**SUMMARY OF SUBMISSIONS TO SELECT COMMITTEE ON SECURITY AND JUSTICE ON THE CRIMINAL AND RELATED MATTERS AMENDMENT BILL [B17B – 2020]; and**

**RESPONSE BY DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

**Table 1 reflects general comments and the DOJCD’s response; and**

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

**Table 1**

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| **NAME OF INSTITUTION/INDIVIDUAL** | **COMMENTS/RECOMMENDATIONS** | **DOJCD RESPONSE** |
| **Persons who do not support the Bill** | | |
| **S Miller, E du Pisanie, V Jordaan, A Gillespie, V Marais** | | |
| **Persons who do not fully support the Bill** | | |
| **B Enslin**  **L McDonald**  **R Badenhorst**  **W Vorster** | Does not fully support, but argues that the protection of women and children should be improved.  The SAPS and DoJ&CD should do their jobs as mandated by the Constitution before attempting to bring in additional legislation which, won't be properly enforced either.  The amendments are open to abuse since the accused will have to prove their innocence.  Legislation is not adequately enforced. | Noted.  Noted.  In criminal matters the State bears the onus of proof, and not the accused person.  Noted. |
| **Persons who support the proposed amendments** | | |
| **W Krüger, E Livingston, T Allen, S de Sousa, J Pelser, E Vetten, C J Singh, A Rossouw, S Silvis, C Solomons, N Singh, A van Eeden Eeden, P Lunt, A Nolan, L Steyn, G Joubert, M Watson, N Hutchinson, T Kreft, C Asals, D Esakov, A Joubert, A Booysen, C Britz, R van der Merwe, D de Klerk, P Notwana, M Garzola, C van Rensburg, M le Roux** | | |
| **Persons who support the proposed amendments and examples of general comments** | | |
| **M Le Roux**  **L Schoeman**  **T Moleko**  **O Morekhure**  **Action Society**  **Q Mbokoto**  **R Mazibe**  **Law Trust Chair in Social Justice**  **Stellenbosch University**  **Sonke Gender Justice** | More victims should be helped and offenders should be punished properly. Proposes that Parliament should make sure laws can convict those guilty better.  Stricter rules, regulations and laws are required to protect South Africans.    Supports that stricter and tighter measures are put in place to prevent femicide. Emphasises that women have the same rights as men.  Expresses the view that “intermediary” is a broad term and there should be a proper explanation of their roles/functions, abilities, qualifications and knowledge they should have, the minimum years of experience required and their jurisdiction.  (a) Submits that the implementation of stricter laws pertaining to bail applications are likely to prevent perpetrators of GBV from exploiting legal loopholes to avoid imprisonment and will enforce new obligations on the police, prosecutors and the judiciary in their consideration of bail applications.  (b) Submits that being able to give evidence via closed-circuit television provides the victim with the added protection of not having to be in the same room as the perpetrator.  Welcomes the requirement that if a prosecutor does not oppose bail, that the reasons should be placed on record.  Comments that “All things should founder for their violent. And many more involving things that cost violence.so that on that situation, should allowing everyone rights.”.  (a) Supports the proposed amendments to or new sections—  \* 51B and 51C of the Magistrates’ Courts Act, 1944;  \* 59A, 69, 158, 161, 316B, Part II of Schedule 2,  \* Schedule 7 of the Criminal Procedure Act, 1977;  \* Parts II and III of Schedule 2 to the Criminal Law Amendment Act, 1997; and  \* 37B and 37C of the Superior Courts Act, 2013.  (b) Submits that the Bills do not explicitly mention violence against LGBTQIA+ citizens, and argues that Legislation on GBV excludes other oppressed minorities.  The reasonable restriction of police and prosecutor bail must be considered to ensure that provisions are not at odds with section 35(1)(f) of the Constitution. | Noted. The extension of the services of intermediaries should contribute towards helping more victims to participate in court proceedings.    Noted.  Noted.  Intermediaries are provided for in clauses 1, 8 and 18 of the Bill.  According to these provisions a court may appoint a competent person as an intermediary in order to enable a witness―  (i) under the biological or mental age of 18 years;  (ii) who suffers from a physical, psychological, mental or emotional condition; or  (iii) who is an older person,  to give evidence through that intermediary, if it appears to that court that the proceedings would expose such a witness to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings.  Further, before a person is appointed as an intermediary a judicial officer presiding over the proceedings must enquire into the competence of the person to be appointed as an intermediary. The enquiry must include the person’s experience, qualifications, knowledge and abilities.  (a) Noted.  (b) Noted.  Noted.  Noted.  (a) Noted.  (b) The terminology, such as a victim, a witness a person with a disability, that is used in the Bill is neutral and therefore inclusive of members of the LGBTQIA+ community.  Noted. |

**Table 2**

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| **NAME OF INSTITUTION/INDIVIDUAL** | **COMMENTS/RECOMMENDATIONS** | **DOJCD RESPONSE** |
| **Clause 1: Magistrates’ Courts Act, 1944: Proposed new sections—**  **51A. Evidence through intermediaries in proceedings other than criminal proceedings**  **51B. Oath and competency of intermediaries**  **51C. Evidence through audiovisual link in proceedings other than criminal proceedings** | | |
| **MEC Social Development: Western Cape** | **Section 57A(7)(d):** (a) Paragraph (d) should be deleted or clarified by providing that only in circumstances where no other intermediary is available and the court is able to ensure that vulnerable witnesses will be protected from undue psychological, mental or emotional stress, trauma and suffering while giving evidence, can the court continue the proceedings in the absence of the appointed intermediary.  (b) There should be consequence management for intermediaries who are absent without good cause. | (a) The proposal is not supported. Subsection (7)(d) should not be considered in isolation. Subsection (7)(c) makes provision for the appointment of a “new” intermediary.  (b) It is submitted that the proposed subsection (6) which provides for an intermediary to be summoned to appear before a court is sufficient to ensure that intermediaries co-operate with the court. |
| **Law Trust Chair in Social Justice**  **Stellenbosch University** | Reference to “physical conditions” in the proposed new section 51A(1)(b) is too wide. It is recommended that factors should be stipulated that must be taken into consideration. | It should be noted that subsection (1) affords the court with the discretion to decide, with reference to the witness’ undue psychological, metal or emotional stress, trauma or suffering, whether an intermediary should be appointed or not.  It is submitted that it will be difficult for the Legislature to stipulate factors that should be considered by the court in the case of a “physical condition”. It may therefore be more appropriate to provide the courts with sufficient leeway to determine the presence of “physical conditions” on a case by case basis. |
| **MEC Social Development: Western Cape** | **Section 51B(3)(e):** It is suggested that the term head of a court be clarified. The term “most senior magistrate” is vague because it could refer to age or the time when the magistrate started service at the office. | It is not necessary to define who a “head of court” is. Reference to “head of a court” is a term that is widely used in legislation and is well established. The term implies a judicial officer at any court who is responsible for the execution of certain duties associated with the functioning of the court. |
| **MEC Social Development: Western Cape** | Proposes that a new section 51B be introduced in terms of which a court should be allowed on application or of its own accord to allow technology to be used as a communication tool to enable witnesses who, due to mental and physical conditions, are unable to give viva voce evidence. The court should also be obliged to give reasons for allowing or refusing the application. Provide for training of intermediaries in the use of augmentative technology. | The proposal is not supported.  Alternative means to give evidence, other than *viva voce*, is generally recognised and is subject to the discretion of the court to allow this if it is in the interest of justice. Section 51A deals with intermediaries and they are not persons with technical expertise to operate technologies that enables a witness to communicate.  Section 161 of the Criminal Procedure Act, is broad enough to allow for "other forms of non-verbal" communications as a medium to give evidence.  Technologies in this field develop at a rapid pace and may require a procedure for the court to evaluate the extent of autonomy of the witness to communicate as well as the reliability of the communications received or interpreted by experts. This will be addressed in the revision process of the Criminal Procedure Act. |
| **Clause 2: Proposed amendment of section 59 of the Criminal Procedure Act, 1977** | | |
| **MEC Social Development: Western Cape** | (a) Recommends that subsection (1)(a)(ii) be amended by the inclusion of the words “with whom the accused is or has been in a domestic relationship”.  (b) A subparagraph (iv) should be inserted as follows: “(iv) with an element of violence committed while the accused is or was a sentenced offender placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998, in respect of an offence committed with an element of violence.”. | (a) It is submitted that the definition of “domestic relationship”, as reflected in the Domestic Violence Act, 1998, is sufficient to include “existing and previous” relationships. It is not necessary to insert the words as proposed.  (b) It is submitted that the ambit of subparagraph (i), namely, “an offence referred to in Part II or III of Schedule 2” to the Act is wide enough to cover the proposal. The inclusion of subparagraph (iv) is therefore not necessary. |
| **Sonke Gender Justice** | Supports the requirement that the prosecutor should be required to put the reasons for not opposing bail on record in cases of domestic violence. | Noted. |
| **COSATU** | Supports the proposal to tighten bail conditions and argues that there should be clear stipulation of cases and conditions where bail should not be granted. | The principal Act already provides for circumstances where police or prosecutor bail may not be granted. The Bill seeks to provide for additional circumstances where police or prosecutor bail may not be granted, namely, where the accused is in custody for an offence against a person who is in a domestic relationship with such an accused or for contravening a protection order that was obtained against the accused to protect the victim against the accused. The principal Act and the proposed amendments in the Bill contain provisions relating to factors which a court must take into account when hearing bail applications. |
| **Clause 3: Proposed amendment of section 59A of the Criminal Procedure Act, 1977** | | |
| **Law Trust Chair in Social Justice**  **Stellenbosch University** | Proposes that an accused person should be psychiatrically evaluated as soon as possible after arrest, but before first appearance, for a bail application to determine factors that could have an effect on the person having committed the offence and that the information be captured for data purposes and that the report be submitted to the DPP for bail proceedings. | The proposal is not supported. The feasibility of the proposal is questioned. It should be kept in mind that the psychiatric evaluation of a person is not necessarily something that can be concluded within 48 hours after arrest, which is the general norm for the first appearance of the alleged offender.  The Department is also concerned with regard a number of unintended consequences associated with regard to the proposal, among others—  \* the possible unjustifiable limitation of the alleged offender’s section 35 rights (such as the right to remain silent and not to be compelled to make a confession or admission);  \* whether the State has sufficient resources (human and financial) to ensure a proper evaluation and reporting within the standard 48 hours.  The Department is further of the view that the proposal does not fall within the ambit of the Bill and is not something that should be considered without comprehensive research, with specific reference to the administration of justice, the rights of alleged victims and alleged offenders, having been conducted in this regard. |
| **Clause 4: Proposed amendment of section 60 of the Criminal Procedure Act, 1977** | | |
| **MEC Social Development: Western Cape** | It is recommended that paragraph (b) be amended to promote the right of the victim or complainant under section 60(2A)(b) to present their views to the court and accommodates the kind of constraints that victims may be subject to. | The proposal is not supported. Paragraph (b) is clear and unambiguous to the extent that the court is obliged to take any view expressed by an alleged victim into account. It is submitted that the Legislature should not be too prescriptive in this regard and allow the courts to exercise its discretion in this regard. |
| **Clause 7: Proposed amendment of section 161 of the Criminal Procedure Act, 1977** | | |
| **Sonke Gender Justice** | The proposed wording in 2(a) should be amended to include “sign language and gestures”. | It is submitted that reference to “gesture-language” in paragraph (a) is sufficient to cater for those instances where a person lacks a sense of hearing or the ability to speak. The term used is wide enough to include “sign language”. It is submitted that the wording used in the paragraph is clear and unambiguous. |
| **Clause 8: Proposed amendment of section 170A of the Criminal Procedure Act, 1977** | | |
| **MEC Social Development: Western Cape** | (a) It is also recommended that consideration be given to provide for instances where certain witnesses are not able to give viva voce evidence, but would require an intermediary and the use of technology as a tool of communication.  (b) With regard to clause 8(d) it is recommended that the term “most senior judicial officer” be defined. | (a) See response in respect of clause 1 above.  (b) See response in respect of clause 1 above. |
| **Law Trust Chair in Social Justice**  **Stellenbosch University** | Recommends that factors should be stipulated to clarify what would qualify as a “physical condition”. | Please refer to response under clause 1 above. |
| **Clause 9: Proposed amendment of section 299A of the Criminal Procedure Act, 1977** | | |
| **MEC Social Development: Western Cape** | (a) It is recommended that provision be made for a representative of the victim to attend parole hearings or to make representations on behalf of the complainant.  (b) It is recommended that an obligation be placed on the sentencing court in matters subject to section 299A to enquire from the prosecutor, in the absence of the victim, as to the efforts that have been made to secure the victim’s attendance at court. | (a) Section 229A provides for persons other than the victim (i.e relatives) to be informed of the right to be present and make presentations when parole is considered.  (b) This proposal is not supported, a prosecutor as a matter of course always determines whether evidence will be led in aggravation of sentence, and deals with a matter accordingly. |
| **Law Trust Chair in Social Justice**  **Stellenbosch University** | Recommends that in the event where an offence was committed against a victim who is a student at a tertiary institute the imposition of a restorative justice programme should be considered in addition to or in the place of a sentence to be imposed by the court. | The proposal is not supported. It is questionable whether it would be feasible to introduce a sentencing option which does not apply equally to all offenders (with specific reference to the circumstances under which the offence was committed). |
| **Sonke Gender Justice** | Supports the notion that victims must be heard during parole processes. Supports the proposed amendment of section 299A of the Criminal Procedure Act, 1977. | Noted. |
| **Clause 18: Proposed new sections 37A, 37B and 37C of the Superior Courts Act, 2013** | | |
| **MEC Social Development: Western Cape** | (a) Paragraph (d) should be deleted or clarified by providing that only in circumstances where no other intermediary is available and the court is able to ensure that vulnerable witnesses will be protected from undue psychological, mental or emotional stress, trauma and suffering while giving evidence, can the court continue the proceedings in the absence of the appointed intermediary.  (b) There should be consequence management for intermediaries who are absent without good cause. | (a) See response in respect of clause 1 above.  (b) See response in respect of clause 1 above. |
| **Law Trust Chair in Social Justice**  **Stellenbosch University** | Recommends that factors should be stipulated to clarify what would qualify as a “physical condition”. | Please refer to response under clause 1 above. |
| **Clauses 15, 16 and 17: Proposed amendment of Parts I, II and III of the Criminal Law Amendment Act, 1997** | | |
| **Sonke Gender Justice** | (a) Supports the proposed amendment of Parts I, II and III of Schedule 2 to Act 105 of 1997.  (b) However, it is re-iterated that there is very little research available that indicates that an increase in severity of punishment in fact deters crime. | (a) Noted.  (b) Noted. |
| **COSATU** | Supports the increase of minimum sentences. | Noted. |