

SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON THE CRIMINAL AND RELATED MATTERS AMENDMENT BILL [B17 – 2020]

Attention: Mr V Ramaano

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THE WOMEN'S LEGAL CENTRE

WLC requests the opportunity to make oral submissions to the Portfolio Committee at the public hearings on the Bill.

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A. INTRODUCTION

1. The Women's Legal Centre is an African feminist legal centre that advances women's rights and equality through strategic litigation, the provision of free legal services and advice, advocacy, education and training. We aim to develop feminist jurisprudence that recognizes and advances women's rights.
2. The Women's Right to be Free from Violence is one of the WLC's four strategic programmes. The programme's vision is the recognition and implementation of an accessible and responsive justice system that takes account of, and supports, the particular needs of women who are survivors of violence, and which provides optimal services and protection.
3. Its core objectives include ensuring that there is a legislative framework to address violence against women which is compliant with international and constitutional obligations; ensuring that the state has implementation plans in place to action legal frameworks and policies; holding the state and private entities accountable in the implementation of laws and policies; and in the development of due diligence standards relating to violence against women.
4. WLC runs a Legal Advice Unit which provides legal advice to women on a wide range of issues. WLC welcomes the opportunity to make submissions on the Criminal Matters Amendment Bill 2020.

B. GENERAL COMMENTS

5. The purpose of this Bill is to regulate the granting of bail, sentencing and the placement of persons on parole in respect of offences that have been committed against vulnerable persons.
6. Following the national public outcry and marches held on 1 August 2018 in protest against the high levels of violence against women, President Ramaphosa held a Presidential Summit on Gender Based Violence and Femicide in November 2018. One of the outcomes of the Summit was the Declaration which set out government commitments to address gender based violence and femicide. Article 5 of the Declaration states *'The existing laws and policies applicable to gender-based violence*

and femicide are to be reviewed to ensure that they are more victim-centred and responsive, and that the identified legislative gaps are addressed without delay’.

7. Another of the outcomes of the Summit was the establishment of the Interim Steering Committee on Gender Based Violence and Femicide (GBVF) which was tasked with the development of the National Strategic Plan on GBVF (2020 – 2030)¹. This plan sets out the national response to the crisis facing South Africa. The President also announced the roll out of immediate measures to fast track medium term interventions which are detailed in the Emergency Response Action Plan (ERAP October 2019).
8. The ERPA contains specific objectives relating to the amendment of legislation relating to gender based violence and femicide. WLC commends the Department of Justice and Correctional Services for the development and drafting of Bills to actively address violence against women in a more comprehensive manner.
9. However, WLC is of the opinion that more extensive amendments to legislation that regulate the investigation and prosecution of sexual offences is necessary to decisively and comprehensively manage the levels of sexual and domestic violence in South Africa.
10. While WLC will restrict its comments to the content of the proposed amendments in the Bills currently out for public comment, we encourage the Portfolio Committee to further engage with civil society to explore more comprehensive ways of ensuring the effective prevention, detection, investigation and prosecution of both sexual and domestic violence matters.
11. In addition, WLC is concerned that the commitments contained in Article 7 of the Declaration on Gender Based Violence and Femicide have not been fulfilled to date: *‘The finalisation of outstanding legislative measures and policies that relate to gender-based violence and femicide, as well as the protection of the rights of women and gender non-conforming persons, be fast-tracked, in particular the Prevention and Combating of Hate Crimes and Hate Speech Bill, the Victim Support Services Bill, and the policy relating to the decriminalisation of sex work’.* WLC encourages the Department to specifically expedite the release of the policy on the decriminalisation of sex work and draft legislation related thereto. While we commend the Department for developing draft

¹ The NSP was approved by Cabinet in December 2019

Bills to address violence against women, it is our submission that the Department and Portfolio Committee cannot adequately address violence against women and femicide if it does not include the rights of sex workers and the decriminalisation of sex work itself.

C. SPECIFIC COMMENTS ON THE BILL

Insertion of sections 51A, 51B and 51C in Act 32 of 1944

Ad section 1

Evidence through intermediaries in proceedings other than criminal proceedings

12. WLC supports the introduction of the use of intermediaries in court proceedings other than criminal proceedings.
13. WLC welcomes the broader criteria used in this section in comparison with the current wording used in section 170A of the Criminal Procedure Act (“the CPA”) (and therefore also welcomes and supports the amendment to section 170A of the CPA). The extension of the measures contemplated in both this section of the Bill, as well as the amendments to section 170A of the CPA, recognises the vulnerability of witnesses above the biological and / or mental age of 18 years.

“Evidence through audiovisual link in proceedings other than criminal proceedings”

14. WLC supports the introduction of the use of an audiovisual link in court proceedings other than criminal proceedings.

Amendment of section 59 of Act 51 of 1977

Ad section 2 and section 3

15. WLC supports the provisions which, for the purposes of the release on bail by the police or a prosecutor (under specific circumstances), require the relevant authority (police or

prosecution) to consider the nature of the alleged offence committed and the context in which the offence was allegedly committed.

16. Previously, when a person was considered for either 'police bail' in terms of section 59 of the Criminal Procedure Act ("the CPA") or 'prosecutor bail' in terms of section 59A of the CPA, neither, firstly, the nature of the relationship between the suspect and victim, nor secondly, the nature of the offence in the context of a breach of a protection order in terms of the Domestic Violence Act or Protection from Harassment Act, was specifically required to be taken into account by the authority (police or prosecution) considering the release on bail.
17. The Bill now specifically excludes the option of both police and prosecutor bail for a suspect where the offence was committed against someone with whom they were in a domestic relationship, or if the offence was a contravention of a protection order in terms of the Domestic Violence Act or Protection from Harassment Act.

Amendment of section 60 of Act 51 of 1977

Ad section 4 with reference to section 60(2)(d)

18. WLC supports the addition of the requirement of the provision of reasons by the prosecutor where they do not oppose bail in matters where the offence was perpetrated by a person against someone with whom they were in a domestic relationship, and secondly, where the offence was a contravention of a protection order in terms of the Domestic Violence Act or Protection from Harassment Act.

Ad section 4 with reference to section 60(2A)(b)

19. WLC supports the amendment and the requirement for the court to take into consideration the view of the victim before reaching a decision on the bail application.
20. WLC supports the codification of inconsistent police and prosecutor practice of (in)formally obtaining the views of the victim on the issue of bail for an accused person in a sexual or domestic violence matter. The practice is somewhat regulated in terms of SAPS National Instructions and NPA Directives, but it is not widely implemented. Currently, the investigating officer provides the court, by means of testimony at the bail

application, with evidence to support either the release of the accused on bail or evidence to oppose the bail application. Very often the views, information and/or evidence from the victim/complainant is not placed before the court, either by the investigating officer or the victims herself, which may lead to the court not being in full possession of all the relevant facts on which to base the decision to grant bail or not.

21. The formal requirement of this provision will necessitate a regulation and / or NPA directives in terms of the Criminal Procedure Act to provide for a formal mechanism in terms of which this information is obtained from victims/complainants and placed before the court.
22. This provision is drafted broadly for all victims/complainants and is not limited to victims of sexual and domestic violence.

Ad section 4: remaining amendments

23. WLC supports the amendments in the rest of this section.
24. More formal provisions and mechanisms must be made developed for the collection this information/evidence from victims/complainants and ensure that it is placed before the court for consideration; this needs to be done in regulations in the prescribed manner.

Ad section 5

25. WLC supports the amendments in this section.

Ad section 6

26. WLC supports the amendments in this section.

Ad section 7

27. WLC supports the amendments in this section.

Amendment to section 170A of Act 51 of 1977

Ad section 8

28. WLC generally welcomes the amendment to section 170A. The extension of the protective measure of use of an intermediary to witnesses who are over the biological or mental age of 18 is a recognition of the vulnerability of adult witnesses who are usually required to give evidence *viva voce*.
29. Concern however is raised as to the meaning of 'condition' referred to in section 8(b). It is unclear whether the 'condition' is one that must be proved i.e. established by means of expert evidence, and if it is a 'condition' such as a medical condition that exists separate from the state of mind of the witness as a result of having to testify *viva voce* in court.
30. It is submitted that the only criteria that should apply for a witness to qualify for the use of an intermediary should be if the witness would be subjected to undue psychological, mental or emotional stress, trauma or suffering if the witness testifies at court proceedings.
31. WLC recommends the following amendment of section 170:

8. Section 170A of the Criminal Procedure Act, 1977, is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) Whenever criminal proceeding are pending before any court and
it appears to such court that it would expose any witness—[

(a) **under the biological or mental age of eighteen years;**

(b) **who suffers from a physical, psychological, mental or emotional condition; or**

(c) **who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006),]**

to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.”

Amendment of section 299A of Act 51 of 1977

32. WLC supports the amendments in this section.
33. However, concern is expressed regarding the current implementation of this section as it pertains to the Commissioner of Correctional Services complying with the requirements of section 299A. Very few complainants are in court at the time of sentencing; this means that the duty on the court to inform complainants and / or relatives of their rights to participate by means of representations in terms of section 299A(1) amounts to very little unless there is a similar duty on the police and / or prosecutor to inform the complainant and / or relative of their rights to participate. In practice not enough is done by personnel in the criminal justice system to ensure complainant participation in parole hearings when prisoners apply for parole.
34. The right exists irrespective of whether the complainant and / or relative is in court at the time of sentencing. The current wording of the section implies that the court only has the duty to inform the complainant ‘if he or she is present’ in court. Therefore, the section must place a legal duty on the system as a whole to inform the complainant of their right to participate in the placement of a sentenced person on parole.
35. WLC recommends that the duty is placed on the court to inform the complainant, and a second duty placed on the police and prosecution to do the same.
36. The directives issued by the Commissioner of Correctional Services must include a legal obligation to contact the complainant prior to the date when the prisoner is considered

for parole or correctional supervision in order to inform the complainant of her right to make representations and attend the parole hearing.

Ad sections 10, 11, 12, 13, 14

37. WLC supports the amendments in these sections.

Ad section 15(a) with reference to (a)(iii) of Schedule 2 of the Criminal Law Amendment Act, 1997

38. WLC supports this amendment. We proposed the inclusion of a minimum sentence of life for the murder of a person under the age of 18 years in our submissions to the Department in April 2020 when the proposed Bill reflected a person under the age of 16 years.

39. WLC believes that the minimum sentence of life should be imposed for the murder of a child, which in South African law is a person under the age of 18 years and not 16 years.

Ad section 15(a) with reference to (g) of Schedule 2 of the Criminal Law Amendment Act, 1997

40. WLC supports this addition to the Schedule to include victims who have been murdered in the context of a domestic violence relationship or murdered as a result of physical or sexual domestic violence.

Ad section 15(b) and (c) with reference to Schedule 2 of the Criminal Law Amendment Act, 1997

41. WLC supports the amendments to these sections.

Ad sections 16 and 17

42. WLC supports the amendments in these sections.

Additional amendments

43. WLC recommends that several additional amendments are considered by the Portfolio Committee.

The National Forum on the Implementation of the Sexual Offences Act - Bridging the Gap

44. The National Forum on the Implementation of the Sexual Offences Act (*sic*) was held from 30 to 31 October 2017 at Emperors Palace, Kempton Park.
45. The Deputy Minister of Justice and Constitutional Development established a Steering Committee which organised and planned the National Forum. The Steering Committee comprised various stakeholders and role-players from the side of Government as well as from the side of civil society.
46. The objective of the two-day National Forum on the implementation of the Act was to identify the challenges that continue to hinder the successful implementation of the Act and to come up with a set of proposals to be formulated for actual implementation.
47. Although there was some agreement that the current legislative framework is sufficient to provide for effective implementation of the Act, it was specifically tabled that the following aspects need to be relooked and/or amended in the legislation *inter alia*:
 - (i) Competency assessment of children particularly section 164 of the Criminal Procedure Act;
 - (ii) State Appeals extended rights to also appeal on matters of fact - section 310 and 311 of the Criminal Procedure Act, and
 - (iii) In relation to section 55A of SORMAA, the finalisation of minimum standards and regulations and operationalising this section
48. WLC recommends that the Portfolio Committee engage with the Department to consider amendments to sections 164, 310 and 311 of the Criminal Procedure Act as

recommended by the National Forum. With regards to section 55A of SORMAA, this section has been passed into operation.

The automatic provision of reasons to victims by the NPA for the decision not to prosecute

49. The current NPA Policy Directives require the NPA to provide reasons to victims for the decision not to prosecute, but only if the victim requests said reasons. There is currently no automatic right for victims to receive reasons from the NPA, nor is there any requirement stipulating the extent or detail for said reasons to which a victim is entitled.
50. The practice of the NPA is to simply state that the reason they are not proceeding with a prosecution is because there is no reasonable prospect of a successful prosecution, even when reasons are requested by victims.
51. This lack of detail provided to victims severely limits victims' rights to access to justice and / or to challenge or review the decision of the NPA. It is therefore recommended that victims are automatically provided with reasons by the NPA for a decision not to prosecute, and that the reasons are provided in writing. The reasons must be detailed and apply to the specific merits of the case in question.
52. It is recommended that the NPA must notify the victim of a decision to prosecute, or not to prosecute, and provide detailed reasons therefore in writing, applicable to the specific merits of the case, should the latter apply.