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Mr 14/10/08

## SUMMARY OF COMMENTS ON THE CRIMINAL PROCEDURE AMENDMENT BILL, 2008 [B42 – 2008]

Clause no./ Theme	Commentator	Comment
Clause 1 (Insertion of sections 159A, B, C and D in Criminal Procedure Act)	Civil Society Prison Reform Initiative (CSPRI) (08CPA02)	<p>1. The provisions are in general welcomed. However the following issues are raised:</p> <p>1.1 Will the court only see the accused person's face or will it see a full view of the person with the liberty to direct the gaze and focus of the camera? This question is raised in light of the protective functions of a court appearance, where the presiding officer can take note of any injury or the general well-being of the accused person. It is therefore suggested that s159B be strengthened to enable the presiding officer to make an assessment of the accused person's appearance as he or she would ordinarily have done in court. Although there is no specific requirement for the presiding officer to make such an observation, there is a moral duty to act when there is an observable problem with the mental or physical health of the accused person. The suggestion is to amend proposed section 159(C)(1) by adding a new paragraph (c) which would read as follows:</p> <p><u>"(c) at the court point to have an unimpeded, clear and full view of the accused person and that the presiding officer may direct the focus of the camera as is needed."</u></p> <p>1.2 The proposed procedure for audiovisual adjournments should be extended to cover the negotiations intended for section 105A(1) of the Act, which relates to plea agreements between an accused who is represented and the prosecutor. CSPRI is of the view that the plea and sentence agreements procedure is under-utilised. The under utilisation of this procedure can be attributed to two reasons. Firstly, the lack of knowledge by accused persons and hence a lack of trust shown to that option. Secondly, the lack of access between accused persons and prosecutors, which presents a practical obstruction to the use of plea and sentence agreements. Audiovisual technology can assist in addressing these problems. It is suggested that the infrastructure be utilised for the purposes of negotiations between the accused person, the legal representative and the prosecutor. Further, accused persons in detention could also be educated about plea agreements as audiovisual links provide for direct communications between the accused person and the prosecutor. The accused person can ask questions and gather information about plea agreements directly from the prosecutor. It is suggested that a section 159E be added to the proposed amendments, which would read as follows:</p> <p><u>"159E. (1) With the aim of facilitating plea and sentence agreements contemplated under s105A, the infrastructure to enable an audiovisual link between a court point and a remote point may also be utilised for negotiations between the prosecutor and the accused person as referred to in s105A(1)(a). Such negotiations will not constitute a court as contemplated in clause 159A(2)(e).</u></p> <p><u>(2) With the aim of facilitating plea and sentence agreements contemplated under s105A, the infrastructure to enable an audiovisual link between a court point and a remote point may also be utilised by the</u></p>

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	<p>Research Unit, Parliament</p> <p>Commission on Gender Equality</p>	<p><u>prosecutor or a person designated by him or her, to educate and provide information to accused person(s) regarding plea and sentence agreements. The utilisation of audiovisual infrastructure for such purposes shall not constitute negotiations contemplated in s105A (1). "</u></p> <p>2.1 "Appropriate persons" is defined as persons entitled to be present. Should the proceedings not be open to any members of the public?</p> <p>2.2 Will accused persons be given a choice as to whether they wish to appear physically before a court?</p> <p>2.3 How have accused persons responded during the pilot project?</p> <p>2.4 Have there been any problems where an interpreter has been needed if the interpreter is in court rather than at the remote point?</p> <p>3.1 Where communication is forwarded by fax from the remote point to the court point, a breach of confidentiality could take place. This would impede the right to a fair trial and could result in unnecessary delays or the withdrawal of charges against accused persons.</p> <p>3.2 It is proposed that where any document is transmitted, then, not only the document but also the procedure be captured and stored in audiovisual records.</p> <p>3.3 Original documents must be held in a secure place on behalf of the accused person.</p> <p>3.4 Where there is a breach of attorney/client privilege due to negligence or an attempt to exert undue influence on the accused person, this should be regarded as an offence in terms of the Criminal Procedure Act, 1977.</p>
General Comments on audio-visual postponements	Civil Society Prison Reform Initiative (CSPRI) (08CPA02)	1. What will be the impact of technical difficulties and/or interruptions in an audiovisual adjournment? Legislation must provide guidance on what exactly constitutes an appearance in court and what steps are to be followed if there are technical problems in the quality of the audiovisual link or interruptions thereof.
Pilot project relating to audio-visual postponements	Research Unit, Parliament	<p>1.1 Details of the project implementation plans and time frames</p> <p>1.2 Cost-benefit analysis of the project</p> <p>1.3 Feedback from DCS, court personnel, presiding officer on the effectiveness of the project</p> <p>1.4 Details of estimated costs and allocated funding</p> <p>1.5 Details of the tender process for the installation of the equipment.</p>
Clause 2	Research Unit, Parliament	1.1 Does the expungement of criminal records mean that the record is wiped permanently from the record/ or does it mean that the effect of the criminal record is limited to circumstances in which a person will be required to disclose the existence of the record and regarding categories of persons who will have access to the record?

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	Civil Society for Prison Reform Initiative(CSPRI) (08CPA 02)	<p>1.2 Does it mean a person who has had a criminal record expunged will no longer be required to disclose a criminal record under any circumstances, i.e travel, security vetting etc?</p> <p>1.3 What about providing for exclusions?</p> <p>1.4 Where will the prescribed form be available?</p> <p>1.5 The record will be expunged on submission of a certificate issued by the Director-General in terms of proposed new section 271A. Is there a mechanism for appealing against a decision of the DG who refuses to issue such a certificate?</p> <p>1.6 Are there systems in place to provide for easy access to criminal records to allow the DG to ensure that applicants have complied with the criteria set out in proposed new section 271A (1) and (2)?</p> <p>1.7 The receipt of written applications and the issuing of prescribed certificates of expungement seems like a time consuming administrative process. Is there capacity in the DG's office to deal with this?</p> <p>1.8 What will be "exceptional circumstances" referred to in proposed new section 271(A) (4) that will allow the Minister to authorise expungement before the periods of five and ten years, respectively, have lapsed. On what basis will an application be made directly to the Minister rather than to the DG? Why are some applicants permitted to bypass the system at the Minister's discretion?</p> <p>1.9 Penalties are in place for issuing certificates without authority or negligently expunging a criminal record. What about providing for penalties in respect of failure to ensure that the record has been expunged?</p> <p>1.10 Regarding the capacity of the Criminal Record Centre, are criminal records stored electronically?</p> <p>2.1 The Bill fails to address the issues of expungement adequately and comprehensively, in line with clearly defined principles that are progressive and useful in promoting law-abiding behaviour. The Committee should refer the matter back to the Department of Justice and Constitutional Development to conduct further research and draft legislation that aligns and harmonises the different provisions in law and apply principles consistently.</p> <p>2.2 The possibility of expungement should create a real incentive for a broad range of convicted offenders to refrain from committing further offences. The Bill defines a narrow category of offenders who may benefit from expungement</p>



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		<p>and then only after they have not been convicted of further offences for disproportionately long periods. It seems as if only a small number of offenders who have served time in prisons or who have been under correctional supervision will stand to benefit from the Bill. The scope of the expungement of criminal records should be broadened significantly and the time frames should be reconsidered.</p> <p>2.3 The Bill must be aligned and harmonised with the provisions relating to offender registers and to other legislation dealing with the expungement of criminal records, for example, the Child Justice Bill and the Constitution on membership of Parliament. There needs to be simple, understandable and universal rules with minimum exceptions, striking a balance between the protection of public safety and constitutional obligations. There are no guidelines in the Bill in the case of professional bodies and employers which use criminal records for vetting purposes. Employers and professional bodies develop their own rules, which give rise to frustration and economic marginalisation. Legal jargon and cross-references should be avoided so that persons who stand to benefit, can understand the law.</p> <p>2.4.1 The legislation should define categories of offenders as narrowly as possible with the purpose of promoting public safety, rather than providing blanket categorisations.</p> <p>2.4.2 Offender registers should be examined to achieve this goal.</p> <p>2.5 The system of expungement should be developed in such a manner that it functions automatically and is not dependent on an application from an individual. This application procedure will result in the benefits of expungement being out of the reach of most South Africans. The proposed application procedure will inevitably give rise to delays and could result in the benefits of expungement being lost if there are delays. The Bill does not provide timelines on how soon an application must be processed and finalised.</p> <p>2.6 In order to give recognition to the fact that having a criminal record is also part of the punishment, the presiding officer should, at the time of sentencing, inform the offender whether or not his or her record for that conviction can be expunged and what the conditions to such expungement are. Alternatively, the presiding officer could specify the conditions for the expungement.</p>
Clause 3	Research Unit, Parliament	<p>1.1 What if the Director General: Justice declines to issue such a certificate? Is there a means of appealing his or her decision?</p> <p>1.2 Does the Bill cover offences enacted by subordinate legislators such as city councils?</p> <p>1.3 Are TBVC states included in the ambit of what the Bill describes as the 'homelands'?</p>

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		1.4 Does the Bill cover unintended consequences such as the offence of leaving the Republic illegally as this was not covered in old order legislation?
General comments	Commission on Gender Equality	<p>1.1 Legal practitioners should be allowed access to all criminal records and their fees should be capped when so as to ensure that they offer a service to the public.</p> <p>1.2 The costs of accessing and issuing of certificates of expungement should be capped and points of access localised to ensure that the expungement process is quick and cost-effective.</p> <p>1.3 Certain crimes where admission of guilt fines were paid, convictions arising from contraventions of bylaws, minor traffic offences, certain white collar crimes and economic crimes and crimes committed by women in abusive relationships should qualify for early expungement.</p> <p>1.4 An offence should be created in the Criminal Procedure Act, 1977, in instances where persons are prejudiced on the basis of criminal records that have been expunged.</p>