9 October 2020

Parliamentary Portfolio Committee
on Justice and Correctional Services
Attention: V Ramaano
Email: Gbvbills@parliament.gov.za

Dear Sir

THE EMBRACE PROJECT NPC'S WRITTEN SUBMISSION ON THE CRIMINAL AND RELATED MATTERS AMENDMENT BILL [B17-2020]

1. The Embrace Project welcomes this opportunity to make submissions to the Parliamentary Portfolio Committee on Justice and Correctional Services ("the Portfolio Committee") on the Criminal and Related Matters Amendment Bill [B17-2020] ("the Amendment Bill").

2. The Embrace Project is a registered non-profit company which aims to "creatively combat" gender based violence. We provide an online platform for the sale of artwork donated by various South African artists and creatives who collaborate with our organisation. The proceeds of the art sales are paid out to selected grass-roots organisations already combating gender based violence in their own communities. These organisations are the beneficiaries of The Embrace Project. We also create awareness around gender based violence (its prevalence and causes) through our social media presence, while simultaneously working at changing the narrative around violence and disempowerment. Participating in the current legislative process is one such method.

3. We record our interest in making verbal representations should we be called upon by the Portfolio Committee to do so.

Purpose

4. The Amendment Bill implicates the amendment of four different Acts of Parliament, namely:

   4.1. Magistrates' Courts Act no 32 of 1944.

   4.2. Criminal Procedure Act no 51 of 1977.

   4.3. Criminal Law Amendment Act no 105 of 1997.

   4.4. Superior Courts Act no 10 of 2013.

5. The purpose of the amendments are to:

   5.1. provide intermediaries for an extended group of vulnerable persons who would otherwise be traumatised by having to give evidence in criminal proceedings;

   5.2. allow for the giving of evidence remotely, through an audiovisual link, in civil proceedings;

   5.3. extend considerations required prior to the granting of bail, as well as extend provisions triggering the cancellation of bail granted;

   5.4. extend the categories of convictions which require that a victim be informed when parole is being considered for the convicted accused, and allow the victim to make representations in respect of the parole consideration; and

   5.5. increase minimum sentences for sexual offences.

6. The amendments referred to in paragraphs 5.3 and 5.4 above pertain to domestic violence.

7. All of the amendments are welcomed.

Legislative suggestions

8. The words "Appellate Division" should be replaced with "Supreme Court of Appeal", as it is now called, in section 316B of the Criminal Procedure Act, in clause 10 of the Amendment Bill.

Substantive comments

9. We commend the Portfolio Committee for the extension of the function of intermediaries in criminal proceedings in both the lower and higher courts. Out of an abundance of caution, we recommend that in section 51B(2)(b)(i) of the Magistrates' Court Act, under clause 1 of the Amendment Bill, section 170A(12)(b)(i) of the Criminal Procedure Act, at clause 8 of the Amendment Bill, and section 37B(2)(b)(i) of the Superior Courts Act, under clause 18 of the Amendment Bill, which require that an intermediary be a person fit to undertake such a role, provision be explicitly made for the vetting of such a person against the National Register of Sex Offenders (and any other relevant register). Intermediaries will be working with and assisting vulnerable persons (children, the disabled and the traumatised), which would require a rigorous vetting process prior to certification.

10. We recommend that the offences referred to in Schedules 1 and 8 of the Criminal Procedure Act be included in the exceptions to being released on police bail in terms of section 59(1)(a) of the Criminal Procedure Act, contained in clause 2 of the Amendment Bill. The offences referred to in Schedules 1 and 8 are of equally serious a nature as those contained in Parts II and III of Schedule 2, and no other provisions in the Criminal Procedure Act address the offences in Schedules 1 and 8 in respect of bail. They are therefore subject to police bail, which is nonsensical given the seriousness of the offences.

11. We commend the Portfolio Committee for the inclusion of section 299A(1)(h) in the Criminal Procedure Act, at clause 9 of the Amendment Bill. However, the requirement for an accused to have been handed a seven year sentence on a conviction of domestic violence, in order for a complainant to qualify to be informed of an accused's parole consideration, does not take into account the uniquely abusive relationship which is perpetrated in a violent domestic relationship. A complainant in a case of domestic violence should always be informed of an accused's parole consideration, regardless of the length of the sentence, as the possible release of the accused will have a direct impact on the complainant's situation – considering the domestic relationship that existed, and that might continue to exist subsequent to the accused's release. We, therefore, recommend that the words "a period exceeding seven years for" be removed from section 299A(1)(h).

12. The amendment to section 316B of the Criminal Procedure Act in clause 10 of the Amendment Bill makes it more onerous for the National Prosecuting Authority to lodge an appeal. We do not believe that that is the intended aim of the amendment. We therefore recommend that, aside from the replacement of "attorney-general" with "National Director", and "Appellate Division" with "Supreme Court of Appeal", as recommended in paragraph 8 above, section 316B should remain unamended.

13. We commend the Portfolio Committee for the amendments to Parts I, II and III of Schedule 2 of the Criminal Law Amendment Act, in clauses 15, 16 and 17 of the Amendment Bill, which implicate the minimum sentences provision in section 51 of that Act. We would, however, like to draw the Portfolio Committee's attention to the superfluity (and possible contradiction) of the whole of paragraph (iii)(bb) under the offence of rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 in Part I of Schedule 2 of the Criminal Law Amendment Act (in clause 15 of the Amendment Bill). Paragraph (iii)(aa), under the same offence, more than covers the whole of paragraph (iii)(bb). In fact, paragraph (iii)(bb)'s inclusion confuses things. We therefore recommend that paragraph (iii)(bb) be removed. We make the same comment and recommendation in respect of paragraph (iii)(bb) for the offence of compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, under the same part of Schedule 2 and clause in the Amendment Bill.

14. We note the removal of the offences of rape and compelled raped, without aggravating circumstances, as well as the offence of sexual exploitation from Part III of Schedule 2 of the Criminal Law Amendment Act, and note their insertion into Part II of Schedule 2 of that Act. We note further that, Part III of Schedule 2 of that Act attracts minimum sentences of between 10 and 20 years, whereas Part II of Schedule 2 attracts increased minimum sentences of between 15 and 25 years, in terms of section 51 of the Criminal Law Amendment Act. We commend the Portfolio Committee for the increased minimum sentences for sexual offences. However, we wish to point out the severity of the offences identified in this paragraph which, we believe, is not adequately reflected by the minimum sentences assigned to the offences. These sexual offences should not require the existence of additional aggravating circumstances in order for them to qualify for a minimum sentence of life imprisonment, in terms of Part I of Schedule 2. In support of this contention, we quote the International Criminal Tribunal for the former Yugoslavia which described rape as, "*one of the worst sufferings a human being can inflict upon another*." The International

Criminal Tribunal for Rwanda described sexual violence as "*a step in the process of destruction of...the spirit, of the will to live, and of life itself*." Our own Constitutional Court described rape as being "*not simply an act of sexual gratification, but one of physical domination. It is an extreme and flagrant form of manifesting male supremacy over females*." The Constitutional Court held further that, "*for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity*" and that, "*sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women*." Victims of sexual violence would prefer death to sexual violation.[1] Studies conducted in South Africa and elsewhere have shown that post-traumatic stress disorder (PTSD) and depression are common among rape survivors – which have the effect of deteriorating a survivor's quality of life.[2] That is why sexual violence (without more) is constitutive of circumstances aggravating enough to warrant a minimum of a life sentence, and not a minimum of between 15 and 25 years imprisonment. What's more is that, when asked by UN Special Rapporteur on Violence Against Women why they commit these crimes, the majority of South African sexual abusers answered that they do it out of boredom, for fun or because they are entitled to.[3] If sexual violence is ever to be seriously condemned in South Africa, Parliament must send an unequivocal message to even potential first-time offenders. We therefore recommend that the offences of rape and compelled rape, without the need for additional aggravating circumstances, as well as sexual exploitation, be included in Part I of Schedule 2 of the Criminal Law Amendment Act.

General comments

15. We note that, in November 2019, a Kwa-Zulu Natal magistrate, Kholeka Bodlani, sentenced a father who was convicted of having raped his 11 year old daughter to a wholly suspended 5 year sentence because he was a good father. In September 2018 the Western Cape High Court's Judge Binns-Ward found, in mitigation in the sentencing of a rape accused, who had

[1] Germaner, S *'I begged him to kill me rather': 'Uber gang' victim's night of terror* < https://www.timeslive.co.za/news/south-africa/2019-02-06-i-begged-him-to-kill-me-rather-uber-gang-victims-night-of-terror/> accessed on 9 October 2020.
[2] Mgoqi-Mbalo, N., Zhang, M. & Ntuli, S. (2017). Risk factors for PTSD and depression in female survivors of rape. *Psychological Trauma: Theory, Research and Policy,* Vol. 9 (3), pp.301-308.
[3] 2011 report of Gender Links and South African Medical Research Council in 'Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa' UN A/HRC/3242/Add.2 14 June 2016.

repeatedly raped a child under the age of 16 (being statutory rape at the very least), that the accused had a history of prior *consensual* intercourse with the victim who was 13 years old; there was no actual violence used other than *forced* sexual intercourse; and that the accused stopped his assault when the victim started bleeding.[4] For these reasons the learned judge held, in dissent, that the accused's sentence should be reduced. Such findings and sentences should not exist at the highest level of our criminal justice system as they evince a disregard for prescribed minimum sentences that the judiciary are obliged to apply, and display a total lack of understanding of the nature of the crime with which they are dealing. We therefore strongly recommend that the Amendment Bill provide for compulsory and regular judicial training, as well as sensitisation training, and effective judicial accountability mechanisms (other than the Judicial Service Commission) – if these amendments are to prove effective.

16. In addition to intermediaries, we recommend that the Portfolio Committee consider reforming the law of evidence applicable to sexual offences victims. We recommend that the Portfolio Committee look to the International Criminal Court ("ICC") for their Rules of Procedure and Evidence for victims of sexual violence. Rule 72 requires that when being tried before the ICC for sexual violence any evidence put forward by the accused may not be adduced during the trial without warning. In terms of the ICC Rules, notice must first be given to the Court. The notice must describe the substance of the evidence and its relevance. To determine whether or not this evidence will be admissible, the Court must hear the views of the prosecution, the defence, the witness/es and the victim in a closed hearing. From there, the Court is required to weigh up the degree of the probative value of the evidence against the prejudice it may cause. If the evidence is found to be admissible, the Court states on record its reasons for deciding so. Only then may such evidence be adduced by the accused at trial.

General comments

17. The Amendment Bill should also make provision for preventative measures with regards to sexual offences and other acts of gender based violence. A part of these measures should include a rehabilitation programme for perpetrators of these crimes that is evidence-based, so as to prevent offenders from perpetrating the same crimes in future. Correctional services facilities should not exist purely for punitive purposes, but for rehabilitative

[4] *Zamla v S* (A207/2016) [2018] ZAWCHC 130 (25 September 2018) at paras 1 to 44.

purposes as well. Because correctional services facilities have some of the most violent environments, coupled with an abuse of power by correctional services authorities, they are not conducive for releasing rehabilitated offenders back into society subsequent to the serving of a prison sentence. The system therefore requires an overhaul.

18. We note that violence is learnt behaviour. The majority of South African children who grow up in violent households (where violence is either perpetrated in front of them or against them) are likely to perpetuate the cycle into adulthood. Therefore, as a sexual violence prevention measure, we recommend that the Amendment Bill provide for the development of specialised curricula, by the Departments of Basic and Higher Education, for girls and boys, respectively, aimed at eradicating harmful practices, beliefs, attitudes and stereotypes which perpetuate gender based violence, and violence in general. The curricula should address consent, bodily autonomy and appropriate inter-sex conduct. This could form part of the Life Skills and the Life Orientation curricula at school. Educators teaching these curricula would also require specialised training.

Conclusion

19. We welcome the amendments contained in the Amendment Bill, but urge the Portfolio Committee to consider our recommendations in the light of the severity of the nature of gender based and sexual violence.

20. Should you have any queries, please do not hesitate to contact us.

Yours faithfully

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