

Submission by CSPRI on the Criminal Procedure Amendment Bill [B42 of 2008]



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INTRODUCTION

The Civil Society Prison Reform Initiative (CSPRI) was established in 2003 and is a project of the Community Law Centre at the University of the Western Cape. CSPRI was formed in response to the limited civil society participation in the discourse on prison and penal reform in South Africa. To address this, four broad focus areas were developed:

- Developing and strengthening civil society involvement and oversight over corrections
- Promotion of non-custodial sentencing and penal reform
- Improving prison governance
- Improving offender reintegration services

This submission will comment on the two substantive issues dealt with in the Bill, namely audiovisual linking between a court and a correctional centre to enable postponements and prevent the unnecessary transportation of prisoners, and secondly, the expungement of criminal records.

AUDIO-VISUAL LINK-UP

The proposed amendment to s159 of the Criminal Procedure Act to provide for the postponement of certain criminal proceedings against an accused person who is awaiting trial in a correctional centre through audiovisual link-up is in principle supported, as should any measure be that will bring about greater efficiency in the criminal justice system. The Memorandum attached to the Bill clearly explains the financial benefits of audiovisual link-up and using these figures, it is estimated that the capital costs will be recouped within two months.

Protection afforded by a court appearance

An accused person's appearance in court serves a number of functions. It firstly protects the right of freedom by placing that person before an independent and impartial authority to determine if there is reason for the continued detention of the accused person. It, secondly, affords the court the opportunity to physically see the person and make observations and such enquiries as may be necessary. This is an important mechanism to reduce the incidence of torture and cruel, inhuman and degrading treatment or punishment. It is also not uncommon for courts to record observations and enquire about the accused person's physical appearance and state of health.

In the context of audiovisual link-up, it therefore becomes important what the court actually sees. 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? Although of a practical nature, it can severely limit the intended protective functions of a court appearance if the court does not have a view of the accused that is as 'real' as possible as opposed to a partial and potentially manipulated virtual court appearance.

In view of the above it is submitted that the requirements in section 159B be strengthened to enable the presiding officer to make an assessment of the accused person's well-being as he/she would ordinarily have done in a court. Although there is no specific requirement for the presiding officer to make such an assessment, there is a moral duty to react when there is an observable problem with the physical and/or mental health of the accused. Audiovisual link-up should not impede the presiding officer from fulfilling this moral duty due to a technical limitation.

In view of the above the following amendment to clause 159C is proposed:

*159C. (1) For the purposes of proceedings in terms of section 159A, both the court point and the remote point must be equipped with facilities that enable all appropriate persons—
(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.*

Plea and sentence agreements

Plea and sentence agreements were introduced into the South African criminal justice process in 2001 but have unfortunately remained under-utilised. The National Prosecuting Authority (NPA) reports that in 2005/6 there were 1204 plea agreements and in the following year this figure dropped to 1139. It is of great concern that while the unsentenced prison population is climbing steadily resulting in severe overcrowding and the most inhumane conditions of detention, that such an extremely low number of plea agreements were reached. Plea agreements can make a substantial contribution to the length of time that accused persons remain in custody prior to their cases being adjudicated.

Plea agreements are not without problems and these have been described by a number of commentators. Two issues that are working against the potential benefits of plea agreements are firstly the **lack of knowledge** by accused persons about plea agreements and consequently the **lack of trust** shown by them in this option. Secondly, the **access of accused persons to prosecutors and vice versa** must present a practical obstruction to the use of plea and sentence agreements. It is our submission that the availability of audiovisual link-up can assist in addressing these two problems.

Section 105 (1)(a) of the Criminal Procedure Act reads: 'A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement'. It is therefore practicable that the infrastructure availed through audiovisual link-up between a court and a correctional centre can be utilised for the purposes of the negotiations between the accused, assisted by his or her legal representative, and the prosecutor. Such negotiations will not constitute a court as envisaged by clause 159 A(2)(e) of the Criminal Procedure Amendment Bill (42 of 2008). Moreover, s105A(3) of the Criminal Procedure Act specifically excludes the court from being part of the negotiations contemplated in s105(1). There therefore do not appear to be any procedural difficulties in utilising the available infrastructure for the purposes of negotiations contemplated under s105(1).

The available infrastructure can furthermore be utilised for educating accused persons in detention about plea agreements as it provides for direct communications between such accused persons and a prosecutor. It will enable accused persons to ask questions and gather information about plea agreements directly from the prosecutor.

In view of the above it is submitted that clause 159 be amended to add clause 159E as proposed below:

Promoting and facilitating the use of plea and sentence agreements

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 as referred to in s 105A(1)(a). Such negotiations will not constitute a court as contemplated in clause 159A(2)(e).

(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 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).

Procedural protections and technical problems

From a practical point of view it needs to be asked what the impact may be of technical difficulties and/or interruptions on procedural issues when an accused person appears by means audiovisual link-up. An audiovisual link-up may be of poor or intermittent quality in respect of visual and/or audio relay. The link-

up may also be interrupted only to be restored much later. For example, if the link is interrupted prior to the proceedings being concluded, can this be regarded as an appearance in court? In such situations the legislation must provide guidance on what exactly constitutes an appearance in court and what the steps are to be followed if there are technical problems in the quality of the audiovisual link-up or if it is interrupted.

EXPUNGEMENT OF CRIMINAL RECORDS

Background

The expungement of criminal records is well-recognised in South African law.¹ The proposed amendment does, however, present the opportunity to re-think this issue. Fundamental to the debate is the acknowledgment that having a criminal record can be severely detrimental to a person's access to employment and social status in general. Moreover, the effect of a criminal record is that the punishment for the crime committed lasts much longer than the sentence imposed by the court. It is this lasting effect that ex-offenders and ex-prisoners often experience as being exclusionary and marginalising. The effect of a criminal record is that it becomes a debt to society that cannot be re-paid.² It is this debt that Van Zyl Smit calls a 'civil disability' – individuals are excluded from certain civil functions and types of employment because at some time in the past they had committed and were convicted of a crime.³ In the American literature this is also referred to as 'collateral disabilities'.⁴ As Van Zyl Smit observed in respect of prisoners in 2003: *'There has been no systematic effort to think through what the fundamental change to the constitutional order should mean for the legal disabilities imposed on former prisoners. Current disabilities are something of a neglected ragbag, typically relegated to a passing paragraph in the major legal textbooks dealing with their legal status generally.'*

Criminal records also serve a protective function; they signify to society that a specific offender is dishonest or poses a danger to children, or is violent. The protective value of criminal records in such instances have now also found expression in recently passed legislation providing for a sex offenders' register⁵ and a register of persons convicted for crimes against children⁶. Criminal records are also used by courts when imposing sentences to assess the criminal history of the offender. Previous convictions would normally

¹ Provision is made for expungement in the Criminal Procedure Act and more recently in the Child Justice Bill.

² Love MC (2002) 'Starting over with a clean slate – in praise of a forgotten section of the model penal code' *Fordham Urban Law Journal*, Vol. 30 p. 1705

³ Van Zyl Smit D (2003) 'Civil disabilities of former prisoners in a constitutional democracy: building on the South African experience' *Acta Juridica*, pp. 221-237.

⁴ Love MC (2002) 'Starting over with a clean slate – in praise of a forgotten section of the model penal code' *Fordham Urban Law Journal*, Vol. 30 p. 1714

⁵ Criminal Law (*Sexual Offences and Related Matters*) Amendment Act, 32 of 2007

⁶ Children's Act, 38 of 2005

count against the offender and result in a more severe penalty. There are also different schools of thought on this issue.⁷

The retention or expungement of criminal records then centres on two issues: on the one hand, the duty to promote safety in society and protect citizens from dangerous and dishonest individuals and, on the other hand, the right to equality⁸ and the constitutional duty 'to free the potential of each person'⁹.

Scope of expungement

The Bill lists, in clause 271A, the categories of offenders who would qualify for the expungement of criminal records and are based on the sentence that was imposed by the court. A distinction is further made between periods of five and ten years respectively during which no further convictions are recorded. These categories are summarised as follows:

- Five-year period with no further convictions
 - Postponement of passing of sentence
 - Discharge with caution or reprimand
 - Fine only, less than R10 000
 - Corporal punishment (prior to abolition)
- Ten-year period with no further convictions
 - Postponement of passing of sentence
 - Discharge with caution or reprimand
 - Fine only, less than R50 000
 - Corporal punishment (prior to abolition)
 - Imprisonment of six months or less with or without the option of a fine
 - Imprisonment of six months or less that was suspended in full or partially
 - Imprisonment of twelve months or less that was partially suspended resulting in six months effective imprisonment
 - Correctional supervision
 - Periodical imprisonment
 - Imprisonment of less than two years, with or without the option of a fine if the person was a child at the time of the offence and not already covered by other categories.

A significant challenge in assessing the possible impact of the Bill is that there is currently no reliable statistics available on the sentences imposed by the courts. Reliable sentencing statistics were last released

⁷ Three approaches are discernable: (1) Flat rate sentencing only acknowledges the crime that is being punished now as the punishments for previous crimes have already been executed and it would be unfair to punish again for a crime that was already punished. (2) Cumulative sentencing argues that for each crime the punishment should be more severe in order to build on the deterrent value of the punishment. (3) The progressive loss of mitigation works from an upper ceiling downwards, giving maximum benefit to the first offender and least to the repeat offender up to him/her receiving the maximum specified penalty. [Ashworth A (2005) *Sentencing and Criminal Justice*, Cambridge University Press, pp. 184-187]

⁸ Constitution s 7

⁹ Constitution Preamble

in 1992. The Department of Correctional Services is the only department that keeps reliable and accessible statistics on the people placed in its care and based on this some observations are made:

- Offenders serving sentences of less than 6 months constitute 4.5% of the total sentenced population (n=5053)
- Offenders serving sentences of between 6 and 12 months constitute 3.4% of the total sentenced population (n=3880)
- Offenders sentenced to periodical imprisonment constitute less than 0.8% of the total sentenced population.¹⁰
- As at the end of February 2008 there were 18 627 offenders placed under correctional supervision.¹¹

Seen against the total number of convictions of more than 288 000 recorded by the National Prosecuting Service for 2006/7¹², it appears that only a small number of offenders who have served time in prisons or sentenced to correctional supervision stand to benefit from the proposals contained in the Bill.

It is further noted that the five-year and ten-year periods proposed in the Bill may indeed be too long to serve as an incentive to encourage law abiding behaviour in certain instances. A five-year period for a conviction that received a caution or reprimand seems excessive and equally so for a conviction for which the passing of sentence was postponed. In such instances it must be assumed that the court did not regard the offence as serious at all or that there were such special circumstances that re-offending is highly unlikely.

The ten-year period in respect of short prison sentences is also excessive. Firstly, the sentence itself is a relatively light one, compared to what courts have become accustomed to hand down. Secondly, the ten-year period is too long to serve as an incentive. These sentences are typically handed down by district courts with a sentence jurisdiction of three years of imprisonment, yet it requires that there must be no further convictions for ten years. From the above it appears that the proposal, as it reads now, lacks a set of clear principles that are progressive and useful in promoting law abiding behaviour.

Requirements for a system expungement

Following from the above, as well as what is proposed in the Bill, it is possible to formulate a number of requirements for an expungement system if any benefits are to be derived from it by the individuals which it seeks to benefit and maintain a balance with the duty to protect society.

It needs to be simple and apply rules universally with minimum exceptions, striking a balance between the protection of public safety and Constitutional obligations. From this it follows that the provisions relating to offender registers, as noted above, as well as other legislation dealing with the expungement of criminal records need to be aligned and harmonised. In the case of the latter reference is made to the Child

¹⁰ The figures are for January 2008.

¹¹ Department of Correctional Services <http://www.dcs.gov.za/WebStatistics/> Accessed 2 September 2008.

¹² National Prosecuting Authority (2007) *Annual Report of the National Prosecuting Authority 2006/7*, Pretoria, p. 27.

Justice Bill and the provisions of the Constitution relating to membership of Parliament. For example, a person is excluded from being a Member of Parliament if he/she has been convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine and this disqualification remains in force for a period of five years after the sentence has been completed.¹³ The Child Justice Bill, on the other hand, proposes a different system referring to offences listed on the accompanying schedules and uses the date of conviction as the reference point.¹⁴

It is also the case that professional bodies and employers in general, use criminal records to refuse membership or deny employment. There are no guidelines in this regard and it appears that employers and professional bodies develop and apply their own rules. Employment is often denied to ex-offenders purely on the basis of having a criminal record without assessing the suitability of the person for the position or bringing the conviction in relation to the required job function and the employment context. This form of discrimination leads to enormous frustration and economic marginalisation amongst such individuals.¹⁵

A system of expungement needs to be understandable to lay persons and those who would stand to benefit from it. The existing as well as previous provisions for the expungement of criminal records are complex and are not written in a simple language nor are they, in our experience, explained by the relevant officials to persons convicted of criminal offences. The provisions in the Bill proposes an even more complex system with various cross references to other sections and legal jargon that would make it completely inaccessible to a lay person, even if such a person is able to consult a copy of the Criminal Procedure Act.

The possibility of expungement should create a real incentive for a broad range of convicted offenders to refrain from committing further offences. The expungement of a criminal record should be an attainable reward achieved through good behaviour over a reasonable time period. It should also not be so exclusive that it becomes meaningless for the majority or even a large proportion of offenders. In order to apply this principle it would be necessary to understand current sentencing profiles and assess the possible impact of the proposals contained in the Bill as well as other proposals. Fundamentally this principle speaks to what the state wants to achieve with the expungement of records and how it can utilise this mechanism to promote law abiding behaviour on a more general scale as opposed to create an opportunity for a select few.

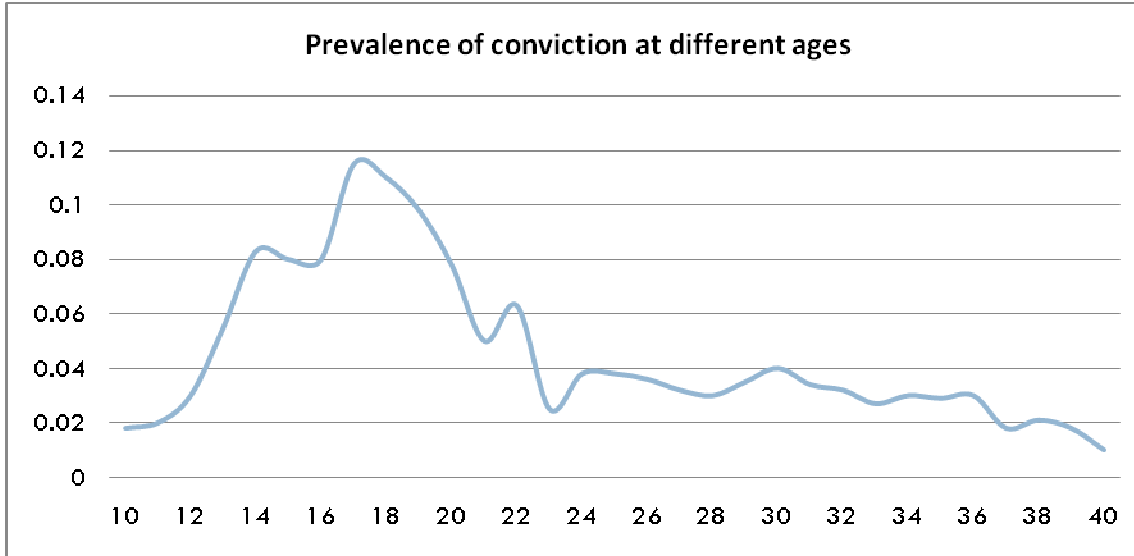
A system of records-expungement must be based on knowledge and informed by evidence. Developing policy and legislation for the expungement of criminal records should be based on reliable information describing offending and re-offending patterns. Many persons convicted of a first criminal offence will never commit further offences, while a small percentage of offenders will continue to commit crimes for large part of their adult lives. The former category may indeed have a committed one or several offences at a young age and will then desist from committing further offences. For the remainder of their lives they will not pose a threat to society and should not be punished for the rest of their lives for the crimes committed

¹³ S 47(1)(e) Although this does not expunge the record, it does enable a convicted offender to be a Member of Parliament.

¹⁴ Clause 87

¹⁵ This was confirmed by two research projects undertaken by CSPRI and Khulisa respectively.

when they were young. Reliable research from the UK indicates that offending behaviour builds up from age 10-years to a peak at age 18-years after which it declines sharply to age 24 and then maintain a stable level to age 35 and then declines even further, as shown in Chart 1.¹⁶

CHART 1¹⁷

Research of this nature has not been done in South Africa and it is therefore unknown how age and offending converge as well as what the re-offending patterns are. It is, however, universally the case that most offences are committed by young men in their late teens to their early twenties. The intention should therefore be not to continue punishing an individual for the rest of his life for something that he did at age 19 or 21, but rather to integrate them back into society as soon as possible and remove the obstacles in the way of integration.

The retention of criminal records should be selective and purposeful. There is a small group of offenders who will continue to pose a risk to society and/or who have committed such heinous crimes that the expungement of the conviction(s) is not morally justifiable. The central question then becomes: Why should an offender's conviction NOT be expunged? It must serve a purpose to retain the record. The aim should be to define these categories of offenders as narrowly as possible with the purpose to protect public safety, rather than the blanket categorisations that have been the basis for previous and existing legislation on the expungement of criminal records. In this regard offender registers can serve this purpose as their application is forward-looking and is not merely an extension of the punishment for the sake of punishment.

¹⁶ Piquero AR, Farrington DP, and Blumstein A (2007) *Key Issues in Criminal Career Research*, Cambridge University Press, London, p. 49.

¹⁷ Please note that the chart is an approximation of Figure 4.1 in the cited work as access to the raw data for the purposes of recreating the graph was not possible. It nonetheless reflects the overall pattern found by the researchers.

Recommendations

In view of the above, the following recommendations are made in respect of the proposed amendments.

The Bill fails to address the situation of the expungement and retention of records adequately and comprehensively. It does not align and harmonise the different provisions in law nor does it formulate and apply a set of principles consistently. **It is therefore recommended that the Committee requests the Department of Justice and Constitutional Development to conduct further research and draft legislation that would achieve this.**

The bill defines a fairly narrow category of offenders who may benefit from expungement and then only after they had not been convicted of further offences for disproportionately long periods. **It is submitted that the scope of the expungement of criminal records should be broadened significantly and that the time frames should be reconsidered.**

The Bill proposes in clause 271A(3) a mechanism that places the onus on the convicted offender to apply to have his/her record expunged. It is our submission that such a mechanism will place the potential benefits of the expungement of a criminal record out of the reach of most South African offenders. Moreover, the mechanism does not provide any timelines as to how soon such an application must be processed and finalised. The benefit derived from expungement may in fact be lost to time if there are significant delays. Current technology is perfectly capable of enabling a system of expungement that functions automatically and there should be no reason why the responsibility should rest with the convicted person to initiate the process. **It is recommended that the system of expungement is developed in such a manner that it functions automatically and is not dependent on a request from an individual.**

Having a criminal record is as much part of the punishment as, for example, the fine or imprisonment imposed. This should be given the deserved recognition at sentencing. **It is therefore recommended that at sentencing the sentencing officer should inform the offender whether or not his/her record for that conviction can be expunged and what the conditions thereto are. A further option is that the sentencing officer may in fact specify what those conditions are.**

CONCLUSION

CSPRI wishes to thank the Committee for this opportunity and is willing to answer further questions and respond to comments from Committee members.