

081014 pgjustice  
 Yes 14/10/08

**DEPARTMENT'S RESPONSE TO COMMENTS ON THE CRIMINAL PROCEDURE AMENDMENT BILL, 2008 [B42-2008]**

Clause no./ Theme	Commentator	Response
Clause 1 (Insertion of sections 159A, B, C and D in Criminal Procedure Act)	<p>Civil Society Prison Reform Initiative (CSPRI) (08CPA02)</p> <p>Research Unit, Parliament</p>	<p>1.1 The technology provides for the remote zooming function that is controlled from the court. The magistrate can direct that the camera focus on any aspect of the appearance of the accused person at the remote point, including a full view at different angles of the accused person. Proposed new section 159C(1)(a) and (b) provides that all appropriate persons at the remote point and court point must be able to see and hear each other and follow the proceedings. The regulations envisaged in proposed new section 159C (2) will also deal with the technical matters and will, it is envisaged, give effect to proposed new section 159C (1)(a) and (b). It is envisaged that these regulations will deal with the presiding officer's ability to have a full and proper view of the accused person appearing at the remote point. Consideration could, however, be given to inserting a provision, requiring a presiding officer to inquire into the physical and mental well-being of an accused person who appears by means of audiovisual link and, for that purpose, to direct that the facilities be focussed in such a manner which will enable a presiding officer to satisfy himself or herself as the accused's well-being.</p> <p>1.2 The SALRC, in its Report on Project 113, proposed an incremental approach to introducing audiovisual technology in courts, with a view to it being expanded later. The Department endorses this approach. Addressing the technical matters relating to the implementation of the legislation will be costly, and the approach should therefore be to get the basics perfected before the provisions are expanded to deal with other issues.</p> <p>2.1 Members of the public who are <i>entitled</i> to be present should not be interpreted in a restrictive manner. It means that any member of the public who would ordinarily be entitled to be present in court is an appropriate person. This will include the media. The public can follow proceedings as well, with the aid of the plasma screens fitted in the public gallery.</p> <p>2.2 Accused persons will not be given a choice as to whether or not they want to appear by audiovisual link. The purpose of the legislation is to alleviate the burden on the court rolls and to effect savings in the budgets of DCS, SAPS and DOJ as a result of lesser personnel and other incidental costs being required to attend adjournments. However, in terms of proposed section 159C(3), the presiding officer may give any order to ensure a fair trial which may not be inconsistent with the Act or any regulation made under the Act. This provision envisages that should an accused person make representations that he or she does not wish to appear by audiovisual adjournment, or should the court itself require that the accused person be brought to court in person, then the court may make such an order. Moreover, some accused persons see a day in court as an opportunity to get out of prison for a number of ulterior motives. Allowing accused persons to have a say whether they want to appear by audiovisual link or not, will be</p>

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	Commission on Gender Equality	<p>counter-productive and defeat the objectives of the proposed legislation.</p> <p>2.3 The response has been very good and no objections have been reported.</p> <p>2.4 No problems with regard to interpreters have been reported. The accused, appearing at the remote point, is able to see and hear the interpreter.</p> <p>3.1 The fax is used primarily to assist the Department in finalising its administrative responsibilities relating to the committal of an accused person. It is used primarily for the transmission of the J7 or the Committal Warrant, which is a document signed by the magistrate authorising the committal of an accused person to the correctional facility.</p> <p>3.2 Recordings of all adjournments are made which form part of the record of proceedings. The system does not cater for the visual recording of adjournments.</p> <p>3.3 Original court documents are stored in the usual manner as in other cases, namely with the clerk of the court. Other original documents, eg between attorney and client should be kept by the legal representative to ensure their safety. The Departments should not be burdened with this administrative responsibility. The procedure envisaged by the amendments should not be confused with private communications between legal representatives and accused persons, except in so far as private oral communication is required to facilitate the adjournment.</p> <p>3.4 Proposed new section 159D provides for the protection of private communications between accused persons and legal representatives. This communication is confidential and is as inadmissible as if the communication had taken place in the presence of the accused person. Accused persons appearing by means of audiovisual link are afforded the same protection as accused persons appearing in person in courts for adjournments. The Criminal Procedure Act, 1977, does not criminalise the breach of the privilege that exists between legal representatives and accused persons. The opinion is held that it would be inadvisable to include a provision as suggested by the CGE in this regard.</p>
General Comments on audiovisual postponements	Civil Society Prison Reform Initiative (CSPRI)(08CPA02)	<p>1. Proposed section 159B (1) provides that an accused person appearing by audiovisual link must do so from a place at which the requirements in subsections (2) and (3) and section 159C have been complied with. This includes technical arrangements for private communications between the accused person and his or her legal representative. All appropriate persons must also be able to see and hear the person at the remote point and to follow the proceedings. It follows that an audiovisual remand cannot take place where these provisions have not been complied with. The accused person would then have to be brought to court to appear in person. Consideration could perhaps be given to inserting a provision to the effect that, in the event of any technical problem before or during the proceedings, the accused person must be brought to court on the day in question for the matter to be dealt with in court.</p>
Pilot project relating to	Research Unit, Parliament	<p>1.1 The IJS budget has set aside R40 million for this project. The costs will include the supply, deployment, installation and maintenance of the Audio Visual Remand (AVR) systems, network/communication infrastructure, as</p>

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audiovisual postponements		<p>well as renovations to identified sites in preparation for the installation of the system. The tender process has been concluded. Installation to the identified 36 Remote Points (Correctional Centres) and 47 courts will commence in this financial year. Based on the site refurbishment requirements, the project is expected to be rolled-out over a period of two years.</p> <p>1.2 The analysis done through an impact study in July 2006 after the initial 6 month pilot phase revealed a monthly operational cost saving of R 59 159, 00. According to the impact study report it was not possible to link a definite monetary value in terms of security provided and administration benefits. The main cost drivers were determined to be the infrastructure (i.e. transportation costs vs. AVR equipment installed), operating cost (data and telephone lines installations and monthly rentals as well as transportation fuel costs) utilised and human resources of the respective establishments (primarily SAPS and DCS ). Note should be taken of the fact that the cost drivers for transportation and guarding of awaiting trial prisoners are not strictly confined to this activity alone as prison transportation must still transport those detainees who appear in matters not covered by these audiovisual remands. In this regard the amount quoted is merely a guide which was determined during 2006.</p> <p>1.3 The feedback has been exceptionally positive from all parties. In fact, the magistrate currently working on the pilot project is being used for rendering additional support and securing buy-in at workshops in other regions where the project is being rolled out. His support is being used in the form of a change management process that is being implemented as part of the project.</p> <p>1.4 It is estimated that 40 court points and 22 Correctional Centres will be covered by the project. Equipment is estimated to cost approximately R22, 8 million for all the sites. Communication and connectivity installation will cost a total of R200 00, 00. The monthly rental for communication is estimated to cost R1 million. Refurbishment of the sites will cost R15, 2. This is a total of R39, 2 million.</p> <p>1.5 The tender process has been concluded. The Department engaged with SITA (State Information Technology Agent) to guide the procurement process. A service provider for the supply, installation and maintenance of the system has been appointed through an open tender process. Digital Voice Processing was awarded the tender.</p>
Clause 2 (Expungement of criminal records)	Research Unit, Parliament	<p>1.1 The original aim of section 271A was not to clear a person's name but rather to indicate to the courts that a previous conviction in the circumstances indicated in that section should not be taken into account when imposing a subsequent sentence. Expungement in terms of the Bill will mean that the name of the applicant whose application is successful is permanently removed from the record, and that the person will have a clean record in respect of the conviction expunged.</p> <p>1.2 Disclosing a criminal record will not be necessary since the record will not be reflected on the Criminal Record System. The person whose criminal record is expunged may, however, be required to disclose the conviction in certain circumstances, for example if it is a requirement to disclose previous convictions, eg in vetting.</p> <p>1.3 While the Bill does not provide for any exclusions, it might be appropriate to consider some exclusions, for</p>

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	Civil Society for Prison Reform Initiative(CSPRI) (08CPA 02)	<p>instance where a person has been convicted of a sexual offence against a child or a mentally disabled person, the particulars of which are to be submitted to the National Register of Sex Offenders as provided for the in Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.</p> <p>1.4 The prescribed form will be provided for in the envisaged regulations. The forms can be made available at magistrates' offices, on the Department's website and at police stations.</p> <p>1.5 The Bill does not specifically provide for an appeal procedure. The opinion is held that an aggrieved applicant will have recourse to PAJA in the case of a refusal by the DG.</p> <p>1.6 The profiles of persons having criminal records are available from the Criminal Record System of the Criminal Records Centre. The system is electronic and the information is usually readily available. This information is usually contained in SAP69's which the Department requests from the Criminal Records Centre on receipt of an application. If needs be, court records might need to be resorted to.</p> <p>1.7 There is a Directorate in the Department which deals with pardon applications. Concerns of capacity have been raised since the increase in the volume of work occasioned by large volumes of pardon applications. <b>Measures to increase capacity might be needed.</b></p> <p>1.8 "Exceptional circumstances" will have to be decided on by the Minister on a case to case basis. It is felt that there should be provision for deviations from the general rule in very limited circumstances. These limited circumstances will be determined at a political level and strong motivation will be required to be provided by the application on which the Minister will exercise his or her discretion.</p> <p>1.9 Creating an offence for failure to ensure that records are expunged could lead to unintended consequences, giving rise to charges being against officials where applicants are disgruntled because they do not qualify for expungement. The failure of officials to carry out their duties properly should rather be dealt with in terms of public service prescripts.</p> <p>1.10 See paragraph 1.6 above.</p> <p>2.1 Noted. One of the main aims of this provision is to enact into law a simple quick procedure to clear the records of persons who are currently granted presidential pardons as a matter of routine. As pointed out by CSPRI, there is little information available relating to the issue under discussion. Further research is necessary to deal with this matter more comprehensively.</p> <p>2.2 Noted. The proposed expungement procedure is aimed at the expungement of records in respect of less serious offences which are routinely pardoned by the President. See also paragraph 2.1 above.</p> <p>2.3 Noted. The expungement procedure is aligned with the Child Justice Bill. See also paragraphs 2.1 and 2.2 above. The Bill is aimed at the expungement of certain criminal records. Where expungement has taken place, there will be no criminal record indicating the conviction and sentence..</p> <p>2.4 Noted. See paragraphs 2.1, 2.2 and 2.3 above.</p>

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		<p>2.5 Noted. See paragraphs 2.1, 2.2, 2.3 and 2.4 above. Consideration could possibly be given to the development of an automatic expungement system at a later stage after further research has been done. The Criminal Record Centre has indicated that it is not in a position at this stage to implement an automatic expungement system for various reasons.</p> <p>2.6 Noted. It might be appropriate to include a provision requiring a sentencing officer to inform an accused person, at the time of sentencing, whether that person qualifies for expungement. This will partially address the problem of uninformed members of society being excluded from the benefits of expungement. (A similar example to this can be found in section 299A of the Criminal Procedure Act, 1977, in terms of which the court must inform a complainant in the case of certain serious offences of the possibility of the accused person being granted parole at a later stage and of the complainant's right to make representations to the parole board at that stage regarding the granting of parole or not).</p>
3 ment ial s from er n)	Research Unit, Parliament	<p>1.1 The expungement of criminal records in respect of specified old order offences will be automatic. Where the offence is not specified in the Bill, the application must be made to the Director-General, who will consider the application and authorise expungement. If the DG does not authorise the expungement due to uncertainty whether the conviction in respect of which an application is made is old order legislation or not, the application must be referred to the Minister who will make a final decision. This is a safety mechanism aimed at protecting the applicant. The Child Justice Bill contains a similar provision. As mentioned above, PAJA will also be applicable in the case of refusal.</p> <p>1.2 It might be appropriate to adapt this provision by mentioning all forms of legislative instruments in order to avoid any uncertainty.</p> <p>1.3 Former TBVC states are covered under a general name of "homelands", irrespective of their status of independent states or "self governing" entities. Again, it might be appropriate to address this uncertainty by being more specific in the provision.</p> <p>1.4 What is of importance is that there must be a conviction in respect of which an application is based. It will be sufficient to allege that the conviction was based on an old order legislation which was intended to promote the policy of apartheid. It will then be the duty of the DG or Minister, as the case may be, to consider whether the conviction satisfies the criteria set out in new section 271B (2). PAJA will also be applicable.</p>
l ts	Commission on Gender Equality	<p>1.1 Nothing bars legal practitioners from requesting criminal records on behalf of their clients. They are also entitled to request the records on behalf of their client by virtue of the power of attorney provided by their clients. Fees are only prescribed in respect of the issuing of a police clearance certificate.</p> <p>1.2.1 There are no fees payable in respect of applications under 271A or the pardon procedure. Fees are only payable when a person applies for a police clearance certificate which does not relate to the expungement procedure</p>

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		<p>and is more of a conduct certificate.</p> <p>1.2.2 The functions of the Criminal Records Centre are centralised and the source documents are only available in Pretoria. The CRC also liaises with Departments the Department of Foreign Affairs and Justice and Constitutional Department which are national departments as well as embassies around Pretoria. Although persons can submit applications to police stations they are forwarded to the CRC in Pretoria. It is therefore quicker to send documents directly to the CRC rather than to the police station only to be sent to the centralised offices of the CRC.</p> <p>1.2.3 The Directorate that will be responsible for processing the applications for expungement of criminal records is based in the National Department of Justice and Constitutional Development and will be working closely with the Office of the Director-General's Office. The centralised approach works out better for co-ordination between the Department and the CRC.</p> <p>1.3. Sentencing is a judicial function, and care must be taken not to interfere with the functioning of the courts. The opinion is held that expungement of criminal records where the prescribed period has not lapsed should only be allowed in limited circumstances, as in the Bill where the Minister is empowered to authorise the expungement of a criminal record of a person where exceptional circumstances exist.</p> <p>1.4 Imposing penalties for prejudicing persons on the basis of expunged criminal records will be difficult to implement as it will be difficult to determine the reason for the prejudicial treatment unless that can be supported by evidence. Also employers have a prerogative of who they want to employ and to this end may have very specific requirements regarding the conduct of who is employed in the organisation. Persons who allege prejudice on the basis of expunged criminal records can approach court for relief.</p>