

ANNEXURE A :

ORGANISATION: BANKING ASSOCIATION SOUTH AFRICA

SUBMISSION DESCRIPTION: COMMENTS ON THE SOUTH AFRICAN LAW REFORM COMMISSION FIVE DISCUSSION PAPERS ON THE REVIEW OF THE CRIMINAL PROCEDURE ACT, 1977

**1) DISCUSSION PAPER 169
MENTAL AND INTELLECTUAL DISABILITY AND THE CRIMINAL JUSTICE SYSTEM**

NO	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem?)	PROPOSED WORDING/CHANGE
1.	1. General		
	1.1 Lack of alignment with financial sector laws (general observation)	<p>BASA notes that the paper does not cross-reference FICA, FAIS, NCA, or POPIA implications. Banks must comply with these statutes when dealing with vulnerable customers. Misalignment may create regulatory conflict.</p> <p>BASA proposes that a cross-sector clause is inserted requiring that implementation of the Criminal Procedure Act must be read subject to financial sector legislation, particularly regarding customer due diligence, consent, and record-keeping.</p>	
	1.2 Implementation and resource implications (general)	<p>BASA proposes that the paper includes an implementation impact assessment as banks will need to update systems, mandate forms, training, and vulnerable customer procedures.</p> <p>If new categories of representation or findings are introduced, banks will face uncertainty regarding existing mandates and historical court orders.</p>	
	1.3 Transitional arrangements	<p>BASA proposes that a regulatory impact statement is added that acknowledges the operational burden on regulated institutions and that reasonable transition periods for implementation are allowed</p> <p>BASA proposes that e explicit transitional provisions confirming the treatment of existing curatorships, mandates, and prior court findings are included.</p>	
2.	Definition of “mental illness” and “intellectual disability” (general definitions section)	<p>BASA notes that overly broad or clinically fluid definitions create uncertainty when assessing a client’s legal capacity to operate accounts, sign mandates, or entering into credit agreements. Banks require clear, objective triggers before</p>	<p>BASA proposes that wording be inserted that clarifies that a finding of mental or intellectual disability does not automatically imply lack of financial or contractual capacity unless formally declared by a competent court.</p>

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		restricting a client's financial autonomy. Ambiguity increases litigation risk and potential discrimination claims.	BASA proposes alignment with the Mental Health Care Act 17 of 2002 to avoid a rigid definition and to rather incorporate the way that this legislation deals with capacity to make informed decisions.
3.	Sections dealing with fitness to stand trial assessments	BASA notes that the paper focuses on criminal fitness but does not address the civil/commercial consequences of such findings. Banks may receive court orders but lack guidance on whether account restrictions are required. This creates inconsistent operational responses across institutions.	BASA proposes that guidance be included stating whether a finding of unfitness to stand trial has any automatic effect on civil capacity and require courts to specify if financial management restrictions are intended.
4.	Provisions relating to court-ordered detention for observation	BASA notes that banks may become aware that a customer is detained for psychiatric observation. Without explicit legal direction, freezing accounts may infringe customer rights, while allowing unrestricted access may expose banks to fraud or undue influence risk.	BASA proposes that a provision be added to the effect that detention for observation does not in itself suspend the person's ability to transact financially unless a curator, administrator, or similar legal representative is appointed.
5.	Appointment of curators or administrators (representation provisions)	BASA notes that operationally, banks need standardised proof requirements to recognise curators/administrators. The discussion paper does not address the practical need for certified appointment documents, scope of powers, or revocation processes. This creates fraud and mandate risks.	BASA proposes that any court order appointing a curator/administrator must clearly state: (a) powers over financial affairs, (b) effective date, and (c) revocation procedure.
6.	Provisions expanding diversion and alternative procedures	BASA notes that increased diversion without clear record systems may limit banks' ability to assess fraud risk, financial crime exposure, or	BASA proposes that clarification is required on what information may lawfully be shared with regulated financial institutions under existing lawful disclosure frameworks.

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		behavioural risk indicators when legally permitted.	
7.	Confidentiality and protection of medical information	BASA notes that strengthened privacy protections are appropriate, but banks still require sufficient information to comply with risk management and vulnerable customer frameworks. Over-restriction may prevent reasonable safeguarding.	BASA proposes that wording be included to permit disclosure of minimum necessary information to regulated financial institutions where required by law or court order for financial protection purposes.
8.	Absence of guidance on financial abuse and exploitation risk	BASA notes that individuals with intellectual or mental disabilities are high-risk targets for financial exploitation. The paper focuses on criminal procedure but does not integrate safeguards that interface with the financial system.	BASA recommends the inclusion of a provision encouraging courts to consider financial vulnerability safeguards, including notification to appointed financial representatives where appropriate.

P.T.O for the BASA Comments on the next discussion paper

2) **DISCUSSION PAPER 170**

PROTECTION OF THE RIGHTS OF VICTIMS OF CRIME IN CRIMINAL PROCEEDINGS (REFLECTIONS ON PREVIOUS INVESTIGATIONS PERTAINING TO VICTIMS OF CRIME)

NO	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem?)	PROPOSED WORDING/CHANGE
1.	<p>General</p> <p>1.1 Operational and systems impact</p>	<p>BASA notes that enhanced victim rights may increase case volumes involving fraud, scams, and disputed transactions. Banks will incur system, training, and process costs not acknowledged in the paper .BASA proposes adding a regulatory impact statement recognising operational implications for financial institutions and allowing reasonable implementation timeframes.</p> <p>BASA advises that if new victim remedies are introduced, banks will require clarity on treatment of existing cases, historic fraud matters, and pending investigations.</p>	
	1.2 Transitional arrangements	BASA proposes the inclusion of explicit transitional provisions addressing how new victim rights measures apply to pre-existing matters.	
2.	General expansion of victims’ rights framework	<p>BASA notes that while enhanced victim protection is supported, the paper does not clearly address the role of financial institutions when victims seek urgent financial relief (e.g., frozen funds, fraudulent transfers).</p> <p>BASA further advises that lack of clarity may create inconsistent responses and cause reputational risk for banks.</p>	BASA proposes that wording is inserted to clarify the expected role of regulated financial institutions in assisting victims, subject to existing financial sector laws and court processes.
3.	Victim participation and notification provisions	BASA notes that banks may receive requests from victims or investigators for account information. Without explicit alignment with FICA and POPIA, institutions risk unlawful disclosure or regulatory breach.	BASA proposes adding a provision confirming that any disclosure of banking information must comply with applicable financial sector and privacy legislation.

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4.	Restitution and compensation mechanisms	BASA would like to advise that operationally, banks may be requested to reverse transactions or facilitate restitution. The paper does not distinguish between court-ordered restitution and informal requests, creating legal exposure and fraud risk.	BASA proposes that clarification be given that financial institutions may only process reversals or restitution payments upon receipt of valid legal authority (e.g., court order, authorised mandate, or statutory directive).
5.	Protection of vulnerable victims	BASA notes that vulnerable victims (including elderly or cognitively impaired persons) present elevated financial exploitation risk. The paper does not sufficiently integrate banking safeguards or reporting channels.	BASA suggests that language encouraging coordination with regulated financial institutions' vulnerable customer and anti-financial crime frameworks be included where appropriate.
6.	Information sharing between state agencies	BASA advises that expanded information sharing may inadvertently conflict with banking secrecy and data protection duties. Banks require legal certainty before acting on third-party requests.	BASA proposes the insertion of wording that information requests directed to financial institutions must follow lawful subpoena, warrant, or statutory request processes.
7.	Confidentiality of victim information	BASA notes that while confidentiality is essential, overly restrictive provisions may hinder banks' ability to investigate fraud cases or protect customer accounts when acting in good faith.	BASA suggests that disclosure of minimum necessary information to regulated financial institutions be permitted where required for fraud prevention, account protection, or compliance with law.
8.	Operational and systems impact (general)	BASA would like to advise that enhanced victim rights may increase case volumes involving fraud, scams, and disputed transactions. Banks will incur system, training, and process costs that have not been acknowledged in the paper.	BASA proposes that a regulatory impact statement be added recognising operational implications for financial institutions and allowing reasonable implementation timeframes.

NO	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem?)	PROPOSED WORDING/CHANGE
9.	Absence of standardised court order formats	BASA would like to advise that banks frequently experience delays and risk due to inconsistent court order wording relating to freezing, restitution, or victim compensation.	BASA recommends the development of standardised court order templates for matters affecting financial accounts.

P.T.O for the BASA Comments on the next discussion paper

3) **DISCUSSION PAPER 171**

ENSURING THE CONTINUITY OF CRIMINAL TRIALS: REFORMING THE “DE NOVO” RULE AND COURT RECORD MANAGEMENT IN SOUTH AFRICA

NO	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem?)	PROPOSED WORDING/CHANGE
1.	<p>General</p> <p>1.1 Operational and resource implications</p>	<p>BASA notes that measures to speed up trials will likely increase the tempo of financial crime litigation, subpoenas, and urgent court orders affecting banks. The paper does not acknowledge the implementation burden.</p> <p>BASA proposes that a regulatory impact statement be included that recognises the operational impact on regulated financial institutions and allowing reasonable implementation periods.</p> <p>BASA would also like to advise that changes to trial continuity rules may affect ongoing matters where banks are already subject to orders or subpoenas.</p>	
	1.2 Transitional arrangements	BASA suggests that explicit transitional provisions be included to confirm the treatment of existing subpoenas, preservation orders, and evidentiary requests.	
2.	General objective to minimise trial delays	BASA notes that while supported, accelerated trial processes may increase the frequency and urgency of subpoenas, preservation orders, and account freezes directed at banks. BASA advises that without adequate procedural safeguards, operational strain and legal risk may be created.	BASA suggests including wording recognising the need for reasonable compliance timeframes for regulated financial institutions when responding to court processes.
3.	Judicial officer substitution provisions	BASA advises that where trials continue under a new judicial officer, banks may face uncertainty regarding the ongoing validity of prior financial orders (e.g., preservation or disclosure orders). This creates legal and operational ambiguity.	BASA proposes that all existing financial and disclosure orders remain valid and enforceable unless expressly varied or set aside by the court.
4.	Expanded use of electronic records and evidence	BASA notes that banks frequently provide electronic records and that the paper does not	BASA proposes that minimum standards be introduced for electronic evidence submission,

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		address standardisation of electronic evidence formats or secure transmission requirements, increasing risk of disputes and rework.	including format, certification, and secure transmission protocols for financial institutions.
5.	Increased reliance on documentary evidence	BASA advises that greater reliance on documents may increase subpoena volumes to banks. Without coordination mechanisms, this may create duplicated requests and unnecessary operational burden.	BASA suggests that the use of consolidated or coordinated information requests be encouraged to regulated financial institutions where feasible.
6.	Witness availability and scheduling reforms	BASA advises that banks' officials are frequently called as witnesses in fraud and financial crime matters. Short-notice scheduling may disrupt critical banking operations and increase compliance costs.	BASA proposes that provision be inserted to encourage reasonable advance notice to institutional witnesses and allowance for affidavit-based evidence where appropriate.
7.	Case management and pre-trial procedures	Enhanced case management is positive but does not explicitly include early identification of third-party record holders such as banks. Late-stage requests create operational pressure and delay risk.	BASA proposes that provision be made for early identification of required third-party financial records during pre-trial case management processes.
8.	Information sharing and disclosure obligations	Expanded disclosure expectations may conflict with banking secrecy and POPIA obligations if not carefully aligned.	BASA proposes the inclusion of a cross-reference confirming that disclosures by financial institutions must comply with applicable financial sector and data protection laws.

P.T.O for the template for the next discussion paper

4) **DISCUSSION PAPER 172**
EMPLOYMENT OF LAY ASSESSORS

NO	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem?)	PROPOSED WORDING/CHANGE
1.	<p>General</p> <p>1.1 Operational and cost implications</p> <p>1.2 Absence of standardised guidance in financial crime matters</p>	<p>BASA would like to advise that expanded use of lay assessors may increase the duration and complexity of financial crime trials, indirectly increasing compliance costs for banks responding to subpoenas and evidence requests.</p> <p>BASA proposes that a regulatory impact statement be included that acknowledges downstream operational impacts on regulated institutions.</p> <p>BASA notes that banks frequently participate in fraud and money laundering cases. Lack of tailored guidance for assessors in such matters may lead to inconsistent treatment of banking evidence.</p> <p>BASA recommends the development of practice notes or bench guides for cases involving financial institutions and complex financial evidence.</p>	
2.	General expansion of the use of lay assessors	BASA notes that while the broader use of lay assessors may enhance representativity, it may also introduce variability in the handling of complex financial crime matters where specialised knowledge is required. This may indirectly affect banks involved as complainants or evidence providers.	BASA proposes that wording be inserted to encourage the consideration of assessor expertise in cases involving complex commercial or financial evidence.
3.	Qualification and competency requirements	BASA would like to advise that the paper does not clearly address minimum competency standards in relation to financial, commercial, or cybercrime matters. Insufficient expertise may lead to misunderstandings of banking evidence.	BASA suggests that a provision allowing courts to consider relevant financial or commercial literacy be included when appointing lay assessors in complex financial crime cases.

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4.	Role clarity between judicial officers and lay assessors	BASA advises that the lack of clarity on the weight of assessor input may create uncertainty in matters involving technical banking evidence, potentially increasing appeals and legal risk.	BASA proposes that the respective roles and decision-making weight of lay assessors versus the presiding judicial officer be clarified in the Act or Regulations or guidelines.
5.	Training and orientation of lay assessors	BASA advises that from a banking perspective, inadequate training may result in misinterpretation of electronic banking records, payment flows, or fraud typologies.	BASA recommends the inclusion of structured training requirements for lay assessors, including exposure to financial crime and electronic evidence concepts.
6.	Operational delays and trial efficiency	BASA suggest that if not properly managed, increased reliance on lay assessors may introduce scheduling complexities that delay trials. Delays increase costs and prolong account freezes or preservation orders affecting banks and customers.	BASA advises that procedural safeguards be encouraged to ensure assessor availability does not unduly delay proceedings involving financial institutions.
7.	Electronic and documentary evidence handling	BASA advises that financial crime cases rely heavily on digital records. The paper does not address whether lay assessors will receive guidance on evaluating large volumes of electronic banking evidence.	BASA proposes the insertion of a provision supporting development of guidelines for assessors on handling complex electronic and financial documentation.
8.	Confidentiality and data protection	BASA notes that lay assessors will have access to sensitive financial information. The paper does not sufficiently address confidentiality safeguards aligned with POPIA and banking secrecy expectations.	BASA proposes that confidentiality provisions applicable to lay assessors should be strengthened, including explicit reference to protection of financial and personal data.

P.T.O for the template for the next discussion paper

5) **DISCUSSION PAPER 173**
STRENGTHENING GOVERNANCE AND ACCOUNTING MECHANISM IN THE CRIMINAL JUSTICE SYSTEM

NO	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem?)	PROPOSED WORDING/CHANGE
1.	General		
2.	General proposed amendments	BASA advises that the discussion paper introduces procedural changes that may increase the volume and urgency of legal processes directed at financial institutions (e.g., subpoenas, account freezes, and disclosure requests). Without explicit safeguards, this may create operational strain and legal risk for banks.	BASA proposes the inclusion of wording recognising the need for reasonable compliance timeframes for regulated financial institutions when responding to court processes.
3.	Information disclosure provisions	BASA notes that expanded disclosure expectations may conflict with banking secrecy obligations, FICA requirements, and POPIA if not carefully aligned. BASA advises that banks require legal certainty before releasing customer information.	BASA proposes adding a cross-reference confirming that disclosures by financial institutions must comply with applicable financial sector and data protection legislation.
4.	Use of electronic and documentary evidence	BASA advises that banks frequently provide electronic records. The paper does not address standardisation of electronic evidence formats or certification requirements, increasing the risk of disputes and repeated requests.	BASA recommends the introduction of minimum standards for electronic evidence submission, including format, certification, and secure transmission protocols for financial institutions.
5.	Court orders affecting financial accounts	BASA advises that banks often receive preservation, restraint, or production orders. Inconsistent wording in court orders creates legal uncertainty, expose banks to contempt risk and delays in execution.	BASA recommends the development of standardised court order templates for matters involving financial institutions. This can take the form of prescribed statutory formats.

NO	REFERENCE IN ACT/BILL/DOCUMENT	COMMENT (Why is it a problem?)	PROPOSED WORDING/CHANGE
6.	Witness and affidavit procedures	BASA advises that bank officials are frequently required to testify in financial crime matters. Short-notice court appearances disrupt critical banking operations and increase compliance costs.	BASA recommends greater use of affidavit-based evidence and provide for reasonable advance notice to institutional witnesses.
7.	Operational and resource implications	BASA notes that the implementation of the proposed changes will likely increase the tempo of financial crime litigation and related court processes affecting banks. The paper does not acknowledge the associated system, training, and staffing costs.	BASA suggests the inclusion of a regulatory impact statement recognising the operational impact on regulated financial institutions and allow reasonable implementation periods.
8.	Confidentiality and handling of sensitive financial data	BASA advises that financial institutions handle highly sensitive customer information. The paper does not sufficiently emphasise safeguards when such information is introduced into criminal proceedings.	BASA proposes strengthening of confidentiality provisions and explicitly reference protection of financial and personal data obtained from regulated institutions.
9.	Coordination between investigators and financial institutions	BASA advises that late or fragmented requests for banking records often delay proceedings and increase compliance burden.	BASA recommends early identification and coordinated requests for third-party financial records during investigation and pre-trial stages.
10.	Transitional arrangements	BASA notes that if procedural rules change, banks involved in ongoing matters may face uncertainty regarding existing subpoenas, freezes, or disclosure obligations.	BASA suggests Including explicit transitional provisions confirming treatment of existing orders and pending matters affecting financial institutions.

END OF BASA SUBMISSION