.

Courts, tribunals or forums therefore have the discretion to consider foreign law when interpreting the Bill of Rights. This study will look into compensation schemes of three countries³⁶⁸ as it forms an integral part of social reintegration for victims of crime. The purpose of compensation is to remove the burden unfairly placed upon the victim by the offender.³⁶⁹ Normally the offender should be responsible for the compensation, but when the offender does not have the means, the possibility of state compensation must be explored.³⁷⁰

4.2 Foreign law countries

In the quest to discover whether any lessons can be learned from other countries, the research of this study will look into legislation and the victim compensation schemes of the three countries.³⁷¹ The purpose and contents as far as it is applicable to sexually abused children will be explored. It has been argued that victims have a variety of needs which must be met and part of their needs is to be heard; to feel vindicated and the need to feel a sense of safety and acknowledgment of their pain and suffering.³⁷² In order to address their needs, legislation should be in place to ensure a holistic support system.³⁷³

368 As mentioned in Chapter 1, the three countries are Canada, Australia and New Zealand.

369 Ashworth 1986 *Punishment and Compensation* 93.

370 Ashworth 8-10 and 22. Ashworth further states that an offender will not be able to compensate in instances where the offender is either not traceable or sentenced to direct imprisonment or has insufficient funds.

371 Zweigert and Kötz 34. When a comparison is done one has to compare things that fulfil the same function because although countries may face the same problem they might have different ways of resolving it.

372 Zehr 191.

373 Zehr 208.

Although compensation schemes are not a new concept it has yet to be implemented in South Africa.³⁷⁴

Margery Fry is considered to be the social reformer of crime victim compensation programs.³⁷⁵ She argued that victims ought to be compensated by the government charged with the responsibility to protect them when it failed to do so.³⁷⁶ As a result of her efforts Britain and New Zealand were the first countries to set up their compensation programs in 1964 and 1963 respectively.³⁷⁷ Crime victim compensation is one of the pillars of victim assistance. For many victims each year it serves as the primary means of financial aid in the aftermath of victimisation.³⁷⁸

Although compensation *per se* does not remedy devastating harms victims of sexual abuse had to endure, it does assist in a victim's recovery process.³⁷⁹ The rationale for the implementation of compensation programs in foreign countries is not always specifically expressed.³⁸⁰ If it is said that the purpose of compensation is due to the lack of government to protect their citizens, it could *inter alia* lead to vast financial implications for countries.³⁸¹ Another argument could be that compensation programs are a humanitarian response to a compelling human need or that such a program could lead to better citizen co-operation in the prevention and reporting of crime.³⁸² According to Ashworth:

The victim has a right to compensation from the offender. A practical problem occurs when the offender cannot discharge his duty to compensate, whether because he has insufficient funds or because he is sentenced to imprisonment, or when the offender is not found. In practice, the victims of serious crimes are unlikely to be adequately compensated by offenders. The

374 Von Bonde 210.

375 Lamborn 1973 *Propriety of Governmental Compensation* 465. Although compensation schemes started in New Zealand with the adoption of the *Criminal Injuries Compensation Act* in 1963, it was the immense debate in England between 1954 and 1964 (due to Margery Fry's proposals) that started the idea of a compensation scheme. See Eboe-Osuji 2011 *From Sympathy to Reparation* 290.

376 Fry 1959 *Justice for Victims* 191.

377 www.restorativejustice.org [Date of use 8 Oct 2012].

378 www.nacvcb.org [Date of use 8 Oct 2012].

379 Forster 2005 *Good Law or Bad Lore* 270.

380 Garret 1989 *Compensation for Victims of Crime* 212.

381 Garret 212.

382 Garret 212.

extent of the State's obligations is closely bound up with particular conceptions of the duties and role of the State in general.³⁸³

It can be deduced from what the author concludes that a definite need exists for the states to be actively involved in compensating victims of crime. It appears, however, that the states' legal obligations are complex.

This study will examine the existence of a victim compensation program if any in Canada, Australia and New-Zealand.³⁸⁴ It will look at how each country defines a victim as it relates to their specific scheme. This study will also explore the purpose, benefits, claims and limitations in regard to the compensation programs and most importantly what lesson, if any, South Africa can learn from examining the existence of each country's victim compensation scheme. It will be argued that compensation amongst others helps with the social reintegration of abused children.

Canada, Australia and New Zealand's successful implementation of their compensation schemes make them suitable for the "legal tradition of South Africa".³⁸⁵

4.2.1 Canada

According to Brown and Randall, the single largest request for compensation in Ontario, is from victims of sexual assault which include child sexual assault and domestic violence.³⁸⁶ They are, however, of the view that the legal system in Canada including the compensation schemes, are inadequate to assist victims of crime.³⁸⁷ Northcott reported on a study wherein it was found that Ontario youth

383 Ashworth 106.

384 Zweigert and Kötz 40-41. The authors state that 'mature legal systems' are often studied as they have paved the way. Other legal systems that adopted the so-called 'parent system' are also compared as long as it has maintained the style of the original legal system.

385 Müller and Van Der Merwe 2006 *Recognising the Victims* 649. Mathias 2007 *Legal Origins* 64.

386 Brown and Randall 2004 *Compensating the Harms* 331. Also see Sullivan 1998 *Balancing the Scales* 23 wherein he states that the most common cases for instituting an application are sex-related offences and assault.

387 Brown and Randall 312.

that fall victim to crime experience higher levels of anti-social behaviour, low self-esteem, drug and alcohol use and self-harm.³⁸⁸ Victim compensation therefore is a necessity.³⁸⁹

The rationale for a compensation scheme is to provide victims of crime with pecuniary compensation to enable them a better chance of getting their lives in order.³⁹⁰ It is argued that the process of obtaining compensation is part of the therapeutic process for victims of crime.³⁹¹

It should be borne in mind that Canada consists of ten provinces and three territories and each has its own polices and laws as it relates to the ten provinces and three territories and each has its own polices and laws as it relates to compensation to victims of crime.³⁹² For purpose of this study, compensation schemes of only two provinces will be discussed although all provinces with the exception of Newfoundland and the territories have compensation or financial assistance programs.³⁹³ Victims of violent crimes including child sexual abuse may be eligible for compensation. Each province is responsible for the administration of its program.³⁹⁴ Sullivan concludes that the Federal Government as well as the Provincial Government is ultimately responsible for victims and ensuring that the system addresses their needs because the Federal Government enacts and reforms law while the Provincial Government enforces, administrates and prosecutes laws.³⁹⁵

The Federal Minister of Justice entered into an agreement with his provincial and territorial counterparts to adopt a uniform policy statement of victims' rights.³⁹⁶ This statement of principles should be used to guide each province's legislative

388 Northcott 2012 *Understanding the Youth* 21-22.

389 Bassiouni 1997 *Searching for Peace* 22.

390 Sullivan 21.

391 Feldthusen, Hankivsky and Greaves 2000 *Therapeutic Consequences* 67.

392 The ten provinces are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan. The three territories are Northwest Territories, Nunavut and Yukon.

393 Sullivan 22. See also Wilson 2005 *Independent Legal Representation* 272.

394 Sullivan 5.

395 Sullivan 5.

396 Sullivan 6. The agreement was entered into in 1988.

and administrative procedures.³⁹⁷ However, these principles do not offer a victim any rights but rather encourage provinces to promote the principles in their implementation of their policies and laws.³⁹⁸ One of the principles is *inter alia* that information should be provided to victims concerning available victim assistance services, other programs and assistance available to them and means of obtaining financial reparation.³⁹⁹ It is noteworthy that during civil proceedings there now is a presumption that all victims of sexual assault or attempted sexual assault have suffered emotional distress.⁴⁰⁰

4.2.1.1 Ontario

Due to the compensation schemes introduced in Britain and New Zealand, three provinces in Canada, including Ontario, established their compensation schemes in 1968.⁴⁰¹ Three categories were introduced that would be responsible for the implementation of the schemes to wit courts, special committees and administrative tribunals.⁴⁰² The latter is applicable in Ontario.⁴⁰³

The Ontario Ministry of the Attorney-General is responsible for the administration of the Victim Crisis Assistance and Referral Services, the Victim Quick Response Program, the Victim/Witness Assistance Program, the Sexual Assault/Rape Crisis Centres and the Victim Support Line. The Victim Crisis Assistance and Referral Services is a government-funded program and provide immediate on-site service to victims of crime 24 hours a day and 7 days a week.⁴⁰⁴ The program works in partnership with the police and emergency services.⁴⁰⁵

397 Sullivan 6.

398 www.justice.gc.ca/principles [Date of use 10 Oct 2012].

399 www.justice.gc.ca [Date of use 10 Oct 2012]. On 1 October 2003 the Canadian Statement of Basic Principles of Justice for Victims of Crime was endorsed by the Federal, Provincial and Territorial Ministers Responsible for Justice. The Statement contains 10 principles.

400 Sullivan 15. Also see s3(2) of the *Victims Bill of Rights* discussed at 4.2.1.1 (a).

401 Cilliers 1984 *'n Penologiese Studie*155.

402 Brown and Randall 340.

403 Cilliers 155.

404 Sullivan 16.

405 Wilson 272.

The Victim Quick Response Program provides fast help to *inter alia* victims of sexual assault. It was designed to fill the gap between the time a crime occurs in Ontario and the time a victim receives long-term support services. The Victim/Witness Assistance Program provides information and assistance to victims of crime including sexual assault victims. Part of their services includes crisis intervention, emotional support and need assessment. The Sexual Assault/Rape Crisis Centres provide counselling and information and referral services to female victims of sexual assault.

The Victim Support Line is a toll-free information line that provides information and referral to support services and access to information about sentenced prisoners.⁴⁰⁶ Two agencies are identified. The Office for Victims of Crime established in 1988 ensures that services to victims are effective and meet the needs of victims. The Criminal Injuries Compensation Board provides financial compensation to victims of violent crimes and family members of deceased victims.⁴⁰⁷ Victims may claim for pecuniary loss and pain and suffering for physical as well as psychological injuries caused during an attack which includes sexual abuse and sexual assault.⁴⁰⁸ In 2001 Ontario further established an integrated Victim Services Division in the Ministry of the Attorney-General.⁴⁰⁹

The following Ontario legislation assists victims of crime:

(a) *Victims' Bill of Rights S.O. Chapter 6 1995*

(b) *Compensation for Victims of Crime Act R.S.O. Chapter C.24 1990*

(c) *Victim Empowerment Act S.O. Chapter 12 bill 60 2002*

(a) *The Victims' Bill of Rights SO Chapter 6 of 1995*

406 www.crcvc.ca/victims/services [Date of use 10 Oct 2012].

407 www.attorneygeneral.jus.gov.on.ca [Date of use 10 Oct 2012].

408 Feldthusen, Hankivsky and Greaves 72. Also see the Compensation for Victims of Crime Act R.S.O. C.24 s7.

409 Wilson 269.

The preamble of the *Victims' Bill of Rights* affirms that victims of crime have rights that could be violated by crime and that victims should be treated with compassion and fairness. It is furthermore stated that in endeavouring to apply justice, the suffering of victims should not be increased - instead their participation in the justice system should be encouraged. The *Victim's Bill of Rights* defines a victim as:

A person who, as a result of the commission of a crime by another, suffers emotional or physical harm, loss of or damage to property or economic harm and, if the commission of the crime results in the death of the person, includes a child or parent of the person within the meaning of section 1 of the Family Law Act and a dependant or spouse of the person, both within the meaning of section 29 of the Family Law Act but does not include a child, parent or dependant or spouse who is charged with or has been convicted of committing a crime.⁴¹⁰

Section 2(1) contains the principles and section 2(2) the limitations of the act. It is of importance to note that section 2(1) stipulates *inter alia* that victims should have access to information about services available to them and the provisions in the *Compensation for Victims of Crime Act*. The Act thus does not place an obligation on the Ontario government to see to it that victims of crime be assisted but the government ought to attempt to adhere to the provisions of section 2(1).⁴¹¹

It emphasises the point even more when section 2(2) is read in regard to the limitations. It states that:

The principles set out in subsection (1) are subject to the availability of resources and information, what is reasonable in the circumstances of the case, what is consistent with the law and the public interest and what is necessary to ensure that the resolution of criminal proceedings is not delayed.

410 S1 S.O.1995 Chapter 6.

411 See Wilson 270. The author refers to *Vanscoy v Ontario* 1999 O.J.No. 1661 (Ont.Supt.Ct.Jus.) wherein the court ruled that the Victims' Bill of Rights did not intend and do not provide rights to victims of crime.

The achievability of subsection (1) depends *inter alia* on resources. To have access to information and to know what the *Compensation for Victims of Crime Act* provides is not a right but is formulated as a principle.⁴¹²

Victims may institute civil claims.⁴¹³ Section 3(1) states that an offender convicted of a specific crime is liable for compensation to a victim of the crime for emotional distress and bodily harm as a result of the distress. However, the judge shall not consider the sentence of the convicted offender when ordering the offender to pay damages in respect of harm caused.⁴¹⁴ There is, however, an exception to this principle and that is the sentence of the convicted offender comes into play when a judge considers making an order for the payment of punitive damages.⁴¹⁵ A special fund was created known as the Victims' Justice Fund Account.⁴¹⁶ The money paid into this account is used to assist victims of crime either through support programs or paid over to agencies that provide assistance to victims.⁴¹⁷

In favour of victims of crime is the presumptions stipulated in section 3(2). It states *inter alia* that there is a presumption that victims of sexual assault or attempted sexual assault have suffered emotional distress due to the crime that was committed. This presumption is rather significant in that the victim need not prove emotional distress when instituting a claim.

The purpose of the *Victims' Bill of Rights* is to provide assistance to victims of crime. The Act places no obligation on the government to provide victims of crime either with assistance or with agencies to assist victims but provides principles that should be adhered to. The *Victims' Bill of Rights* does not refer to a timeline wherein an application must be submitted.

412 Wilson 270. In the matter *Vanscoy v Ontario* 1999 OJ no 1661 Ontario Supreme Court Justice the court ruled that the Victims' Bill of Rights does not provide rights to the victim of a crime.

413 S3 S.O.1995 Chapter 6.

414 S4(3) S.O. 1995 Chapter 6.

415 S4(4) S.O. 1995 Chapter 6.

416 S5 S.O. 1995 Chapter 6.

417 S5(4) S.O. 1995 Chapter 6.

(b) *Compensation for Victims of Crime Act R.S.O Chapter C.24 of 1990*

The Act came into operation mainly because of inadequacies of "tort as a compensation mechanism".⁴¹⁸ According to Brown and Randall, who did a study on the differences in accident compensation, when a claim is made against an insurance company and criminal acts against a victim that claims for compensation from a state-funded scheme, a victims' needs for compensation are no less compelling when the harm against victims are done intentionally.⁴¹⁹

The *Compensation for Victims of Crime Act*, defines a victims as a person who has been injured or killed by another from the commission of a crime of violence that constitutes an offence in the *Criminal Code*.⁴²⁰ The offence must be stipulated in the *Criminal Code* of Canada.⁴²¹ The latter contains a schedule of offences. Ontario does not have a schedule of offences but is restricted to violent crimes.⁴²² It further defines a child without referring to a specific age but rather indicates that it could be a child born in or out of a marriage.⁴²³ Upon receiving an application for compensation the Criminal Injuries Compensation Board may consider payment to the victim or to a person responsible for supporting the victim.⁴²⁴ It appears therefore that children that have been victims of sexual abuse can still receive compensation but that the compensation, if any, will be paid out to their parents or guardians.

The compensation may be awarded for expenses actually and reasonably incurred as a result of the victim's injury, pain and suffering, support of a child born as a result of rape and other pecuniary loss resulting from the victim's

418 Brown and Randall 329-330. The Act came into operation in 1971.

419 Brown and Randall 317.

420 S1 and s5(a) R.S.O. 1990 c C.24.

421 Tang 1998 *Rape Law Reform* 259-260. The terminology 'rape' was replaced after 1983 with the word 'sexual assault' in the Criminal Code. Sexual assault provides for a whole range of sexual activities.

422 Sullivan 23.

423 S1 R.S.O. 1990 c C.24.

424 S5(d) and s5(e) R.S.O. 1990 c C.24.

injury.⁴²⁵ Compensation orders are paid from money appropriated therefore by the legislature.⁴²⁶

A Victim, however, still has the right to institute civil proceedings against the offender for damages in respect of the injury.⁴²⁷ There are nonetheless consequences if a victim decides to institute civil proceedings.⁴²⁸ The Criminal Injuries Compensation Board is subrogated to all rights of the person to whom payment is made under this act to recover damages by civil proceedings in respect of the injury and may institute an action in the name of the victim against the offender.⁴²⁹ If the victim receives any compensation from the offender, the Criminal Injuries Compensation Board must be notified and is entitled to be reimbursed if compensation was paid to the victim.⁴³⁰ A Victim is not entitled to claim compensation from both the Board and the offender. Offenders, however, don't always have the financial means to compensate victims.⁴³¹

Unlike the *Victims' Bill of Rights*, the *Compensation for Victims of Crime Act* has a limitation clause in regard to when an application may be made. It states that the application for compensation should be made within two years after the injury or death. The Board may grant an extension.⁴³²

The limitation places a duty on the victim to make an application as soon as possible after the crime has been committed. In case of a child victim it would be

425 S7(1)(a)-(f). S21(2) and s21(3) of R.S.O. 1990 c C.24 states that the Criminal Injuries Compensation Board may pay the victim directly and in the case of a minor to the parent or guardian.

426 S27(1) R.S.O. 1990 c C.24.

427 S26(1) R.S.O. 1990 c C.24. Also see Brown and Randall 317-325 wherein the authors discuss the outcome of the decision in the Scalera-case. In the matter *Non-Marine Underwriters Lloyd's of London v Scalera* 2000 1 S.C.R. 551 Scalera decided in combination with *Sansalone v Wawanesa Mutual Insurance Co* 2000 2 S.C.R. 627, the court confirms that victims of the most serious crimes find it difficult to obtain adequate compensation for injuries sustained thereby affirming the hurdles faced by victims if they do decide to follow the route of a civil action.

428 S26 R.S.O. 1990 c C.24.

429 S26(2) R.S.O. 1990 c C.24. Also see Sullivan 29. The Criminal Injuries Compensation Board usually do not make use of their right to subrogate because of the problems of getting the money from the offenders.

430 S26(5) R.S.O. 1990 c C.24.

431 Sullivan 46.

432 S6 R.S.O. 1990 c C.24.

the responsibility of the parent or guardian to make an application on behalf of the child victim.⁴³³ For a parent or guardian to bring such an application would mean that the parent or guardian must be aware of the sexual abuse on the child. Very few victims of sexual assault report the matter to the authorities.⁴³⁴ The limitation may be a hindrance to not only victims of sexual offences but especially to sexually abused children.

If the offender is convicted of a criminal offence, that conviction shall be taken as conclusive evidence that the offence has been committed.⁴³⁵ The presumption therefore assists victims when they have to lodge their claim. In matters where it is found that the offender is not fit to stand trial, the Act states that compensation must be paid to a victim as the offender is deemed to have committed the offence that caused injury to the victim.⁴³⁶ An order for compensation is not dependent on an offender being convicted or even prosecuted.⁴³⁷ The Criminal Injuries Compensation Board may postpone its proceedings pending the outcome of a prosecution or intended prosecution.⁴³⁸

The *Compensation for Victims of Crime Act* in essence benefits a child that has fallen victim to a sexual offence. Compensation may be paid to the parent or guardian by a state-funded scheme. The scheme provides for the assistance to victims of crime either through an agency or direct payment to the victim. Usually funding for compensation for victims of crime has come from government which in return receives its income from tax payers. The latter cannot bear the entire brunt; therefore other sources should be considered.⁴³⁹ The Ontario scheme is operated on funds obtained from *inter alia* convicted offenders.⁴⁴⁰ Ontario

433 S21(3) R.S.O. 1990 c C.24.

434 Wilson 250.

435 S11 R.S.O. 1990 c C.24. It shall be taken as evidence that the offence was committed only after the convicted offender has unsuccessfully exhausted his/her appeal remedies.

436 S16(2) R.S.O. 1990 c C.24.

437 S16(1) R.S.O. 1990 c C.24.

438 S16(1) R.S.O. 1990 c C.24.

439 Sullivan 29.

440 See Brown and Randall 342. A Victims' Justice Fund which is a public compensation scheme in Ontario is enshrined in the Bill of Rights and is exclusively devoted to victim services in Ontario. However, according to Brown and Randall, the Victims' Justice Fund is not providing adequate support due to administration inefficiencies and inadequate management of Victims' Justice Fund funds.

Criminal Injuries Compensation Board not only pays for pecuniary damages but also for non-pecuniary damages for *inter alia* enjoyment of life, and pain and suffering.⁴⁴¹ Ontario is one of the few provinces that use a board decision-making body.⁴⁴²

A victim has the right to appeal against the decision of a single board member and the appeal will be dealt with by a two-member board panel.⁴⁴³ Thereafter the victim will have to approach a court but only on a question of law.⁴⁴⁴ Despite the fact that the Act provides for civil litigation, this is more often than not available only to victims that can finance legal representation to initiate a private law action.⁴⁴⁵ To secure a successful action would require an offender with "sufficiently deep pockets".⁴⁴⁶

The Act is unfortunately not beyond critique. The time limitation for the instituting of the application with the Criminal Injuries Compensation Board is of great concern. This might be problematic for children that do not disclose after the sexual abuse but only years later even though they might know they have been sexually abused. It would have been more beneficial if section 6 of the Act was tailored in such a way to specifically accommodate children in respect of late disclosure. It is Brown and Randall's opinion that the Criminal Injuries Compensation Board does not have adequate financial resources there is a lack in paying out and long delays on processing applications and lengthy proceedings are some of the critique that can be attributed to the Criminal Injuries Compensation Board. They further state that the Criminal Injuries Compensation Board does not provide an explicit rationale for offering compensation in that the rationale fails to address the deeper question as to what compensation is supposed to do for victims of crime that receive it.⁴⁴⁷

441 S7(1) R.S.O. 1990 c C.24.

442 S3(1) R.S.O. 1990 c C.24.

443 S11 and S23 R.S.O. 1990 c C.24.

444 Sullivan 25-26.

445 Brown and Randall 313.

446 Brown and Randall 313.

447 Brown and Randall 334-335.

There is nevertheless a 'victim-centred approach' to compensating harm.⁴⁴⁸ This entails that each victim's application for compensation is unique in that damages are awarded according to that specific individual's needs and injuries.⁴⁴⁹ Therefore compensation orders are made taking into consideration the severity of the consequences instead of the severity of the injuries.⁴⁵⁰

(c) *Victim Empowerment Act S.O. Chapter 12 bill 60 of 2002*

The Act refers to the same definition of a 'victim' as the *Victim's Bill of Rights*.⁴⁵¹ The purpose of the Act is to give victims a greater role at parole hearings and to hold offenders accountable for their actions.⁴⁵² The Act assented in 2002 and the Minister of Correctional Services is responsible for the implementation and administration of the act.⁴⁵³ Although the Act in its preamble refers to the accountability of offenders, it fails to address questions that relate to whom should the offender be accountable to and how should the offender account for his/her wrongdoings. The province of Ontario lists the piece of legislation as one of their endeavours to assist victims of crime.⁴⁵⁴ Although it provides a victim with a voice during the parole hearing, it does not address compensation from either the convicted offender or the state. It is unfortunate that this part of legislation does not assist a victim of crime and especially a sexually abused child victim.

Ontario provides for compensation to victims of violent crimes including rape, sexual relations with a minor and assault.⁴⁵⁵ Ontario also provides for pain-and-suffering payments and in doing so considers the financial needs of each individual.⁴⁵⁶

448 Brown and Randall 338.
449 Brown and Randall 338.
450 Brown and Randall 337-338.
451 S1 Chapter 12 bill 60 of 2002.
452 Preamble to bill 60 of 2002.
453 Chapter 12 bill 60 of 2002.
454 Chapter 12 bill 60 of 2002.
455 Brown and Randall 330.
456 Wilson 272.

4.2.1.2 Prince Edward Island

Prince Edward Island promulgated the *Child Protection Act* in 2000.⁴⁵⁷ The primary purpose of the said act as stipulated in section 2(1) is to protect children from abuse and neglect. The Act defines a child as a person under the age of 18 years.⁴⁵⁸ Abuse as it relates to children is also defined and includes physical, mental, emotional or sexual exploitation or mistreatment or injury of the child.⁴⁵⁹ Section 2(2) refers to the "best interests of the child" principle. The section expresses the interpretation of the principle more broadly by referring to when and under which circumstances it should be considered.⁴⁶⁰

Section 9 of the Act is of considerable importance as it stipulates when a child is considered to be in need of care. Section 9 states *inter alia* that a child is considered in need when sexually abused by either a parent or another person whilst the parent knew or ought to have known about the abuse.⁴⁶¹ The section thus makes special provision for cases where a child has been sexually abused within a family context and the members of the family have not revealed the abuse.

Although the *Child Protection Act per se* does not relate to the question of compensation to sexually abused children, it does concede that children that have been sexually abused are in need of care and that care includes

457 2000 (2nd) Chapter C-5.1.

458 S1(h) 2000 (2nd) Chapter C-5.1.

459 S1 2000 (2nd) Chapter C-5.1.

460 According to s 2(2)(a)-(m) the considerations that should be looked into are (a) the safety of the child (b) the capacity of a parent to properly discharge parental obligations; (c) the physical, mental and emotional needs of the child, and the appropriate care or treatment to meet those needs; (d) the physical, mental and emotional level of development of the child; (e) the views of the child, where appropriate; (f) a secure place for the child and the development of a positive relationship as a member of a family; (g) the love, affection and ties between the child and persons who have had custody of the child; (h) the love, affection and ties between the child and other persons in the life of the child; (i) the cultural, racial, linguistic and religious heritage of the child; (j) if the child is aboriginal, the importance of preserving the cultural identity of the child; (k) the capacity of persons other than a parent to exercise custody rights and duties respecting a child; (l) the continuity of care for the child and the possible effect of disruption of that care on the child; and (m) the difference in the concept of time, and the developmental capacity of a child.

461 S9(e) 2000 (2nd) Chapter C-5.1.

assessments, treatments and prescribed services.⁴⁶² The services must be provided by the director appointed in terms of the act.⁴⁶³ Prince Edward Island has a *Victims of Crime Act*⁴⁶⁴ that contains a separate part that relates to criminal injuries compensation. The Act defines a victim as:

A person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, by reason of acts which are in violation of criminal laws.⁴⁶⁵

Similar to Ontario's *Victims' Bill of Rights* the *Victims of Crime Act* contains a statement of principles.⁴⁶⁶ It refers to what a victim should receive instead of what a victim must receive.⁴⁶⁷ For example, a victim should be treated with courtesy and compassion.⁴⁶⁸ A Victim Services Advisory Committee was established and certain functions were assigned to them.⁴⁶⁹ What is of importance is that the Act places an obligation on the minister to establish and administer the Victim Services program.⁴⁷⁰ The purpose of the program is *inter alia* to help victims to access services and receive applications for compensation as well as to investigate the claims.⁴⁷¹

A Victim Assistance Fund was also established and provides for surcharges wherein the convicted offender must pay an amount in the same way as a fine.⁴⁷² The money is paid into the fund and the minister may authorise expenditure compensation to qualified victims through a criminal injuries compensation program.⁴⁷³ Part IV of the Act deals with the criminal injuries compensation and has a separate section that deals with definitions.⁴⁷⁴

462 S47 2000 (2nd) Chapter C-5.1.

463 The minister appointed to implement and administer the Act may establish the services and programs. The director, however, is responsible for monitoring the programs and services.

464 Chapter V-3.1 C67.

465 S1(1)(i) Chapter V-3.1.

466 S2 Chapter V-3.1 C67.

467 S2 Chapter V-3.1 C67.

468 S2(a)-(i) Chapter V-3.1 C67.

469 S4(1)(a)-(f), s4(2), s4(3)(a)-(c), s5 and s6(1)-(5) Chapter V-3.1 C67.

470 S7 Chapter V-3 1 C67.

471 S7(a)-(f) Chapter V-3.1 C67.

472 S9(1) Chapter V-3.1 C67.

473 S11(a)-(c) Chapter V-3.1 C67. Also see s16(1)(a)-(e) Chapter V-3.1 C67.

474 S13 Chapter V-3.1 C67.

The Act defines a victim as a person that has been injured due to the commission of an offence stated in the *Criminal Code*.⁴⁷⁵ The compensation scheme provides for non-recoverable interim payments.⁴⁷⁶ However, compensation pursuant to this act is compensation of last resort.⁴⁷⁷ Compensation may be paid to victims that had to incur expenses due to injuries sustained as a result of the commission of an offence including pain and suffering.⁴⁷⁸ Again, conviction of an offender is not a prerequisite for compensation although it serves as conclusive evidence that an offence was committed.⁴⁷⁹ Offenders that are not fit to stand trial are deemed to have committed that crime and compensation in these circumstances can be paid.⁴⁸⁰ In the case of a minor victim, compensation will be paid to the parent or guardian.⁴⁸¹

There are certain limitations and conditions to the act. The Act states in section 17 that an application must be brought within one year after date of the injury. The minister, however, may extend the period either before or after the expiry of the one-year period.⁴⁸² A victim that does not fully co-operate with either the law enforcement authorities or the Victim Services may not be granted an order for compensation.⁴⁸³ Although a victim may institute civil proceedings against the offender, the victim, that received compensation from the Minister, must inform the Minister of such payment.⁴⁸⁴ The Minister, after paying compensation to the victim, has the right to maintain an action against the offender in the name of the victim.⁴⁸⁵ The Victim Services that form part of the criminal justice system on the Prince Edward Island assists victims with counselling and filing of claims for compensation.⁴⁸⁶ Although the Victim Services do not have any legal powers, they do act as a link between the

475 S13(g) Chapter V-3.1 C67.
476 S18(1)-18(2)Chapter V-3.1 C67.
477 S19(1) Chapter V-3.1 C67.
478 S19(1)-19(2) Chapter V-3.1 C67.
479 S22(4) Chapter V-3.1 C67.
480 S22(4)-22(6) Chapter V-3.1 C67.
481 S26(2)-26(3) Chapter V-3.1 C67.
482 S17 Chapter V-3.1 C67.
483 S23(2) Chapter V-3.1 C67.
484 S 32(4) Chapter V-3.1 C67.
485 S32(1)-32(2) Chapter V-3.1 C67.
486 Sullivan 68.

government departments and the victims by ensuring that the victims' needs are attended to.⁴⁸⁷ Even though their services are client-centred approached, the Victim Services also investigate claims lodged for compensation.⁴⁸⁸ The Prince Edward Island does not attend to applications by holding formal hearings but through paper reviews.⁴⁸⁹ The downside of this is that the victims are not afforded the opportunity of expressing what they feel.⁴⁹⁰ If the victim wants to appeal the decision he/she has to approach a superior court with the help of a lawyer and then only on question of law.⁴⁹¹ Although there are several rape-crisis centres in Ontario and Prince Edward Island, these are run by feminist organisations and are not government funded.⁴⁹² The purpose of one of these centres, the Canadian Association of Sexual Assault Centres, is to implement legal, social and attitudinal changes necessary to prevent rape and sexual assault.⁴⁹³ It is argued that the lack of Canadian government's responsibility for justice administration and absence of national leadership on sexist violence has had a negative impact on policy making.⁴⁹⁴

The Canadian government through its compensation schemes adheres to its legal duty to ensure that the violated rights of victims of crime are restored. Support programs and services are provided to victims as stipulated in the various acts. Services are, however, dependent on the availability of funds and resources. No specific attention is given to sexually abused children. South Africa can still learn from Canada in as far as they are one step ahead with a workable compensation scheme.

487 Sullivan 68.

488 Sullivan 69.

489 Sullivan 27.

490 Sullivan 27.

491 Sullivan 26.

492 Lakeman 2012 *"Ending Rape: The Responsibility of the Canadian State"* 37.

493 www.casac.ca [Date of use 25 Feb 2013]

494 Lakeman 46.

4.2.2 Australia

Australia consists of six states and two territories.⁴⁹⁵ Forster and Parkinson are of the view that it is problematic to try and fit sexually abused children into a statutory compensation scheme. The reason is children often do not disclose immediately and would find it difficult to prove injuries after several years have passed since the sexual assault took place.⁴⁹⁶ Neither the injuries sustained by victims of child sexual abuse nor the nature of events are specifically catered for in any of the statutory schemes.⁴⁹⁷ It has been said that part of the recovery process for a victim is to acknowledge and validate a victim's experience, to recognise victims' rights and uphold it and part of those rights to provide a victim with compensation.⁴⁹⁸ For purposes of this study the compensation acts of two states to wit New South Wales and Victoria will be explored specifically if and how sexually abused children fit into the different compensation schemes.

Forster is of the view that few resources are available to victims of sexual abuse to redress their need for recovery through compensation.⁴⁹⁹ She states that a victim can obtain compensation along three possible avenues.⁵⁰⁰ The first avenue is through the criminal law although it is not often used.⁵⁰¹ Secondly, by means of a civil action, but this could be very costly for victims.⁵⁰² Thirdly, victims may use statutory crime injury compensation schemes.⁵⁰³ In choosing the latter, the victim may face several hurdles that need to be overcome before a claim for compensation may be approved.⁵⁰⁴ One of these hurdles could be that a victim will have to be assessed by a psychologist or psychiatrist to determine what the

495 The 6 states are New South Wales, Tasmania, Western Australia, Southern Australia, Queensland and Victoria. The two territories are the Northern Territory and the Australian Capital Territory.

496 Forster and Parkinson 2000 *Compensating Child Sexual Assault* 173.

497 Forster and Parkinson 181.

498 Jarvis and McIlwaine 1996 *Telling the Whole Story* 149.

499 Forster 269.

500 Forster 271.

501 Forster 271.

502 Forster 271.

503 Forster 272.

504 Forster 276.

impact of the crime had on his/her life.⁵⁰⁵ This might lead to further secondary victimisation as the victim may now be branded with a 'psychiatric' condition.⁵⁰⁶

4.2.2.1 New South Wales

The first criminal compensation act was introduced in New South Wales in 1967.⁵⁰⁷ New South Wales has a *Victims Support and Rehabilitation Act*⁵⁰⁸ and a *Victims Rights Act*⁵⁰⁹ that assist victims of crime. New South Wales uses a tariff-model which specifies particular amounts for certain injuries sustained. The injuries are listed in a schedule.⁵¹⁰

(a) *Victims Support and Rehabilitation Act 115 of 1996*

The purpose of the Act is to provide support and rehabilitation to victims of crime and ensure the implementation of a statutory compensation scheme for victims of crime; enable payment of compensation by convicted offenders to victims; for courts to order a convicted offender to pay compensation to a victim of crime under an alternative scheme and to impose levies against convicted offenders that would in return fund the scheme.⁵¹¹ These levies are paid by virtue of the conviction and do not form part of compensation or pecuniary sentence⁵¹².

An act of violence is described in section 5 as an act that is committed in the course of the commission of a crime and involves violence. Section 5(2) specifically includes sexual abuse in the definition. Persons eligible for compensation are divided into three categories to wit primary victims, secondary victims and family victims.⁵¹³ Primary victims are persons that have sustained

505 Jarvis and McIlwaine 147.

506 Jarvis and McIlwaine 147.

507 *Criminal Injuries Compensation Act* 1967 (New South Wales). Also see Forster and Parkinson 174.

508 115 of 1996.

509 114 of 1996.

510 Forster 273.

511 S3 115 of 1996.

512 S3 and s79 115 of 1996.

513 S6 115 of 1996.

injuries or have died as a direct result of the commission of an offence.⁵¹⁴ Secondary victims are persons that witness the crime being committed against the primary victim but must be the parent or guardian to a victim that is under the age of 18 years and that did not commit the crime.⁵¹⁵ A family victim is a person that is related to the primary victim, for example a brother or a parent.⁵¹⁶

The Act provides for specific payment for counselling of victims. However, there are certain conditions attached to the payment.⁵¹⁷ Victims need to apply for payment of counselling services and only then for a certain period of time.⁵¹⁸ Further limitations are placed on an application for compensation; the victim must apply within two years after the injury was sustained. However, it may be extended.⁵¹⁹ A victim may only apply for state compensation if he/she did not receive compensation from an order wherein the court found that the offender has to pay compensation to the victim.⁵²⁰ Interim compensation may be granted under certain circumstances, but if the application for compensation is later turned down the compensation must be paid back by the victim.⁵²¹ In considering a claim for compensation, the compensation assessor may take into account whether the crime had been reported to the police within a reasonable time.⁵²²

The Act considers the fact that children may not disclose immediately after the commission of crime and one of the reasons could be that the child is related to the offender. Section 30(2) deals primarily with these issues and therefore can be considered a helpful tool to sexually abused children. A victim can appeal the decision of the assessor to the Tribunal. The decision of the Tribunal can only be appealed to a district court on a question of law.⁵²³ Compensation is paid from a

514 S7 and s14 115 of 1996.

515 S8 and s15 115 of 1996.

516 S9 and s16 115 of 1996.

517 S21 115 of 1996.

518 S21(3) 115 of 1996.

519 S26 115 of 1996.

520 S24 115 of 1996.

521 S33 115 of 1996.

522 S30(2) 115 of 1996.

523 S36 115 of 1996.

state compensation fund.⁵²⁴ However, a victim still has a right to institute civil proceedings against the offender for compensation and restitution.⁵²⁵

The Act assists victims of crime and in particular victims of a child sexual crime. Although the Act does not specifically refer to sexually abused children, it does define sexual assault as a violent crime and therefore qualifies as a compensable act. Parents or guardians may claim on behalf of a child victim. The latter is eligible for counselling paid from the state compensation fund. The fund is administered by the government and convicted offenders must contribute to the fund by paying a levy. Although there is a time period of two years wherein a victim must apply for compensation and the claim is further burdened by conditions set out in section 30, it does make special provision for children. The compensation assessor may consider *inter alia* the age of the victim, whether the child victim is related to the offender and fear of disclosure. This act is the first of its kind to consider the possibility of lodging a claim for compensation years after the sexual abuse.

(b) Victims' Rights Act 114 of 1996

The Act was established to recognise and promote the rights of victims of crime.⁵²⁶ A victim of crime is defined as a person directly affected by the commission of an act that constitutes a crime.⁵²⁷ The victim must have suffered harm that includes physical bodily harm, mental illness and shock.⁵²⁸ Part 2 of the Act contains the Charter of Victims Rights and refers to the rights a victim has.⁵²⁹ One of those rights is mentioned in section 6.17 wherein it specifically states that a victim of a crime involving "sexual or other serious personal violence" should be able to claim for compensation from a state compensation scheme. However, several conditions are attached to the right.

524 S42 115 of 1996.
525 S43 and s57 115 of 1996.
526 S3 114 of 1996.
527 S4 114 of 1996.
528 S5 114 of 1996.
529 Ss6-7 114 of 1996.

Section 7 states as follows:

(1) The Charter of Victims Rights is, as far as practicable and appropriate, to govern the treatment of victims in the administration of the affairs of the State. (2) Any agency or person exercising official functions in the administration of the affairs of the State (other than judicial functions) must, to the extent that it is relevant and practicable to do so, have regard to the Charter of Victims Rights in addition to any other relevant matter.⁵³⁰

The right is not absolute but the enforcement of the right will depend on the practicality and appropriateness of victim services rendered by state agencies. Part 3 of the Act provides for a Victims of Crime Bureau.⁵³¹ The Act provides victims with information as to what support services are available and that they can claim for state compensation.⁵³² Part 4 provides for a Victims Advisory Board that works closely with the minister in providing him/her with guidance regarding policies and procedures and would also consult victims of crime.⁵³³

The Act can also be seen as beneficial to victims of sexual abuse. It provides victims with a platform for raising their concerns and complaints in regard to claiming state compensation. It further gives victims a voice to speak on their behalf to the minister. Not only does it define a victim of crime but specifically refers to a victim of a sexual crime. A victim finds recognition of his/her right to be heard and assisted. The downside of the Act lies in the limitation placed on this right. The enforcement of the right will depend on the availability of, for example resources, money and manpower. Although section 7 does not stipulate what those limitations could be, it is quite a wide and vague description. It leaves open the possibility that state agencies may not be able to adhere to the rights of victims entrenched in the Act due to the lack of practicality and appropriateness of service delivery.

It is argued by Shackel, that the absence of legislation and a policy framework directed explicitly to the rights of child victims is aggravated by a general legal

530 S7 114 of 1996.

531 Ss9-11 114 of 1996.

532 S18 114 of 1996.

533 S14 114 of 1996.

framework.⁵³⁴ She refers to victim impact statements and the lack of uniformity thereof in Australia.⁵³⁵ She concedes that victim impact statements may be interpreted as a tool for assisting victims in obtaining compensation and assisting them with their healing process.⁵³⁶ New South Wales also has a Violence Prevention Coordination Unit that oversees state initiatives for women but each jurisdiction is responsible for its own funding of the sexual assault services.⁵³⁷

4.2.2.2 Victoria

The state of Victoria has a *Sentencing Act*⁵³⁸, a *Victims' Charter Act*⁵³⁹ and a *Victims of Crime Assistance Act*⁵⁴⁰ in place to assist victims of crime. The state of Victoria introduced specific sexual assault provisions into their compensation schemes.⁵⁴¹ Victoria uses a discretionary model by means of which the magistrate or assessor decides on the appropriate amount within the maximum compensation provided by the scheme.⁵⁴² The acts and the provisions it contains will be looked into and criticised.

(a) *Sentencing Act 49 of 1991*

The purpose of the Act is to ensure *inter alia* that victims of crime receive compensation and restitution.⁵⁴³ A victim is referred to as a person that has suffered injury.⁵⁴⁴ In order to comprehend who meets the requirements, subsection 1 defines injury as a violation or infringement a person has sustained in the form of physical bodily harm, mental illness, grief, distress or trauma or other significant adverse effects.⁵⁴⁵

534 Shackel 2011 *Restorative Role or Restrained Rhetoric* 218.

535 Shackel 219. A victim impact statement is defined in the Sentencing Act in s26.

536 Shackel 239.

537 Eastel 2012 *"Sexual Assault Law in Australia: Contextual Challenges and Changes"* 14.

538 49 of 1991.

539 65 of 2006.

540 81 of 1996.

541 Forster 264.

542 Forster 273.

543 S1(i) 49 of 1991.

544 S1 49 of 1991.

545 S85A(1) 49 of 1991.

An application of compensation may be brought by the victim or the parent or guardian on behalf of the child victim.⁵⁴⁶ The application must be filed within 12 months after the offender has been convicted or found guilty of the offence.⁵⁴⁷ The court may extend the time to bring the application but must first give the offender an opportunity to be heard on the matter.⁵⁴⁸ In deciding whether or not to grant the order the court may take the financial circumstances of the offender into consideration.⁵⁴⁹ The court must deduct any compensation the victim had received under the *Victims of Crime Assistance Act* from the compensation granted.⁵⁵⁰ The court must give reasons for its decision.⁵⁵¹ A victim may still make use of civil litigation if he/she is not satisfied with the payment or recovery made under the subdivision of the act.⁵⁵² The court may grant an order for compensation after the offender has been found guilty or convicted in addition to making an order under the subdivision.⁵⁵³

The Act relates only to matters where the offender has to be sentenced.⁵⁵⁴ Apart from requiring the victim to follow the route of criminal proceedings, the victim further carries the burden that he/she suffered an injury as stipulated in the act. The Act will not be of any use to sexually abused children that either do not know the perpetrator or do not wish to make use of the criminal justice system.

(b) *Victims' Charter Act 65 of 2006*

The purpose of the Act is to recognise, establish and monitor principles that govern the response to persons "adversely affected by crime".⁵⁵⁵ The Act defines a criminal offence and significantly states that it does not depend on a

546 S85C(1)(b) 49 of 1991.

547 S85C(1)(a) 49 of 1991.

548 S85D(1) and s85D(3) 49 of 1991.

549 S85H 49 of 1991.

550 S85I 49 of 1991.

551 S85J 49 of 1991.

552 S85L 49 of 1991.

553 S74 49 of 1991. The court can grant the order whether the accused was conditionally or unconditionally dismissed. See s75-s77.

554 S85B(1) and s85(c) 49 of 1991.

555 S1 65 of 2006.

person being accused of or convicted for the said offence.⁵⁵⁶ Furthermore, the offence must have been the cause of the injury sustained by the victim.⁵⁵⁷ The definition assigned to injury is similar to that stated in the *Sentencing Act*. However the wording "adversely affected" is further defined in this act, which is quite significant. It states that a person is adversely affected if the person has suffered an injury as a result of a criminal offence and includes a person that witnesses a crime being committed.⁵⁵⁸ The definition has been extended by adding the words 'grief, distress and trauma' and in doing so assisted victims of sexual offences to be eligible to claim for compensable injuries.⁵⁵⁹ The victim must still show that he/she was adversely effected and in order to do that may once again be reduced to a victim as it is expected of him/her to "present his/her injuries so that it will align with a psychiatric category".⁵⁶⁰

The objectives of the Act are to recognise the impact crime has on victims, that victims are adversely affected by crime, whether or not the crime was reported and to treat victims with respect and offer them information as to services available that could assist them in their recovery process.⁵⁶¹ A victim may request a court that had convicted an offender or found him/her guilty of an offence, to order the offender to pay compensation.⁵⁶² Under the *Victims of Crime Assistance Act* a victim may apply for state compensation.⁵⁶³ The *Victims' Charter Act* is essentially an affirmation of what is stated in the *Sentencing Act* and the *Victims of Crime Assistance Act*. This act does not grant a victim of sexual abuse more rights.⁵⁶⁴ Victorian jurisdiction is an offence-based model as it requires explicit proof of injury.⁵⁶⁵ Thus the nature of the offence will determine the initial range of compensation.⁵⁶⁶

556 S3(1) 65 of 2006.

557 S3(1) 65 of 2006. See definition of "criminal offences".

558 S3(1) 65 of 2006. See definition of "adversely affected".

559 S3 65 of 2006.

560 Forster 283.

561 S4 65 of 2006.

562 S16(1) 65 of 2006.

563 S16(2) 65 of 2006.

564 S22(1)(a) 65 of 2006.

565 Forster 286.

566 Forster 265.

(c) *Victims of Crime Assistance Act 81 of 1996*

The purpose of the Act is to assist victims of crime by providing them with financial assistance.⁵⁶⁷ The latter should also be seen as "symbolic expression" by the state of the community's sympathy towards victims.⁵⁶⁸ The Act therefore allows victims to claim compensation in instances when it cannot be obtained from either the offender or other sources.⁵⁶⁹

The Victims Referral and Assistance Services, established in 1996, was introduced under the *Victims of Crime Assistance Act* in 1997 and their purpose is to refer victims to agencies that will assist them to restore them to their pre-crime position, to oversee counselling schemes and manage funding that would help community agencies in assisting victims.⁵⁷⁰ When the *Victims of Crime Assistance Act* was introduced in 1996 all compensation for bodily injuries and nervous and mental shock was removed from the compensation framework.⁵⁷¹ This means that victims of sexual abuse, that usually fall within the category of mental shock, are now excluded from the scope of the scheme.⁵⁷²

However, since 2000 compensation for non-pecuniary damages was introduced, which includes offences that involve sexual penetration or attempted sexual penetration.⁵⁷³ The definition of "significant adverse effect" and "victim" are similar to those referred to in other Victorian legislation. However a victim can either be a primary, secondary or related victim.⁵⁷⁴

567 S1 81 of 1996.

568 S1(2)(b) 81 of 1996.

569 S1(2)(c) 81 of 1996.

570 Kirchengast 2009 *Criminal Injuries Compensation* 108.

571 Forster 288. Also see Forster and Parkinson 177 wherein it is stated that in 1996 Victoria completely removed all forms of non-pecuniary compensation.

572 Forster 288.

573 Forster 288. Also see Forster and Parkinson 181 wherein the authors state that the removal of the non-pecuniary compensation has enormous consequences for victims of sexual crimes. The model negates any purpose compensation has for sexually abused victims because they cannot claim for loss of enjoyment of life.

574 S7 states that a primary victim is a person that actually suffered injury or died. S 9 states that a secondary victim is a person that had witnessed the unlawful act on the primary victim that was injured in the process. S 11 states that a related victim is a person that was either dependent or a close family member or had an intimate relationship with the

The Victims of Crime Assistance Tribunal was established by the *Victims of Crime Assistance Act*. The purpose of Victims of Crime Assistance Tribunal is to acknowledge the pain and suffering of victims of crime and to provide them with financial assistance to help them with their recovery.⁵⁷⁵ Financial assistance relates to *inter alia* counselling and medical cost.⁵⁷⁶ Victims of Crime Assistance Tribunal consist of members that are magistrates and they, as a Tribunal, will decide on an application for compensation.⁵⁷⁷ A victim lodges a claim for compensation with the Tribunal.⁵⁷⁸

There are, however, certain limitations. The Tribunal must deduct from the payment granted, any amount or compensation given to the victim from any other source.⁵⁷⁹ A further hurdle that must be met by the victim is that the application must be filed within two years after the commission of the crime.⁵⁸⁰ However, there are exceptions.⁵⁸¹ The most significant factors that a Tribunal should consider when granting an extension is *inter alia* the age of the victim at the time of the commission of the crime, whether the offender was an authority figure to the victim, and in the case of a child victim, if he/she had filed an application within a reasonable time after he/she had turned eighteen.⁵⁸²

These factors are important when one has to consider that children often do not disclose immediately.⁵⁸³ The Act makes no "explicit exception" for sexually

primary victim that had died as a result of the unlawful act, and this member is not the offender in the act.

575 Simmons 2012 *Making Possibilities Realities* 534. She states that the Tribunal will only award financial assistance if the Tribunal is satisfied that a violent act had occurred and the claimant needs financial assistance as a result of the act.

576 S47 81 of 1996.

577 S19(2) and s21 81 of 1996.

578 S25 81 of 1996.

579 S16 and s62 81 of 1996. Other compensation includes compensation from the offender, insurance claims or other compensation schemes.

580 S29(1) 81 of 1996.

581 S29 81 of 1996.

582 S29(3) 81 of 1996. Also see s53 wherein the Act refers to what factors should be considered in order to determine what constitutes a 'reasonable time'.

583 See Forster 265. She states that victims often do not connect their injuries to the abuse until many years after the sexual abuse.

abused victims.⁵⁸⁴ Before an order for compensation is made, the Tribunal will first establish whether an act of violence was committed, whether the applicant is a primary, secondary or related victim and whether the victim is eligible to claim.⁵⁸⁵ Forster argues that sexual abuse can only be recognised if it is an act of violence but says that children are often groomed or coerced into the sexual act and therefore are not accompanied by the kind of violence envisaged in the criminal act.⁵⁸⁶

If the Tribunal finds that the crime had not been reported within a reasonable time or that the victim did not co-operate with the authorities, the application may be dismissed.⁵⁸⁷ The Tribunal can make an interim payment but if the application is later refused any payments made will have to be reimbursed by the applicant.⁵⁸⁸

Section 4 deals with related criminal acts. If the victim for example was sexually abused over a period of time by the same offender, the Tribunal will deal with the claim as if it was one offence.⁵⁸⁹ This section therefore reduces multiple crimes to a single crime for the purpose of compensation if the crimes are 'related'.⁵⁹⁰ Victims of sexual abuse are more likely than other victims of crime to experience multiple assaults by the same offender in similar circumstances.⁵⁹¹

New South Wales as well as Victoria introduced specific sexual assault provisions.⁵⁹² Forster argues that despite the introduction of these provisions, victims of sexual crimes still struggle to obtain compensation.⁵⁹³ These acts state that compensation may be paid in cases where there was a loss of income.⁵⁹⁴

584 Forster 279.

585 S50 81 of 1996.

586 Forster 276 and 283.

587 S52 81 of 1996.

588 S56 81 of 1996.

589 S4(1)(a) 81 of 1996.

590 S4(4) 81 of 1996.

591 Forster 280-281.

592 New South Wales introduced it into the *Victims Support and Rehabilitation Act* in Schedule 1 and Victoria into the *Victims of Crime Assistance Act* in s3.

593 Forster 282.

594 S17 81 of 1996.

In cases where the victim is a child there will be no loss of income.⁵⁹⁵ Furthermore, not all sexually abused children will show visible physical injuries in order to vindicate the onus of proving that bodily harm was done.⁵⁹⁶ Although the two states in Australia have legislation in place that can assist victims of crime, it does not specifically address the unique issues of sexually abused children.

The Australian government adheres to its legal responsibility towards victims of crime and specifically sexually abused victims through a statutory compensation scheme. It is administered by the government and convicted offenders contribute to the scheme by means of a levy. South Africa can draw lessons from this country in the manner in which the scheme is governed.

4.2.3 New Zealand

New Zealand does not have a document known as the constitution but rather a 'constitutional framework' that consists of legislation, common law, constitutional conventions and historic laws.⁵⁹⁷ New Zealand is the first country to introduce a statutory compensation scheme for victims of crime and many countries followed suit based on their compensation scheme.⁵⁹⁸ The rationale behind the implementation was shared liability between the state and the community.⁵⁹⁹ In 1963 the *Criminal Injuries Compensation Act* was introduced.⁶⁰⁰ In 1975 the scheme was included in the Accident Compensation system that provided a more comprehensive compensation.⁶⁰¹ The Act was modified and renamed in 2008 and is now known as the *Accident Compensation Act 49 of 2001*.⁶⁰²

595 Forster 282.

596 Forster 283.

597 Glazebrook, Baird and Holden 2009 *New Zealand Country Report* 57-58.

598 Cameron 1963 *New Zealand Experiment* 367.

599 Cilliers 39.

600 www.lawcom.govt.nz 2 [Date of use 12 Oct 2012]. *Criminal Injuries Compensation Act* 134 of 1963. Also see Weeks 1978 *New Zealand Criminal Injuries Compensation Schemes* 108. See also Cameron 368.

601 www.lawcom.govt.nz 2 [Date of use 12 Oct 2012].

602 Hereafter referred to as the ACA. Todd 2011 *Forty Years* 193-197. The so-called 'Woodhouse' proposals were enacted in the first accident compensation scheme that came into force on 1 April 1974. Since then the scheme was re-enacted four times: In 1982 it was changed to *The Accident Compensation Act*. In 1992 it was renamed as the *Accident Rehabilitation and Compensation Insurance Act*. In 1998 it was again changed to the *Accident Insurance Act* and in 2001 to the *Injury Prevention Rehabilitation and*

The compensation scheme mentioned in the Act is administered by the Accident Compensation Corporation⁶⁰³. The ACC acts as a government agency.⁶⁰⁴ The ACC is funded through taxation and levies.⁶⁰⁵ The ACA and the *Sentencing Act* will be looked into so as to determine whether it provides for compensation.

4.2.3.1 *Accident Compensation Act* 49 of 2001

The ACA came into force on 1 April 2002 and is considered the primary avenue of compensation.⁶⁰⁶ For a person to lodge a claim the first aspect to consider is whether the person has coverage under the compensation scheme.⁶⁰⁷ Persons that may apply for compensation are claimants that suffered personal injury if they have cover for personal injury and are eligible under the Act for entitlement in respect of personal injury.⁶⁰⁸ Personal injury includes *inter alia* physical injury suffered by the claimant and mental injury suffered by the claimant because of physical injury.⁶⁰⁹ Mental injury encompasses psychological dysfunction.⁶¹⁰ The latter can be caused by an outcome of an offence performed by an offender.⁶¹¹

Compensation Act. In 2008 the name was changed to the original one as it still stands today. A comprehensive discussion on the Woodhouse report will not follow, but because it forms an integral part of the initial compensation report, reference to the report is necessary. The Woodhouse report supported the 'no fault principle'. Five guidelines were stated in the report: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency. See Miller 1996 *Advantages and Disadvantages* 256 www.aic.gov.au [date of use 13 Nov 2012]. Also see a discussion on the Woodhouse report in McKenzie 2003 *Origins of ACC in New Zealand* 194-195 and Schuck 2008 *Tort Reform* 189-190.

603 Hereafter referred to as ACC.

604 www.legislation.govt.nz [Date of use 20 Feb 2013]. See s 39.

605 Todd 214. Also see s227-229 ACA 2001 that deals with levies. Parliament must through appropriations contribute to the non-earners' account. Organisations and employees must pay levies which in turn will fund the treatment-injury account.

606 O'Driscoll 2009 *Accounting for the Profits* 699. In Todd 198 he states that the scheme consists of four core categories. They are personal injury caused by employment-related disease, personal injury by way of mental injury suffered as a consequence of physical injury or by the victim of certain specified sexual offences, personal injury by way of medical treatment and personal injury caused by an accident.

607 Tobin and Schoeman 2005 *New Zealand Accident Compensation Scheme* 495. The authors state that if the person does not have cover the scheme becomes irrelevant.

608 S67 ACA 2001.

609 S26 ACA 2001.

610 S27 ACA 2001.

611 S21A ACA 2001. S21(2)(c) states that the Act must be within one of the offences mentioned in schedule 3 of the ACA. Schedule 3 refers to sexual offences. Also see Todd 205 wherein he states that schedule 3 mainly deals with sexual offences and includes sexual violation and incest.

Persons that want to claim from the ACC must do so within 12 months after the personal injury has been sustained.⁶¹² The ACC must make a decision within a reasonable time after the claim had been lodge.⁶¹³ Failing to do so will result in the person's claim being successful.⁶¹⁴ A person is entitled to appeal against the decision of the ACC and the appeal matter will be referred to the District Court.⁶¹⁵

Personal injury alone is not enough.⁶¹⁶ Where a personal injury is caused by an accident, the claimant may lodge a claim.⁶¹⁷ Sexually abused victims face the challenge of proving that they have suffered due to the offender's sexual acts and that this act falls within the ambit of the definition of accident. A Victim of a sexual crime that suffers physical injury can claim under section 20 of the ACA. It becomes problematic if there are no injuries but the sexually abused victim suffers emotionally due to the sexual assault on him/her. Emotional harm is not covered by the ACA.⁶¹⁸ The victim will have to show that he/she suffers from a mental injury caused by a sexual act.⁶¹⁹

Mental injury is contained in the definition of personal injury.⁶²⁰ Section 21 deals with mental injuries caused by certain criminal acts which include sexual offences.⁶²¹ If a victim suffers from psychological problems, it would fall within

612 S53 ACA 2001.

613 S54 ACA 2001.

614 S58 ACA 2001.

615 S149 ACA 2001.

616 Tobin and Schoeman 496. Also see Todd 198 wherein he states the categories in which the personal injury should fall before a claim can be instituted.

617 An accident is defined in s 25 of the ACA and includes *inter alia* the application of force to the human body.

618 www.lawcom.govt.nz 5 [Date of use 12 Oct 2012]. According to Schuck 196 the ACC used to cover emotional harm claims until 1990, when it was barred.

619 Todd 2002 *Vicarious Liability* 302.

620 See s21 and s26 ACA 2001.

621 The offences as per schedule 3 are sexual violation; attempt to commit sexual violation; inducing sexual connection by coercion; incest; sexual intercourse with a girl under care or protection; sexual intercourse with a girl under 12 years; indecency with a girl under 12 years; sexual intercourse or indecency with a girl between 12 years and 16 years; indecent assault on a woman or a girl; sexual intercourse with a severely subnormal woman or girl; indecent act between a woman and a girl; indecency with a boy under 12 years; indecency with a boy between 12 years and 16 years; indecent assault on a man or a boy; anal intercourse; compelling indecent act with an animal; assault on a child, or by a male on a female; infecting with disease; female genital mutilation; further offences

the meaning of a mental injury.⁶²² A sexually abused victim would therefore be able to lodge a claim with the ACC under the ACA.⁶²³

The claim may be lodged irrespective of whether the offender has been charged or found guilty.⁶²⁴ If a victim successfully lodges a claim, he/she cannot bring an action against the offender for compensatory damages.⁶²⁵

Social rehabilitation forms part of the services rendered by the ACC.⁶²⁶ The purpose of social rehabilitation is to restore a victim's independence to the maximum extent possible.⁶²⁷ Social rehabilitation includes *inter alia* aids and appliances, attendant care, child care and home help.⁶²⁸

4.2.3.2 *Sentencing Act* 9 of 2002

The Act was approved on 5 May 2002 and came into force on 30 June 2002. Since the enforcement of the Act it has contained within it a "strong presumption in favour of reparation".⁶²⁹ The Act made compensation to victims of crime one of the main functions of the *Sentencing Act*.⁶³⁰ Section 12 of the *Sentencing Act* states that if a court can impose a sentence of reparation, it must do so unless the court finds that the offender will not be able to adhere to the order.⁶³¹ If the court does not make an order for reparation, it must give reasons for failing to do so.⁶³² A reparation order does not substitute a sentence but is a sentence unto itself.⁶³³

relating to female genital mutilation. See schedule 3 ACA 2001 as well as Todd 2002 302.

622 See s27 ACA 2001.

623 Todd 2002 302-303.

624 S21(5) ACA 2001.

625 See s317 ACA 2001. Also Todd 2002 302.

626 Todd 2002 211. Also see s69(1)(a) ACA 2001.

627 S79 ACA 2001.

628 S81 ACA 2001.

629 www.lawcom.govt.nz 11 [Date of use 12 Oct 2012].

630 Connell 2011 *What is the Place of Corrective Justice* 137.

631 S12(1) *Sentencing Act* 2002.

632 S12(3) *Sentencing Act* 2002.

633 Connell 136.

One of the reasons for not imposing a sentence of reparation could be the lack of the financial capacity of the offender.⁶³⁴ The court, however, may make an order for the offender to pay either less or make instalment payments to the complainant.⁶³⁵ In the absence of a sentence of reparation towards the complainant, the complainant may still bring a civil claim against the offender unless the proceedings are barred.⁶³⁶ This will, however, result in financial implications for the complainant.⁶³⁷

The sentence for reparation may be granted for *inter alia* emotional harm and loss or damage consequential⁶³⁸ to any emotional or physical harm or loss of or damage to property.⁶³⁹ The order can only be granted to someone that is a victim as described in the act.⁶⁴⁰ The court is not allowed to make an order if it is found that the complainant is entitled to bring a claim for consequential damages with the ACC in accordance with the ACA.⁶⁴¹

The complainant is not allowed "double recovery" from both the court and the ACC.⁶⁴² In serious offences for which the court will have to impose a sentence of imprisonment a sentence of reparation will not be possible. The only other route available for a complainant would be to lodge a claim with the ACC. The *Prisoner's and Victim's Claims Act* provides for complainants to bring a claim

634 Connell 139.

635 S35 *Sentencing Act* 2002.

636 S38(2) *Sentencing Act* 2002.

637 Connell 140.

638 www.lawcom.govt.nz 12 [Date of use 12 Oct 2012] wherein consequential loss is described as indirect loss or damage such as medical expenses and travelling costs the complainant had to pay.

639 S32(1) *Sentencing Act* 2002. See www.lawcom.govt.nz 12 [Date of use 12 Oct 2012] wherein it is stated that emotional harm reparation may be considered whenever grief, anxiety or other mental pain and suffering results from the offence. The author refers to *Edgecombe v Attorney-General on behalf of the Department of Corrections* 2005 DCR 780 par 37.

640 S32(2) *Sentencing Act* 2002. S 4(1) of the Act states that a person is considered to be a victim if he/she is a person against whom the offence was committed by another and due to the offence suffered physical injuries or loss of or damage to property. Parents and guardians may stand in for child victims unless they are the offender.

641 S32(5) *Sentencing Act* 2002. Also see O'Driscoll 702. She further states that the court may make an order for reparation for emotional harm including clinical conditions such as traumatic stress disorders.

642 S145(3) *Sentencing Act* 2002. This section coincides with s317 of the ACA.

against an offender who received damages.⁶⁴³ It is a complicated process which is seldom used. It does not benefit victims whose offenders were not imprisoned or did not receive any damages.

The New Zealand government through a statutory compensation scheme assists victims of violent crimes to socially reintegrate by means of services rendered to them. Although there is some critique that can be noted regarding the scheme, South Africa can still learn how to socially reintegrate sexually abused children through a state-funded compensation scheme.

4.3 Conclusion

Ontario and Prince Edward Island have legislation in place to ensure state compensation for victims of crime. A victim may claim for pain and suffering as well as for psychological injuries sustained due to a sexual offence committed by the offender. In Ontario the claim is not dependent on a conviction or prosecution of the offender. Ontario has a limitation clause of two years and Prince Edward Island one year wherein the claim must be lodged. There is, however, the possibility of an extension. The claims are lodged in Ontario with the Criminal Injuries Compensation Board which is an administrative tribunal. In Prince Edward Island it is also simply a paper review. The downside of a faceless claim is that the victim is not afforded the opportunity to express his/her views, which could have been part of the recovery process.

New South Wales and Victoria provide for state-funded compensation schemes. New South Wales has a tariff model that specifies an amount for certain injuries. An assessor will investigate the claim. New South Wales was the first to consider claims for compensation years after the sexual abuse had taken place. Although New South Wales has a *Victims Rights Act* it does not grant a victim any rights but instead states that the implementation of the Act depends on *inter alia* resources and practicality. Victoria has a *Sentencing Act* but it is only applicable

⁶⁴³ 74 of 2005. Also see Dawkins and Briggs 2005 *Criminal Law* 413-414. The authors state that the Act focuses on a small group of people only and does not benefit all victims of crime.

in instances where an offender is charged and convicted and the court can then consider a compensation order against the offender. The *Victims of Crime Assistance Act* provides for state-funded compensation in Victoria. However, there is a limitation clause of two years wherein the claim must be lodged with the possibility of an extension. It appears, though, that the fund will only pay if proven that violence was committed.

New Zealand is the first to have a state compensation scheme. In accordance with the ACA a victim must have coverage before he/she can claim. A victim must have suffered a personal injury which includes a physical or mental injury caused physically. The Act provides for injuries caused due to sexual offences. The limitation clause for lodging a claim is 12 months.

South Africa would be able to learn something from all of these countries. Although not one of these countries has a perfect compensation scheme, they are one step ahead of South Africa when it comes to state compensation for victims of crime. It would be sensible in evaluating all of the above compensation schemes to choose the best aspects of each scheme and incorporate it into one practical and viable state compensation scheme. South Africa could make special provision for sexually abused children and by doing so would be the forerunner on the social reintegration of sexually abused children through the reparation of their constitutional rights.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

The focus of this study was to determine what the state has done to adhere to their legal responsibility to restore the rights of children affected by sexual abuse and degradation. From the statistics provided by SAPS it appears that children are more often than not the victim of sexual crimes. It is submitted that there is a demanding need to ensure services are provided to all children irrespective of their age, whether or not the matter was reported, whether or not the perpetrator was caught.

The current position in South Africa was scrutinised. It was found that section 28 (1)(d) of the *Constitution* provides children with a right to be protected against *inter alia* abuse. This right is further confirmed in the *Children's Act*.⁶⁴⁴ The state through the VEP, the Victims' Charter and the UPVM, confirms their commitment to protect children against sexual abuse and further degradation. However, it was found that the aims stipulated in the VEP, Victims' Charter and the UPVM to assist children that fall prey to sexual abuse are not legally enforceable. The state delegates their commitment towards child victims of sexual abuse to service providers such as Khulisa Social Solution and NICRO. These NGOs are dependent on the state for financial aid but their mandate is not enforced by legislation.

The state through legislation provides for compensation orders in terms of section 300 and section 297 of the CPA. It was found that the sections are only applicable in instances where a child victim becomes part of the criminal justice system and where the offender has been charged and convicted. A further prerequisite is that the offender must be sentenced in such a manner that he/she will be able to compensate the victim.⁶⁴⁵

644 S2 38 of 2005.

645 The offender will have to receive a suspended sentence and will have to be in a financial position to compensate the victim. Furthermore s 300 only deals with the loss and or damage of property.

The sections in the CPA are therefore not applicable to offences where minimum sentences are mandatory.⁶⁴⁶ As indicated, legislation further provides for civil litigation. It was found that in most cases the victim either does not have the financial means to pursue such an action or the offender is not in a financial position to compensate the victim. None of the sections provided for in legislation places any legal obligation on the state to financially assist children to be socially reintegrated. It was found that South Africa does not have a compensation scheme to assist victims of crime. The state confirms its commitment to protect the rights of children but legislation does not make it compulsory for courts, organs of state and stakeholders to provide the necessary services to ensure that sexually abused children's rights are restored.

South Africa signed and ratified the CRC. The latter places an obligation on South Africa to take steps to implement the CRC. Article 39 of the CRC deals specifically with the social reintegration of child victims of *inter alia* abuse. However, it relies on financial and other resources to be in place for the successful implementation. It articulates the rights of children and provides for children to express their views. Article 39 is not incorporated into South African legislation. It is submitted that South Africa is compelled to incorporate the provisions of the CRC into legislation in such a manner that the rights of the children are juridical rights and not moral rights. Furthermore, the rights and the manner in which these rights will be protected will have to be specified. In light of the fact that South Africa follows a dualist approach it would mean that the provisions of the CRC would have to be incorporated into the legislation. The CRC, however, does not provide sexually abused children the right to enforce the provisions of the CRC.

The ACRWC was also signed and ratified by South Africa. It is suited for African countries such as South Africa as it takes into consideration the culture and

646 Most of the sexual offences as stipulated in the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* are subject to the *Criminal Law Amendment Act, S51(1) of 105 of 1997* which states that in cases where the victim is under the age of 16 years and the offender is found guilty of rape, the offender must be sentenced to life imprisonment.

traditions of the people. It provides a broader protection concerning the rights of a child than does the CRC. No specific protection is stated or how the state will act once a right of a child has been violated.

The United Nations Declaration of Basic Principles is only a guideline even though South Africa is a signatory to it. It provides for a national fund to assist victims of crime but South Africa has yet to implement a fund as suggested in the United Nations Declaration of Basic Principles.

To determine what lessons can be learned from foreign law the study looked into existing compensation schemes in Canada, Australia and New Zealand.⁶⁴⁷

In Canada the two provinces, Ontario and Prince Edward Island, have legislation in place to address the needs of victims of crime. It was found that compensation schemes exist whereby victims of crime, including victims of sexual abuse, may put in a claim including a claim for pain and suffering. Most of the schemes are funded by government and/or by fines imposed against convicted offenders. The burden is therefore not only on the state to fund the scheme but also on those that contributed to the victims' pain and suffering. There are, however, time limitation clauses that state that victims must institute a claim within a certain period of time. These acts nevertheless do not specifically provide for child victims of sexual abuse. One of the hurdles seems to be adequate funding for the schemes.

In Australia the two states, New South Wales and Victoria, have legislation in place to address victim compensation. Some of the legislation addresses the needs of sexually abused victims. All have a limitation clause that stipulates a claim must be brought within a certain period of time. However, in New South Wales it is acknowledged that children that have experienced sexual offences do not disclose immediately; hence special provision should be made for them. The schemes are either based on a tariff-model where an amount is allocated to a

647 Zweigert and Kötz 7-8.

certain injury or on an offence-based model according to which an amount is paid depending on the offence committed.

New Zealand has a statutory compensation scheme and was one of the first countries to implement the scheme. The scheme only covers personal injury which includes physical injury and mental injury caused physically. It does not cover emotional harm. Although it includes victims of sexual abuse, victims will have to prove that they have suffered harm specifically due to the sexual act. It is not a prerequisite for an offender to be charged or found guilty in order to claim for compensation.

5.2 Recommendations

From the study done it is submitted that the state is not adhering to its legal responsibility to socially reintegrate sexually abused children. In order to address the failure of the state to assist children of sexual abuse to restore their violated rights, it is further submitted that the state should learn from countries that have already addressed the issue. In considering whether to implement a compensation scheme for victims of crime, South Africa will have to determine the rationale for such a scheme. The rationale behind the implementation of a victim compensation scheme should be to provide victims of crime with compensation (pecuniary or non-pecuniary) to enable them to better the chance of getting their life back in order. Such an obligation should be shared between the state and the community.

The compensation schemes in the three countries that were looked into are not without fault and therefore South Africa can in its attempt to draft such legislation address the shortcomings identified in these schemes.⁶⁴⁸ As mentioned, positive and negative lessons can be drawn from compensation schemes in other countries.

648 Zweigert and Kötz 17. The authors state that it might be necessary to modify a foreign legal system to adapt to a country's existing procedures.

It is suggested that a compensation scheme for victims of crime be legislated wherein specific provision is made for child victims of sexual abuse. In the South African scheme the rights of these children must be stipulated in accordance with the *Constitution*. The South African government, through the scheme, must be held accountable to ensure the social reintegration of the children by means of pecuniary and/or non-pecuniary compensation. The latter may include services rendered by NGOs that already exist and hospitals that have doctors, psychologists and social workers on staff. If need be private professionals such as psychiatrists and forensic social workers that can offer their services on an *ad hoc* basis. The service providers can give feedback on the progress of each child by providing a board with a written report. This will also act as a monitoring device and can be used to assist in statistic reporting.

It should be borne in mind that child victims of sexual abuse often do not disclose immediately and the scheme should pay special attention to it. It should furthermore not be a requirement that the offender be charged or found guilty before a claim may be lodged. It should be considered that the scheme be funded partly by the state, convicted offenders and donor funding.

South Africa already has legislation in place that protects the rights of children. Sections 7(2), and 28(1)(d) of the *Constitution* addresses the protection of these rights. The International law places a specific obligation on the state to adhere to their responsibility to socially reintegrate child victims of sexual abuse. It is submitted that the South African government must adhere to its responsibility relating to international treaties. A child's self-worth is of utmost importance. The degradation of children through sexual abuse leads to low self-confidence. It is submitted that a state-funded compensation scheme will contribute to the social reintegration of sexually abused children.

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