**SUMMARY OF SUBMISSIONS TO PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON THE CRIMINAL PROCEDURE AMENDMENT BILL [B 40 OF 2015] AND RESPONSE BY DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

**Table 1 reflects general recommendations and the DOJCD’s response**

**Table 2 provides a clause by clause summary of the submissions and the DOJCD’s response**

**TABLE 1**

|  |  |  |
| --- | --- | --- |
| **NAME OF DEPARTMENT/INSTITUTION** | **COMMENTS/RECOMMENDATIONS** | **DOJCD RESPONSE** |
| **+Section 27 (S27)** | (a) Overall welcomes the proposed amendments to the Act.  (b) Constitutional Court used the term “intellectual disability” in its judgment rather than the outdated term “mental defect”. Recommends that other existing legislation be amended to remove the terms “mental defect” and “mentally disabled” and to replace it with “intellectual disability”.  (c) Some laws treat people with mental illness and intellectual disability as incapable of carrying out certain duties and responsibilities simply by virtue of their mental health status. Laws frequently disqualify or remove people from office on the grounds that the person is mentally ill or intellectually disabled, having little regard to their ability to carry out the functions and responsibilities of that office. Requests that a comprehensive audit be conducted on legislation containing blanket exclusions. | (a) Noted.  (b) Noted, the matter will be considered further.  (c) Noted, the matter will be considered further. |

**TABLE 2**

| **CLAUSE**  **PROVISIONS** | **NAME OF DEPARTMENT/**  **INSTITUTION** | **COMMENTS/**  **RECOMMENDATIONS** | **DOJCD RESPONSE** |
| --- | --- | --- | --- |
| **1. Clause 1: Amendment of section 77 of Act 51 of 1977** | | | |
| *(b)* the substitution for subsection (6) of the following subsection:  ''(6) *(a)* If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused’s incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court **[shall]** may direct that the accused—  (i) in the case of a charge of murder or culpable homicide or rape or compelled rape as contemplated in **[sections]** section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be—  *(aa)* detained in a psychiatric hospital; or  *(bb)* temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to him- or herself or to members of the public or to any property belonging to him or her or any other person;  pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;  *(cc)* admitted to and detained in a designated health establishment stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002; or  *(dd)* released subject to such conditions as the court considers appropriate; or  (ii) in the case where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence be —  *(aa)* **[be]** admitted to and detained in **[an institution]** a designated health establishment stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002**[,]**:  *(bb)* released subject to such conditions as the court considers appropriate; or  *(cc)* released unconditionally, where the court has found that the accused has not committed any offence,  and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question.  *(b)* If the court makes a finding in terms of paragraph *(a)* after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside, and if the accused has pleaded guilty it shall be deemed that he or she has pleaded not guilty.''; and | **Centre for Child Law (CCL)**  **S27** | (a) The proposed amendment of section 77(6) does not provide child centred options to presiding officers to ensure that the detention of children is used as a measure of last resort. Section 77(6) should fully embody the requirement in section 28(1)(g) of the Constitution that provides that a child may not be detained except as a measure of last resort.  Recommends that subsection (6) be amended in order to refer to section 50 of the Child Justice Act 75 of 2008.  (a) The Constitutional Court, among others, noted that imprisonment can only be used as a stop-gap measure in order to protect the public, only if the accused person is likely to cause harm to himself or others.  S27 is concerned about the proposed new paragraph *(bb)* on three levels, namely, (i) imprisonment in circumstances where the person poses a danger or threat to property; (ii) failure to clearly state which government institution is responsible for establishing the availability of a bed in a psychiatric facility and for the transfer thereafter; (iii) severe shortage of mental health care services.  (i) According to the Constitutional Court, and in order to strike an appropriate balance between the rights of the accused and the protection of the community, “imprisonment is only viable as a ‘stop-gap’ measure if the presiding officer is of the opinion that the State patient is likely to cause serious harm to himself or others. These instances are permissible as they serve the constitutionally mandated purpose of protecting the public.”. The Court correctly did not make any mention of “danger or threat to property”. Depriving an accused person of his or her liberty in order to protect property would not be so justified.  (ii) The proposed amendment of subsection (6) does not state who is responsible for finding and transferring the accused to a psychiatric hospital when a bed becomes available. Lack of clarity in this regard could result in the indefinite detention of accused persons.  (iii) Shortage of beds in psychiatric facilities also creates a risk that accused persons will be detained indefinitely. It seems likely that persons who are placed in detention as a temporary measure pending available space in a psychiatric hospital could be detained indefinitely. The proposed amendment of section 77(6)(a)(i) should be omitted from the Bill. | (a) The proposed new sub-paragraph (bb) aims to make provision for those instances where a person can be released by the court subject to conditions. The ambit of the provision is very wide and will cover a situation where the court finds that the child may be a child in need of care and protection and that a referral to the childrens’ court for an enquiry is necessary. The Prosecuting Authority is, among others, responsible to assist the court in reaching an appropriate decision and is well aware of the statutory provisions that apply to children who are in need of care and protection, including section28(1)(g) of the Constitution, namely, that a child may only be detained as a measure of last resort. (See section 150 of the Children’s Act, 2005, and section 50 of the Child Justice Act, 2008 as set out in the Annexure.)  (a) Please refer to responses under (i) to (iii) below.  (i) The Department supports the proposal.  (ii) These matters, which are of an operational nature, are addressed in the Mental Observation Protocol. The Protocol, among others, aims to promote, facilitate and regulate cooperation between the departments in relation to the mental observation of accused persons.  (iii) Courts at present do not have any discretion with regard to accused persons who are in psychiatric facilities. Accused persons are either detained in psychiatric hospitals or prisons. The proposed extension of the orders that the courts may grant will contribute to easing the current strain on the system. The reality that there may be dangerous patients who must be detained in the interests of the administration of justice, must be catered for and the proposed section 77(6)(a)(i) can therefore not be deleted. |
|  |  |  |  |

**Annexure “A”**

**Children’s 38 of 2005**

**Child in need of care and protection**

**150.** (1) A child is in need of care and protection if, the child—

*(a)* has been abandoned or orphaned and is without any visible means of support;

*(b)* displays behaviour which cannot be controlled by the parent or care-giver;

*(c)* lives or works on the streets or begs for a living;

*(d)* is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;

*(e)* has been exploited or lives in circumstances that expose the child to exploitation;

*(f)* lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;

*(g)* may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;

*(h)* is in a state of physical or mental neglect; or

*(i)* is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.

(2) A child found in the following circumstances may be a child in need of care and protection and must be referred for investigation by a designated social worker:

*(a)* a child who is a victim of child labour; and

*(b)* a child in a child-headed household.

(3) If after investigation a social worker finds that a child referred to in subsection (2) is not a child in need of care and protection as contemplated in subsection (1), the social worker must where necessary take measures to assist the child, including counselling, mediation, prevention and early intervention services, family reconstruction and rehabilitation, behaviour modification, problem solving and referral to another suitably qualified person or organisation.

**Child Justice Act, 75 of 2008**

**Referral of children in need of care and protection to children's court**

**50.** If it appears to the inquiry magistrate during the course of a preliminary inquiry that—

*(a)* a child is in need of care and protection referred to in section 150(1) or (2) of the Children's Act, and it is desirable to deal with the child in terms of sections 155 and 156 of that Act; or

*(b)* the child does not live at his or her family home or in appropriate alternative care; or

*(c)* the child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth,

the inquiry magistrate may stop the proceedings and order that the child be brought before a children's court referred to in section 42 of that Act and that the child be dealt with under the said sections 155 and 156.