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Enq. Ms Nolwandle Made and Prof Thuli Madonsela

Law Trust Chair in Social Justice

Stellenbosch University

tmadonsela@sun.ac.za

nmade@sun.ac.za

**SUBMISSION TO THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT ON THE AMENDMENTS TO THE CRIMINAL AND RELATED
MATTERS [B 17B –2020] BY THE LAW TRUST CHAIR IN SOCIAL JUSTICE,
STELLENBOSCH UNIVERSITY**

9 July 2021

For Attention: Hon. S Shaikh, MP

Email: CRMABill2021@parliament.gov.za

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SECTION 1: INTRODUCTION

1.1. Background To The Submission

The Law Trust Chair in Social Justice (CSJ) and Stellenbosch University in partnership with the Thuma Foundation is grateful for the opportunity to present written comments on to the **Criminal and Related Matters Amendment Bill [B 17B –2020]**.

We were to engage with the Department of Justice and Constitutional Development (DOJCD) through Mr Henk Du Preez (Mr Dupreez) and Ms Joy Watson (Ms Watson) who provided contextual input behind the proposed amendments which were helpful in conceptualising this submission. We are also grateful to Deputy Minister John Jeffrey for offering to avail himself to explain the thinking behind the proposed amendments on a mutually suitable date

This submission is structured in two sections. Section 1 contains the general introduction and background, the executive summary and finally, section 2 deals with the tabular submission of comments.

The Department of Justice and Constitutional Development (DOJCD) has invited interested parties to submit written comments on proposed amendments to three GBV Bills (insert bills) According to Mr H. Du Preez, a representative from DOJCD, the amendments are in response to President Cyril Ramaphosa's address in September 2019 where government expressed a commitment to ending GBV and announced the five-point emergency plan which was to be implemented without further debate to address the scourge of GBV. One of those plans was to enhance the legal and policy framework to strengthen the state's response to the problem. The three bills are regarded as a package, prepared to comply with the president's request" (Du Preez, 2021).

The current Minister of Justice and Correctional Services under Minister Lamola and the current administration as headed by President Cyril Ramaphosa must be applauded for finally signalling an intention to intensify measures aimed at eradicating this country's GBV scourge.

This submission is a collaboration resulting from a virtual roundtable held by the Law Trust Chair in Social Justice on 05 July 2021. Present at the roundtable were government officials, GBV activists, civil society, and academics. The attendants agreed that it was past time that these GBV bills were amended to address the growing cases of different forms of GBV.

1.2. The Law Trust Chair In Social Justice

The submission stems from continuous social justice research that has been undertaken by the CSJ, the outcome of which includes the emergence of social impact conscious policy and legislation design as key to the transformative constitutionalism dictated by the Constitution.

A research output seeking to facilitate social impact conscious policy and legislation design is the sSocial Justice Impact Assessment Matrix (SIAM), an instrument designed to facilitate the leveraging of data analytics to predict the likely poverty and equality impact of any planned law, policy, programme, service or decision on any group identified by one or more of the grounds in section 9 of the Constitution.¹ It aims to eschew laws, regulations, policies and service delivery plans that may exacerbate social and economic inequality, including poverty. Where inevitable, the idea is to implement such policies and decisions, with a compensation strategy that will mitigate the unfair

¹ Outlined in T Madonsela "Law and the economy through a social justice lens" in R Parsons (Ed) *Recession, Recovery and Reform: South African Economy after Covid-19* (2020).

impact. The SIAM, which has parallels with government's Social and Economic Impact Assessment Systems (SEIAS), differs from SEIAS in that SIAM has an overt grounding in the constitutional social justice commitment and related equality duty and emphasises using sufficiently disaggregated data to predict the future as it relates to narrowing or widening the substantive equality and poverty gaps.

The working definition of the CSJ is that "social justice is about the equal enjoyment of all rights and freedoms regardless of human diversity reflected in the just, fair and equitable distribution of all opportunities, resources, benefits, privileges and burdens in a society or group and between societies. In a socially just society, it should not be harder for one group to thrive and easier for another." In the case of South Africa, the transformative constitutionalism mandate regarding social justice transcends avoiding disadvantage to one or more groups, the mandate incorporates an injunction to redress legacy imbalances between these groups. This message emerges loud and clear in the Constitutional Court's jurisprudence, the key case in this regard being *Minister of Finance v Van Heerden*.²

1.3. Literature Review on Gender Based Violence In South Africa

As Prof. Thuli Madonsela once told the audience at the University of KwaZulu Natal graduation ceremony, *"It is my considered view that the violence that we experience today and the deficit in ubuntu is part of the complex and ugly shadow of our past. In South Africa, apartheid left many people behind, and as we advance women, sometimes others feel left behind. But even if they are not left behind, some people were brought up to believe that women have less value than them and then when suddenly women have equal value, they feel something has been taken away from them,"* (Singh and Maqhina, 2019).

South Africa arguably has one of the world's most progressive constitutions. However, despite the human rights afforded to all citizens enshrined in the Constitution, South Africa has one of the highest rates of GBV and is characterised as having a culture of violence as a result of the history of apartheid and colonisation (van Niekerk and Boonzaier, 2016). This is confirmed by numerous stories in the media of fatal GBV cases. It is so prevalent that almost everyone we encounter knows of someone, if not themselves, who have been victims of GBV.

It is noteworthy and encouraging that the bills also seek to address the violence on campuses and educational institutions. In this regard, Mahabeer, notes that young women in institutions *"experienced feelings of vulnerability, silenced by ignorance, fear and powerlessness"*. (Mahabeer, 2021)

Thirdly, the discussion centred on the intersectionality of GBV where social norms are concerned. According to a study on Intimate Partner Violence (IPV) in two communities in the Western Cape, communities view IPV through the same lens as other forms of violence (van Niekerk and Boonzaier, 2016), with a culture of "kiss and make up" to be the norm. Race, class and other forms of female oppression (e.g. patriarchy) intersects with GBV.

² *Minister of Finance and Other v Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); [2004] 12 BLLR 1181 (CC) (29 July 2004)

Fourthly, the bills do not explicitly mention violence against LGBTQ+ citizens, despite its prevalence in South Africa. Legislation on GBV excludes other oppressed minorities whose right are enshrined in the Constitution. *“The narrow focus on VAW in GBV intervention efforts results in the exclusion of violence against gender nonconforming (GNC) individuals, as well as others in the lesbian, gay, trans, queer, intersex, asexual (LGBTQIA+) community, and violence between men. A narrow application of the concept of GBV in prevention efforts may fail to address the full range of gendered violence, and therefore only be successful in preventing heteronormative and cis-gendered forms of GBV”* (Graaf, 2017).

I.4 Submission Overview

The gist of our submission is that we welcome the bill and commend the government for seeking to plug gaps in our national efforts at combating sexual violence and related injustices. Regarding improvements, the thrust of the submission relates to the theory of change underpinning the amendments and definitions. In this regard, we have made recommendations that target a culture change in society and the criminal justice system. We also make recommendations that seek to help identify the causes and influencing factors behind GBV through profiling offenders that are captured through the justice system. We are also recommending that government should eschew narrowing vulnerability to age and disability when it comes to women and narrowing it to women when it comes to broader society. It is worth noting that all women are vulnerable to GBV despite age and that heightened vulnerability extends to groups such as older women and members of the LGBQ community regardless of gender. This is one of the reasons planning with disaggregated data and acute social impact awareness is important.

I.5 Conclusion

The CSJ commends the amendments to the Act which enhances protection for complainants, promotes collaboration between implementing departments and enhances the practicality of the Act. However, for victims of domestic violence to be appropriately protected and for legal clarity, the concerns that have been raised in this submission need to be addressed.

Laws are only as good as their implementation. Indeed, at the opening of our roundtable on GBV it was stressed that most of us have heard of women who have been made to eat the Protection Orders meant to protect them, while some have been abused with the order but received little recourse from the authorities.

The National Strategic Plan on Gender-based Violence and Femicide, 2020 which is the overall policy framework for addressing GBV, is built on six pillars (Republic of South Africa, 2020). These pillars are crucial for achieving the mandate of these amendments. The first pillar rests on accountability, coordination and leadership, aimed at holding our leaders to account, something that has been lacking in the past. The second pillar rests on prevention, rebuilding and social cohesion. The third pillar is justice, safety and protection. The fourth is around appropriate responses, care, support and healing, with the fifth pillar centering on economic power, working through the intersection between economic injustice and violence. Lastly, the sixth pillar is research and information management, pertaining to data and evidence collection. This pillar is of particular importance to the CSJ, as it aligns with our social justice impact assessment matrix (SIAM) (as outlined in the background to CSJ above).

Consequently, research and knowledge creation are crucially important in addressing GBV to ensure the creation of new knowledge for understanding the reasons behind the high levels of violence in South African society. For example, how do cultural norms support or undermine GBV and for tracking the mental state of perpetrators to address the underlying causes of GBV.

We therefore stress the need for disaggregated data as this would assist in providing oversight. In particular, we need an anatomy of end users indicating all of their circumstances. It may also be a good idea for the bill to include a requirement for the collection of data from all found guilty of GBV with a view to using such data to elicit factors behind GBV, help develop early warning mechanisms and feed into efforts aimed at prevention. The role of mental health deficiencies is particularly worth considering. In addition, data becomes important in the context of the fiscal outlook as data driven planning improves impact efficiencies in solving the mischief laws aim to solve. We therefore submit that that consideration be given to using the SIAM as a tool can plug into the sixth pillar on research and information management, to lead to a better understanding of both services and prevention, as well as upstream approaches.

We look forward to engaging your department to achieve an end to GBV in this country.

Submitted by the Chair in Social Justice

University of Stellenbosch

09 July 2021.

5. Criminal and Related Matters Amendment Bill [B 17b_2020]

AMENDMENT	PURPOSE OF AMENDMENT	Agree with Amendment	Reformulate/ Ambiguous	Problematic	Suggested Inclusion
Magistrates Court Act, 1944					
<p>Section 51A</p> <p>Evidence through intermediaries in proceedings other than criminal proceedings</p> <p>51A. (1) A court may, on application by any party to proceedings terms of Part II of this Act before the court, or of its own accord and subject to subsection (4), appoint a competent person as an intermediary in order to enable a witness—</p> <p>(a) under the biological or mental age of 18 years;</p> <p>(b) who suffers from a physical, psychological, mental or emotional condition; or</p> <p>(c) who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006), to give his or her evidence through that intermediary, if it appears to that court that the proceedings would expose such a witness to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings.</p>	<p>The proposed new sections 51A and 37A aim to extend the intermediary service— (a) firstly, to a witness who suffers from a physical, psychological, mental or emotional condition, and to older persons, as defined in the Older Persons Act, 2006 (Act No. 13 of 2006); and (b) secondly, to proceedings other than criminal proceedings.</p> <p>The proposed new sections 51B and 37B provide for the oath and competency of intermediaries appointed under sections 51A and 37A.</p> <p>The proposed new sections 51C and 37C provide for evidence through audiovisual link in</p>	<p>We agree with this amendment.</p>	<p>Ambiguous (both the proposed new sections 51A(b) and 37A(b))</p>	<p>The scope of physical condition is too wide.</p>	<p>Factors taken into consideration to determine to what extent a physical condition would render a witness in need of an intermediary.</p>

<p>(2)(a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary, except examination by the court, may take place in any manner other than through that intermediary.</p> <p>(b) The intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.</p> <p>(3) If a court appoints an intermediary in terms of subsection (1), the court may direct that the relevant witness gives his or her evidence at any place—</p> <ul style="list-style-type: none"> (a) which is informally arranged to set that witness at ease; (b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, the intermediary, as well as the witness, during his or her testimony. <p>(4) (a) The Minister may, by notice in the Gazette, determine the persons or the category or class of persons who are competent to be appointed as intermediaries.</p> <p>(b) An intermediary appearing at proceedings in terms of this section who is not in the full-time</p>	<p>proceedings other than criminal proceedings.</p>				
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employment of the State must be paid such traveling and subsistence and other allowances in respect of the services rendered by him or her as prescribed by the rules made by the Rules Board for Courts of Law under the Rules Board for Courts of Law Act, 1985.

(5) (a) A court must provide reasons for refusing any application for the appointment of an intermediary, immediately upon refusal, which reasons must be entered into the record of the proceedings.

(b) A court may, on application by a party affected by the refusal contemplated in paragraph (a), and if it is satisfied that there is a material change in respect of any fact or circumstance that influenced that refusal, review its decision.

(6) An intermediary referred to in subsection (1) may be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.

(7) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court, is absent for any reason, becomes unable, in the opinion of the court, to act as an intermediary or dies, the court may, in the interests of justice and after due consideration of the arguments put forward by the parties—

(a) postpone the proceedings in order to obtain the intermediary's presence;

<p>(b) summons the intermediary to appear before the court to advance reasons for being absent;</p> <p>(c) direct that the appointment of the intermediary be revoked and appoint another intermediary; or</p> <p>(d) direct that the appointment of the intermediary be revoked and that the proceedings continue in the absence of an intermediary.</p> <p>(8) The court must immediately give reasons for any direction or order referred to in subsection (7)(c) or (d), which reasons must be entered into the record of the proceedings.</p> <p><u>Section 51B</u></p> <p>Oath and Competency of intermediaries</p> <p>51B. (1) Subject to subsection (3), any person who is competent to be appointed as an intermediary in terms of section 51A(4)(a) must, before commencing with his or her functions in terms of section 51A, take an oath or make an affirmation subscribed by him or her, in the form set out below, before the magistrate presiding over the proceedings: 'I,, do hereby swear/truly affirm that, whenever I may be called upon to perform the functions of an intermediary, I shall truly and correctly, to the best of my knowledge and ability—</p>		<p>We agree with this amendment.</p>			
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<p>(a) perform my functions as an intermediary; and</p> <p>(b) convey, properly and accurately, all questions put to witnesses and, where necessary, convey the general purport of any question to the witness, unless directed otherwise by the court’.</p> <p>(2)(a) Subject to subsection (3), before a person is appointed to perform the functions of an intermediary in a magistrate’s court for any district or for any regional division, the magistrate presiding over the proceedings must enquire into the competence of the person to be appointed as an intermediary.</p> <p>(b) The enquiry contemplated in paragraph (a) must include, but is not limited to, the person’s—</p> <p>(i) fitness as a person to be an intermediary;</p> <p>(ii) experience, which has a bearing on the role and functions of an intermediary;</p> <p>(iii) qualifications;</p> <p>(iv) knowledge, which has a bearing on the role and functions of an intermediary;</p> <p>(v) language and communication proficiency; and</p>					
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<p>(vi) ability to interact with a witness under the biological or mental age of 18 years or a witness who suffers from a physical, psychological, mental or emotional condition, or a witness who is an older person as defined in section 1 of the Older Persons Act, 2006.</p> <p>(3) (a) The head of a court may, at his or her discretion and after holding an enquiry contemplated in subsection (2), issue a certificate in the form prescribed by the Minister by notice in the Gazette, to a person whom he or she has found to be competent to appear as an intermediary in a magistrate's court for a district or for a regional division.</p> <p>(b) Before the head of a court issues a certificate referred to in paragraph (a), he or she must cause the person who has been found competent to be appointed as an intermediary, to take the oath or make the affirmation referred to in subsection (1) and must endorse the certificate with a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.</p> <p>(c) A certificate contemplated in paragraph (a) may be accepted as proof of the—</p> <p>(i) competency of a person to be appointed as an intermediary; and</p>					
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<p>(ii) fact that the person has taken the oath or made the affirmation contemplated in subsection (1), for purposes of this section, in any subsequent proceedings in terms of this Act, before a magistrate's court for a district or for a regional division and it is not necessary for the magistrate presiding over the proceedings in question to administer the oath or affirmation or to hold an enquiry into the competence of the person to be appointed as an intermediary</p> <p>(d) Paragraph (c) must not be construed as prohibiting a magistrate from holding an enquiry, at any stage of proceedings, regarding the competence of a person to act as an intermediary.</p> <p>(e) For the purposes of this section, "head of a court" means the most senior judicial officer of that court.</p> <p><u>Section 51C</u></p> <p>Evidence through audiovisual link in proceedings other than criminal proceedings</p> <p>51C. (1) A court may, on application by any party to proceedings in terms of Part II of this Act before that court or of its own accord, order that a witness, irrespective of whether the witness is in or outside the Republic, if the witness consents thereto, may give evidence by means of audiovisual link.</p> <p>(2) A court may make an order contemplated in subsection (1) only if—</p>		<p>We agree with this amendment.</p>			
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<p>(a) it appears to the court that to do so would—</p> <p>(i) (aa) prevent unreasonable delay; (bb) save costs; (cc) be convenient; or (dd) prevent the likelihood that any person might be prejudiced or harmed if he or she testifies or is present at such proceedings; and</p> <p>(ii) otherwise be in the interests of justice;</p> <p>(b) facilities thereof are readily available or obtainable at the court; and</p> <p>(c) the audiovisual link that is used by the witness or at the court enables—</p> <p>(i) persons at the courtroom to see, hear and interact with the witness giving evidence; and</p> <p>(ii) the witness who gives evidence to see, hear and interact with the persons at the courtroom.</p> <p>(3) The court may make the giving of evidence in terms of subsection (1) subject to such conditions as it may deem necessary in the interests of justice.</p> <p>(4) The court must provide reasons for—</p> <p>(a) allowing or refusing an application by any of the parties; or</p>					
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<p>(b) its order and any objection raised by the parties against the order, as contemplated in subsection (1).</p> <p>(5) For purposes of this Act, a witness who gives evidence by means of audiovisual link is regarded as a witness who was subpoenaed to give evidence in the court in question.</p> <p>(6) For purposes of this section “audiovisual link” means facilities that enable both audio and visual communications between a witness and persons at a courtroom in real-time as they take place.”.</p>					
Criminal Procedure Act 51 of 1977					
<p><u>Section 59A</u></p> <p>Section 59 of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:</p>	<p>We agree with this amendment.</p>				

<p>“(a) An accused who is in custody in respect of any offence, other than an offence—</p> <p>(i) referred to in Part II or Part III of Schedule 2;</p> <p>(ii) against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998 (Act No. 116 of 1998); or</p> <p>(iii) referred to in—</p> <p>(aa) section 17(1)(a) of the Domestic Violence Act, 1998;</p> <p>(bb) section 18(1)(a) of the Protection from Harassment Act, 2011 (Act No. 17 of 2011); or</p> <p>(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station</p>					
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the sum of money determined by such police official.”.					
<p>Section 59A</p> <p><u>Section 59A of the Criminal Procedure Act, 1977, is hereby amended-</u></p> <p>(a) by the substitution for the heading of the following heading: “[Attorney-general] Director of Public Prosecutions may authorise release on bail”; and</p> <p>(b) by the substitution for subsections (1), (2), (3) and (4) of the following subsections respectively:</p> <p>“(1) [An attorney-general] A Director of Public Prosecutions having jurisdiction, or a prosecutor authorised thereto in writing by the [attorney-general] Director of Public Prosecutions concerned, may, in respect of the offences referred to in Schedule 7 and in consultation with the police official charged with the investigation, authorise the release of an accused on bail: Provided that a person accused of any offence contemplated in section 59(1)(a)(ii) or (iii) may not be released on bail in accordance with the provisions of this section.</p> <p>(2) For the purposes of exercising the functions contemplated in subsections (1) and (3) [an attorney-general] the National Director of Public Prosecutions</p>	<p>Section 59(1) of the Criminal Procedure Act, 1977, provides that an accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2 to that Act, may, before his or her first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, in consultation with the police official charged with the investigation.</p> <p>The effect of these amendments is that the accused must be kept in custody in respect of the offences referred to in the Domestic Violence Act and the Protection from Harassment Act, until he or she appears in court,</p>				<p>We recommend that, in the event of a person accused of any offence contemplated in section 59(1)(a)(ii) or (iii) such accused person must be psychiatrically evaluated as soon as possible after arrest, but before their first appearance for application for bail, to determine all and any psychological factors which could have had any influence on the person's allegedly committing the</p>

<p>may, after consultation with the Minister, issue directives.</p> <p>(3) The effect of bail granted in terms of this section is that the person who is in custody shall be released from custody—</p> <p>(a) upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his or her bail at his or her place of detention contemplated in section 50(1)(a);</p> <p>(b) subject to reasonable conditions imposed by the [attorney-general] Director of Public Prosecutions or prosecutor concerned; or</p> <p>(c) the payment of such sum of money or the furnishing of such guarantee to pay and the imposition of such conditions.</p> <p>(4) An accused released in terms of subsection (3) shall appear on the first court day at the court and at the time determined by the [attorney-general] Director of Public Prosecutions or prosecutor concerned and the release shall endure until he or she so appears before the court on the first court day.”</p>	<p>whereafter he or she may, in terms of section 60 of the Criminal Procedure Act, 1977, make an application to the court to be released on bail</p>				<p>act and such information to be captured as data for the purposes of possible programmes to prevent gender based violence.</p> <p>The psychiatric report must be presented by the DPP before the bail application is to be heard.</p>
<p><u>Section 60</u></p> <p>Section 60 of the Criminal Procedure Act, 1977, is hereby amended—</p> <p>(a) by the substitution in subsection (2) for paragraph (d) of the following paragraph:</p>					

“(d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection (11)(a) [and], (b) and (c), require of the prosecutor to place on record the reasons for not opposing the bail application.”;

(b) by the substitution for subsection (2A) of the following subsection:

“(2A) The court must, before reaching a decision on the bail application, take into consideration—

(a) any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available; and

(b) the view of any person against whom the offence in question was allegedly committed, regarding his or her safety.”;

(c) by the substitution in subsection (4) for paragraph (a) of the following paragraph:

“(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public, any person against whom the offence in question was allegedly committed, or any other particular person or will commit a Schedule 1 offence.”;

(d) by the substitution for subsection (5) of the following subsection:

“(5) In considering whether the grounds in subsection (4)(a) have been established, the court

may, where applicable, take into account the following factors, namely—

- (a) the degree of violence towards others implicit in the charge against the accused;
- (b) any threat of violence which the accused may have made to a person against whom the offence in question was allegedly committed or any other person;
- (c) any resentment the accused is alleged to harbour against a person against whom the offence in question was allegedly committed or any other person;
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
- (e) any disposition of the accused to commit—
 - (i) offences referred to in Schedule 1;
 - (ii) an offence against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or
 - (iii) an offence referred to in—
 - (aa) section 17(1)(a) of the Domestic Violence Act, 1998;
 - (bb) section 18(1)(a) of the Protection from Harassment Act, 2011; or

<p>(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, as is evident from his or her past conduct;</p> <p>(f) the prevalence of a particular type of offence;</p> <p>(g) any evidence that the accused previously committed an offence—</p> <p>(i) referred to in Schedule I;</p> <p>(ii) against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998; or</p> <p>(iii) referred to in—</p> <p>(aa) section 17(1)(a) of the Domestic Violence Act, 1998;</p> <p>(bb) section 18(1)(a) of the Protection from Harassment Act, 2011; or</p> <p>(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, while released on bail or placed under</p>					
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<p>correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998; or</p> <p>(h) any other factor which in the opinion of the court should be taken into account.”;</p> <p>(e) by the substitution for subsection (10) of the following subsection:</p> <p>“(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice: <u>Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.</u>”;</p> <p>(f) by the substitution for subsection (11) of the following subsection:</p> <p>“(11) Notwithstanding any provision of this Act, where an accused is charged with an offence [referred to]—</p> <p>(a) <u>referred to</u> in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional</p>					
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<p>circumstances exist which in the interests of justice permit his or her release;</p> <p>(b) referred to in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release; or</p> <p>(c) contemplated in section 59(1)(a)(ii) or (iii), the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.”;</p> <p>(g) by the substitution for subsection (11A) of the following subsection:</p> <p>“(11A) (a) If the [attorney-general] Director of Public Prosecutions having jurisdiction intends charging any person with an offence referred to in Schedule 5 or 6, the [attorney-general] Director of Public Prosecutions may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue a written confirmation to the effect that he or</p>					
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<p>she intends to charge the accused with an offence referred to in Schedule 5 or 6.</p> <p>(b) The written confirmation shall be handed in at the court in question by the prosecutor as soon as possible after the issuing thereof and forms part of the record of that court.</p> <p>(c) Whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 5 or 6, a written confirmation issued by [an attorney-general] a Director of Public Prosecutions under paragraph (a) shall, upon its mere production at such application or proceedings, be prima facie proof of the charge to be brought against that person.”;</p> <p>(h) by the substitution in subsection (11B) for paragraph (a) of the following paragraph:</p> <p>“(a) In bail proceedings, the accused, or his or her legal adviser, is compelled to inform the court whether—</p> <p>(i) the accused has previously been convicted of any offence; [and]</p> <p>(ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges;</p> <p>(iii) an order contemplated in section 5 or 6 of the Domestic Violence Act, 1998, section 3 or</p>					
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<p>9 of the Protection from Harassment Act, 2011, or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still of force; and</p> <p>(iv) the accused is, or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998.”; and</p> <p>(i) by the substitution for subsection (12) of the following subsection:</p> <p>“(12) (a) The court may make the release of an accused on bail subject to conditions which, in the court’s opinion, are in the interests of justice: <u>Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.</u></p> <p><u>(b) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), in respect of an offence that was allegedly committed by the accused against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused, and a protection order as contemplated in that Act has not been issued</u></p>					
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<p>against the accused, the court must, after holding an enquiry, issue a protection order referred to in section 6 of that Act against the accused, where after the provisions of that Act shall apply."</p>					
<p>Section 68</p> <p>"Cancellation of bail"</p> <p>68. (1) Any court before which a charge is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that—</p> <p>(a) the accused is about to evade justice or is about to abscond in order to evade justice;</p> <p>(b) the accused has interfered or threatened or attempted to interfere with witnesses;</p> <p>(c) the accused has defeated or attempted to defeat the ends of justice;</p> <p><u>(cA) the accused has contravened any prohibition, condition, obligation or order imposed in terms of—</u></p> <p><u>(i) section 7 of the Domestic Violence Act, 1998;</u></p> <p><u>(ii) section 10(1) and (2) of the Protection from Harassment Act, 2011; or</u></p> <p><u>(iii) an order in terms of any other law, that was issued by a court to protect the person against</u></p>	<p>We welcome the amendment to provide for additional grounds on which bail may be cancelled.</p>				

<p>whom the offence in question was allegedly committed, from the accused;</p> <p>(d) the accused poses a threat to the safety of the public, a person against whom the offence in question was allegedly committed, or [of a] any other particular person;</p> <p>(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;</p> <p>(eA) the accused has not disclosed that— (i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998; (ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or (iii) an order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force;</p> <p>(eB) the accused has not disclosed or correctly disclosed that he or she is or was, at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;</p> <p>(f) further evidence has since become available or factors have arisen, including the fact that the</p>					
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<p>accused has furnished false information in the bail proceedings, which might have affected the decision to grant bail; or</p> <p>(g) it is in the interests of justice to do so, issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.</p> <p>(2) Any magistrate may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1), upon the application of any peace officer and upon a written statement on oath by such officer that—</p> <p>(a) he or she has reason to believe that—</p> <p>(i) an accused who has been released on bail is about to evade justice or is about to abscond in order to evade justice;</p> <p>(ii) the accused has interfered or threatened or attempted to interfere with witnesses;</p> <p>(iii) the accused has defeated or attempted to defeat the ends of justice; or</p> <p>(iv) the accused poses a threat to the safety of the public, any person against whom the offence in question was allegedly committed, or [of a] any other particular person;</p>					
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<p>(b) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail;</p> <p>(c) further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to release the accused on bail; [or]</p> <p><u>(d) the accused has contravened any prohibition, condition, obligation or order imposed in terms of—</u></p> <p><u>(i) section 7 of the Domestic Violence Act, 1998;</u></p> <p><u>(ii) section 10(1) and (2) of the Protection from Harassment Act, 2011; or</u></p> <p><u>(iv) an order in terms of any other law, that was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused;</u></p> <p><u>(e) the accused has not disclosed or correctly disclosed that he or she is or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;</u></p> <p><u>(f) the accused has not disclosed that—</u></p>					
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<p>(i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;</p> <p>(ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or</p> <p>(iii) an order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force; or</p> <p>[(d)] (g) it is in the interests of justice to do so, issue a warrant for the arrest of the accused, and may, if satisfied that the ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail.”</p>					
<p>Section 158</p> <p>Section 158 of the Criminal Procedure Act, 1977, is hereby amended—</p> <p>(a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:</p> <p>“(a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness, irrespective of whether the</p>	<p>Section 158(1) of the Criminal Procedure Act, 1977, provides that all criminal proceedings in any court must take place in the presence of the accused person, unless otherwise provided by law. In terms of section 158(2) a court may, on its own initiative or an</p>				

<p>witness is in or outside the Republic or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.”; and</p> <p>(b) by the addition after subsection (5) of the following subsection:</p> <p>“(6) For purposes of this section, a witness who is outside the Republic and who gives evidence by means of closed circuit television or similar electronic media, is regarded as a witness who was subpoenaed to give evidence in the court in question.”.</p>	<p>application by the prosecutor, order that a witness or an accused person gives his or her evidence by means of closed circuit television or similar electronic media, but only if the witness or the accused person agrees to this. A court may make a similar order on the application of an accused person or a witness.</p>				
<p><u>Section 161</u></p> <p>Section 161 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (2) of the following subsection:</p> <p>“(2) In this section the expression ‘viva voce’ shall[.]—</p> <p>(a) in the case of a [deaf and dumb] witness lacking the sense of hearing or the ability to speak, be deemed to include gesture-language [and,]; and</p> <p>(b) in the case of a witness under the age of eighteen years or a witness who suffers from a physical, psychological, mental or emotional condition, which inhibits the ability of that witness to give his or her evidence viva voce, be deemed to include</p>	<p>In line with the amendments to section 170A (discussed below), we welcome that clause 7 amends section 161 of the Criminal Procedure Act, 1977, to extend the expression ‘viva voce’ in respect of a witness who suffers from a physical, psychological, mental or emotional condition which inhibits the ability of that witness to give his or her evidence viva voce, to include demonstrations, gestures or any other form of non-verbal</p>				

demonstrations, gestures or any other form of non-verbal expression.”	expression. Clause 7 further substitutes the description of a “deaf and dumb” witness for the description of a witness lacking the sense of hearing or the ability to speak.				
<p><u>Section 170A</u></p> <p>Section 170A of the Criminal Procedure Act, 1977, is hereby amended—</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p>“(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness—</p> <p>(a) under the biological or mental age of eighteen years;</p> <p>(b) who suffers from a physical, psychological, mental or emotional condition; or</p> <p>(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</p>	<p>We agree with the amendment, however, would recommend specific factors to be mentioned to clearly define what would be considered a physical condition as contemplated by subsection (1) paragraph (b).</p>				<p>We recommend the substitution of “disability” for “condition”</p>

<p>such witness to give his or her evidence through that intermediary.”;</p> <p>(b) by the substitution in subsection (2) for paragraph (a) of the following paragraph:</p> <p>“(a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary [under subsection (1)], except examination by the court, [shall] may take place in any manner other than through that intermediary.”;</p> <p>(c) by the substitution for subsection (7) of the following subsection:</p> <p>(7) (a) The court [shall] must provide reasons for refusing any application or request by the public prosecutor or a witness referred to in subsection (1), for the appointment of an intermediary, [in respect of a child below the age of 14 years,] immediately upon refusal, [and such] which reasons [shall] must be entered into the record of the proceedings.</p> <p>(b) A court may, on application by the public prosecutor and if it is satisfied that there is a material change in respect of any fact or circumstance that influenced the refusal contemplated in paragraph (a), review its decision.</p> <p>(d) by the addition after subsection (10) of the following subsections:</p>					
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<p>“(11) Subject to subsection (13), any person who is competent to be appointed as an intermediary in terms of subsection (4)(a) must, before commencing with his or her functions in terms of this section, take an oath or make an affirmation subscribed by him or her, in the form set out below before the judicial officer presiding over the proceedings: ‘I, do hereby swear/truly affirm that, whenever I may be called upon to perform the functions of an intermediary, I shall, truly and correctly to the best of my knowledge and ability— (a) perform my functions as an intermediary; and (b) convey properly and accurately all questions put to witnesses and, where necessary, convey the general purport of any question to the witness, unless directed otherwise by the court’</p> <p>(12) (a) Subject to subsection (13), before a person is appointed to perform the functions of an intermediary— (i) in a magistrate’s court for any district or for any regional division, the magistrate presiding over the proceedings; or (ii) in a Superior Court, the judicial officer presiding over the proceedings, must enquire into the competence of the person to be appointed as an intermediary.</p> <p>(b) The enquiry contemplated in paragraph (a) must include, but is not limited to, the person’s— (i) fitness as a person to be an intermediary;</p>					
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<p>(ii) experience which has a bearing on the role and functions of an intermediary;</p> <p>(iii) qualifications;</p> <p>(iv) knowledge which has a bearing on the role and functions of an intermediary;</p> <p>(v) language and communication proficiency; and</p> <p>(vi) ability to interact with a witness under the biological or mental age of eighteen years or a witness who suffers from a physical, psychological, mental or emotional condition, or a witness who is an older person as defined in section 1 of the Older Persons Act, 2006.</p> <p>(13) (a) The head of a court may, at his or her discretion and after holding an enquiry contemplated in subsection (12), issue a certificate in the form prescribed by the Minister by notice in the Gazette, to a person whom he or she has found to be competent to appear as an intermediary in the court concerned.</p> <p>(b) Before the head of a court issues the certificate referred to in paragraph (a), he or she must cause the person who has been found competent to be appointed as an intermediary to take the oath or make the affirmation referred to in subsection (11) and must endorse the certificate with a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.</p>					
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<p>(c) A certificate contemplated in paragraph (a) may be accepted as proof—</p> <p>(i) of the competency of a person to be appointed as an intermediary in the court concerned; and</p> <p>(ii) of the fact that the person has taken the oath or made the affirmation contemplated in subsection (11).</p> <p>for purposes of this section, in any subsequent proceedings in terms of this Act, before the court concerned in respect of which a certificate contemplated in paragraph (a) was issued by the head of a court and it is not necessary for the magistrate or the judicial officer presiding over the proceedings of the court in question to administer the oath or affirmation or to hold an enquiry into the competence of the person to be appointed as an intermediary.</p> <p>(d) Paragraph (c) must not be construed as prohibiting a magistrate or a judicial officer presiding over proceedings from holding an enquiry, at any stage of the proceedings, regarding the competence of a person to act as an intermediary.</p> <p>(e) For the purposes of this section, “head of a court” means the most senior judicial officer of that court.”.</p>					
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<p><u>Section 299A</u></p> <p>Section 299A of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (1) of the following subsection:</p> <p>“(1) When a court sentences a person to imprisonment for—</p> <p>(a) murder or any other offence which involves the [intentional] killing of a person;</p> <p>(b) rape or compelled rape as contemplated in [sections] section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;</p> <p>(c) robbery, where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved;</p> <p>(d) sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;</p> <p>(e) kidnapping;</p> <p>(f) any conspiracy, incitement or attempt to commit any offence contemplated in paragraphs (a) to (e); [or]</p>	<p>Clause 9 of the Bill amends section 299A(1) in order to— (a) delete the requirement in paragraph (a) of intentional killing of a person, since those words may imply that culpable homicide, which is based on negligence, is excluded from the provision; and (b) include any offence, which was committed against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the sentenced person, and where an effective period of imprisonment exceeding seven years was imposed.</p> <p>We do, however, recommend certain additions provide for restorative justice initiatives, healing of past abuse and training in non-violent relationship skills.</p>			<p>We recognise and welcome the fact that tougher sentences will be applied to domestic violence offenders, however, it often seems that harsh sentences do not deter perpetrators.</p> <p>Gender based violent crimes affect not only the victims, but a community as a whole. Where harm was caused, it ought to follow that healing must take place. This does not imply that remedial and/or restorative justice</p>	<p>We therefore recommend that in the event that a convicted person committed a crime and the victim is student at a tertiary educational institute in such an environment, a restorative justice programme be considered in addition to or as a substitute to a sentence imposed by the court.</p> <p>Remedial programmes for convicted persons must be incorporated in any sentence imposed by a</p>
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<p>(g) offences as provided for in sections 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013; or</p> <p>(h) a period exceeding seven years for any offence, which that person committed against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with that person, it shall inform—</p> <p>(i) the complainant; or</p> <p>(ii) in the case of murder or any other offence contemplated in paragraph (a), any immediate relative of the deceased, if he or she is present that he or she has a right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.”</p> <p><u>Section 316B</u></p> <p>The following section is hereby substituted for section 316B of the Criminal Procedure Act, 1977:</p> <p><u>“Appeal by [attorney-general] National Director against sentence of superior court</u></p> <p><u>316B</u> (1) Subject to subsection (2), the [attorney-general] National Director of Public Prosecutions may, in circumstances, where a grave failure of justice would otherwise result or the administration</p>				<p>programmes should replace prison sentences but must be considered in addition to any other penalty provided for in legislation by a court when sentencing is to be passed.</p>	<p>court and be completed by the convicted person before the date of release or, where applicable, an authorised person or body is to consider parole of the convicted person.</p>
	We agree with the amendment.				

<p>of justice may be brought into disrepute, appeal to the [Appellate Division] Supreme Court of Appeal against a sentence imposed upon an accused [in a criminal case] by a [superior court] High Court sitting as a court of appeal in terms of section 310A or as a trial court.</p> <p>(2) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply mutatis mutandis with reference to a case in which the [attorney-general] National Director of Public Prosecutions appeals in terms of subsection (1) of this section.</p> <p>(3) Upon an appeal in terms of subsection (1) or an application referred to in subsection (2), brought by the [attorney-general] National Director of Public Prosecutions, the court may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the appeal or application, taxed according to the scale in civil cases of that court.”.</p>					
<p><u>Amendment of Schedule I to Act 51 of 1977</u></p> <p>Schedule I to the Criminal Procedure Act, 1977, is hereby amended by the substitution for the offence “Assault, when a dangerous wound is inflicted” of the following offence:</p> <p>“Assault—</p> <p>(a) when a dangerous wound is inflicted;</p> <p>(b) involving the infliction of grievous bodily harm; or</p>					

<p>(c) where a person is threatened— (i) with grievous bodily harm; or (ii) with a fire-arm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act No. 15 of 2013)."</p>					
<p><u>Amendment of Part II of Schedule 2 to Act 51 of 1977</u></p> <p>Part II of Schedule 2 to the Criminal Procedure Act, 1977, is hereby amended by the substitution for the offence "Assault, when a dangerous wound is inflicted" of the following offence: "Assault— (a) when a dangerous wound is inflicted; (b) involving the infliction of grievous bodily harm; or (c) where a person is threatened— (i) with grievous bodily harm; or (ii) with a fire-arm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013."</p>	<p>We agree with the amendment.</p>				

<p><u>Amendment of Schedule 7 to Act 51 of 1977</u></p> <p>Schedule 7 to the Criminal Procedure Act, 1977, is hereby amended by the substitution for the offence “Assault, involving the infliction of grievous bodily harm” of the following offence:</p> <p>“Assault—</p> <p>(a) <u>when a dangerous wound is inflicted;</u></p> <p>(b) <u>involving the infliction of grievous bodily harm; or</u></p> <p>(c) <u>where a person is threatened—</u></p> <p>(i) <u>with grievous bodily harm; or</u></p> <p>(ii) <u>with a fire-arm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act No. 15 of 2013).”</u></p>	<p>We agree with the amendment.</p>				
<p><u>Amendment of Schedule 8 to Act 51 of 1977</u></p> <p>Schedule 8 to the Criminal Procedure Act, 1977, is hereby amended by the substitution for the offence “Assault, when a dangerous wound is inflicted” of the following offence:</p> <p>“Assault—</p> <p>(a) <u>when a dangerous wound is inflicted;</u></p> <p>(b) <u>involving the infliction of grievous bodily harm; or</u></p> <p>(c) <u>where a person is threatened—</u></p>					

(i) with grievous bodily harm; or with a fire-arm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act No. 15 of 2013)."					
Criminal Law Amendment Act 105 of 1997					
<u>Amendment of Part I of Schedule 2 to Act 105 of 1997</u> Part I of Schedule 2 to the Criminal Law Amendment Act, 1997, is hereby amended— (a) by the substitution for the offence "Murder" of the following offence: "Murder, when— (a) it was planned or premeditated; (b) the victim was— (i) a law enforcement officer performing his or her functions as such, whether on duty or not; [or] (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), at criminal proceedings in any court; <u>or</u>					

(iii) a person under the age of 18 years;

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or

(ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance

<p>of a common purpose or conspiracy;</p> <p>(e) the victim was killed in order to unlawfully remove any body part of the victim, or as a result of such unlawful removal of a body part of the victim; [or]</p> <p>(f) the death of the victim resulted from, or is directly related to, any offence contemplated in section 1(a) to (e) of the Witchcraft Suppression Act, 1957 (Act 3 of 1957)[.]; or</p> <p>(g) the death of the victim resulted from physical abuse or sexual abuse, as contemplated in paragraphs (a) and (b) of the definition of “domestic violence” in section 1 of the Domestic Violence Act, 1998 (Act No. 116 of 1998), by the accused who is or was in a domestic relationship, as defined in section 1</p>					
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<p>of that Act, with the victim.”;</p> <p>(b) by the insertion of the following offence: “Attempted murder, in circumstances referred to in paragraphs (a) to (g) of the offence of ‘murder’.”</p> <p>(c) by the substitution for paragraphs (a), (b) and (c) of the offence “Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007” of the following paragraphs: “(a) when committed— (i) in the circumstances where the accused is convicted of the offence of compelled rape and evidence adduced at the trial of the accused proves that the victim was also raped— (aa) as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, by any co-perpetrator or accomplice; or (bb) by a person, who was compelled by any co-perpetrator or accomplice, to rape the victim, irrespective of whether or not the co-perpetrator or accomplice has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question; (ii) in the circumstances where the accused is convicted of the offence of compelled rape on the basis that the accused acted</p>					
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<p>in the execution or furtherance of a common purpose or conspiracy and evidence adduced at the trial proves that the victim was raped by more than one person who acted in the execution or furtherance of a common purpose or conspiracy to rape the victim, irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question;</p> <p>(iii) by the accused who—</p> <p>(aa) has previously been convicted of the offence of compelled rape or rape; or</p> <p>(bb) has been convicted by the trial court of two or more offences of compelled rape or the offences of compelled rape and rape, irrespective of—</p> <p>(aaa) whether the rape of which the accused has so been convicted constitutes a common law or statutory offence;</p> <p>(bbb) the date of the commission of any such offence of which the accused has so been convicted;</p> <p>(ccc) whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;</p> <p>(ddd) whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or</p>					
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<p>(eee) whether any such offence of which the accused has so been convicted was committed as part of the same chain of 20 events, on a single occasion or on different occasions; or</p> <p>(iv) under circumstances where the accused knows that the person who is compelled to rape the victim has the acquired immune deficiency syndrome or the human immunodeficiency virus</p> <p>(b) where the victim—</p> <p>(i) is a person under the age of [16] 18 years;</p> <p>(iA) is an older person as defined in section 1 of the Older Persons Act, 2006;</p> <p>(ii) is a [physically disabled] person with a disability who, due to his or her [physical] disability, is rendered [particularly] vulnerable;</p> <p>[or]</p> <p>(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or</p> <p>(iv) is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused; or</p> <p>(c) involving the infliction of grievous bodily harm.” and</p>					
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(d) by the substitution for paragraphs (a), (b) and (c) of the offence "Compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007" of the following paragraphs:

"(a) when committed—

(i) in the circumstances where the accused is convicted

of the offence of compelled rape and evidence adduced at the trial of the accused proves that the

victim was also raped—

(aa) as contemplated in section 3 of the Criminal

Law (Sexual Offences and Related Matters)

Amendment Act, 2007, by any co-perpetrator

or

accomplice; or

(bb) by a person, who was compelled by any co

perpetrator or accomplice, to rape the victim,

irrespective of whether or not the co-perpetrator

or accomplice has been convicted of, or has been

charged with, or is standing trial in respect of, the

offence in question;

(ii) in the circumstances where the accused is convicted of the offence of compelled rape on

<p>the basis that the accused acted in the execution or furtherance of a common purpose or conspiracy and evidence adduced at the trial proves that the victim was raped by more than one person who acted in the execution or furtherance of a common purpose or conspiracy to rape the victim, irrespective of whether or not any other person who so acted in the execution or furtherance of a common purpose or conspiracy has been convicted of, or has been charged with, or is standing trial in respect of, the offence in question;</p> <p>(iii) by the accused who—</p> <p>(aa) has previously been convicted of the offence of compelled rape or rape; or</p> <p>(bb) has been convicted by the trial court of two or more offences of compelled rape or the offences of compelled rape and rape, irrespective of—</p> <p>(aaa) whether the rape of which the accused has so been convicted constitutes a common law or statutory offence.</p>					
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<p>(bbb) the date of the commission of any such offence of which the accused has so been convicted;</p> <p>(ccc) whether the accused has been sentenced in respect of any such offence of which the accused has so been convicted;</p> <p>(ddd) whether any such offence of which the accused has so been convicted was committed in respect of the same victim or any other victim; or</p> <p>(eee) whether any such offence of which the accused has so been convicted was committed as part of the same chain of events, on a single occasion or on different occasions; or</p> <p>(iv) under circumstances where the accused knows that the person who is compelled to rape the victim has the acquired immune deficiency syndrome or the human immunodeficiency virus;</p> <p>(b) where the victim—</p> <p>(i) is a person under the age of [16] 18 years;</p> <p>(iA) is an older person as defined in section 1 of the Older Persons Act, 2006;</p> <p>(ii) is a [physically disabled] person with a disability who, due to his or her [physical] disability, is</p>					
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<p>rendered [particularly] vulnerable; [or]</p> <p>(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or</p> <p>(iv) is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused; or</p> <p>(c) involving the infliction of grievous bodily harm.”</p>					
<p><u>Amendment of Part II of Schedule 2 to Act 105 of 1997</u></p> <p>Part II of Schedule 2 to the Criminal Law Amendment Act, 1997, is hereby amended by the addition of the following offences:</p> <p>“Attempted murder in circumstances other than those referred to in Part I. Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, in circumstances other than those referred to in Part I.</p> <p>Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23, or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as</p>	<p>We agree with the amendment.</p>				

<p>contemplated in section 20(1) or 26(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.”.</p>					
<p><u>Amendment of Part III of Schedule 2 to Act 105 of 1997</u></p> <p>Part III of Schedule 2 to the Criminal Law Amendment Act, 1997, is hereby amended—</p> <p>(a) by the deletion of the following offences:</p> <p>“[Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part I. Sexual exploitation of a child or sexual exploitation of a person who is mentally disabled as contemplated in section 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in section 20 (1) or 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.]”; and</p> <p>(b) by the insertion of the following offence: “Assault with intent to do grievous bodily harm— (a) a child—</p>	<p>We agree with the amendment.</p>				

<p>(i) under the age of 16 years; or</p> <p>(ii) either 16 or 17 years of age and the age difference between the child and the person who has been convicted of the offence is more than four years; or</p> <p>(b) where the victim is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused.”.</p>					
<p>Superior Court Act 10 of 2013</p>					
<p>Section 37A</p> <p>“Evidence through intermediaries in proceedings other than criminal proceedings</p> <p>37A. (1) A Superior Court may, on application by any party to proceedings, other than criminal proceedings before the court, or of its own accord and subject to subsection (4), appoint a competent person as an intermediary in order to enable a witness—</p> <p>(a) under the biological or mental age of 18 years;</p> <p>(b) who suffers from a physical, psychological, mental or emotional condition; or</p> <p>(c) who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act No. 13 of 2006),</p> <p>to give his or her evidence through that</p>				<p>The scope of physical condition is too wide.</p>	<p>Factors taken into consideration to determine to what extent a physical condition would render a witness in need of an intermediary</p>

intermediary, if it appears to that court that the proceedings would expose such a witness to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings.

(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary, except examination by the court, may take place in any manner other than through that intermediary.

(b) The intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary in terms of subsection (1), the court may direct that the relevant witness gives his or her evidence at any place—

(a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary, as well as that witness, during his or her testimony.

(4) (a) The Minister may, by notice in the *Gazette*, determine the persons or the category or class of persons who are competent to be appointed as intermediaries.

(b) An intermediary appearing at proceedings in terms of this section who is not in the full-time employment of the State must be paid such traveling and subsistence and other allowances in respect of the services rendered by him or her as is prescribed by the rules made—

<p>(i) by the Rules Board for Courts of Law under the Rules Board for Courts of Law Act, 1985, in respect of the High Court; or</p> <p>(ii) in terms of section 29 of this Act, in respect of the Constitutional Court.</p> <p>(5) (a) A court must provide reasons for refusing any application for the appointment of an intermediary, immediately upon refusal, which reasons must be entered into the record of the proceedings.</p> <p>(b) A court may, on application by a party affected by the refusal contemplated in paragraph (a), and if it is satisfied that there is a material change in respect of any fact or circumstance that influenced that refusal, review its decision.”.</p> <p>(6) An intermediary referred to in subsection (1) may be summoned to appear in court on a specified date and at a specified place and time to act as an intermediary.</p> <p>(7) If, at the commencement of or at any stage before the completion of the proceedings concerned, an intermediary appointed by the court is for any reason absent, becomes unable to act as an intermediary, in the opinion of the court, or dies, the court may, in the interests of justice and after due consideration of the arguments put forward by the parties—</p> <p>(a) postpone the proceedings in order to obtain the intermediary’s presence;</p> <p>(b) summons the intermediary to appear before the court to advance reasons for being absent;</p> <p>(c) direct that the appointment of the intermediary be revoked and appoint another intermediary; or</p> <p>(d) direct that the appointment of the</p>					
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intermediary be revoked and that the proceedings continue in the absence of an intermediary.

(8) The court must immediately give reasons for any direction or order referred to in subsection (7)(c) or (d), which reasons must be entered into the record of the proceedings.

Section 37B

Oath and competency of intermediaries

37B. (1) Subject to subsection (3), any person who is competent to be appointed as an intermediary in terms of section 37A(4) of this Act must, before commencing with his or her functions in terms of section 37A, take an oath or make an affirmation subscribed by him or her, in the form set out below, before the judicial officer presiding over the proceedings: 'I, do hereby swear/truly affirm that, whenever I may be called upon to perform the functions of an intermediary, I shall truly and correctly, to the best of my knowledge and ability—

(a) perform my functions as an intermediary; and

(b) convey properly and accurately all questions put to witnesses and, where necessary, convey the general purport of any question to the witness, unless directed otherwise by the court'.

(2) (a) Subject to subsection (3), before a person is appointed to perform the functions of an intermediary in a Superior Court, the judicial officer presiding over the proceedings must enquire into

We agree with the amendment.

<p>the competence of the person to be appointed as an intermediary.</p> <p>(b) The enquiry contemplated in paragraph (a) must include, but is not limited to, the person's—</p> <ul style="list-style-type: none"> (i) fitness as a person to be an intermediary; (ii) experience which has a bearing on the role and functions of an intermediary; (iii) qualifications; (iv) knowledge which has a bearing on the role and functions of an intermediary; (v) language and communication proficiency; and (vi) ability to interact with a witness under the biological or mental age of 18 years or a witness who suffers from a physical, psychological, mental or emotional condition, or a witness who is an older person as defined in section 1 of the Older Persons Act, 2006 <p>(3) (a) The head of a court may, at his or her discretion and after 60 holding an enquiry contemplated in subsection (2), issue a certificate in the form prescribed by the Minister by notice in the Gazette, to a person whom he or she has found to be competent to appear as an intermediary in a Superior Court.</p> <p>(b) Before the head of a court issues a certificate referred to in paragraph (a), he or she must cause the person who has been found competent to be appointed as an intermediary, to take the oath or make the affirmation referred to in</p>					
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subsection (1) and must endorse the certificate with a statement of the fact that it was taken or made before him or her and of the date on which it was so taken or made and append his or her signature thereto.

(c) A certificate contemplated in paragraph (a) may be accepted as proof—

(i) of the competency of a person to be appointed as an intermediary; and

(ii) of the fact that the person has taken the oath or made the affirmation contemplated in subsection (1), for purposes of this section, in any subsequent proceedings in terms of this Act, before a Superior Court and it is not necessary for the presiding judicial officer presiding over the proceedings in question to administer the oath or affirmation or to hold an enquiry into the competence of the person to be appointed as an intermediary.

(d) Paragraph (c) must not be construed as prohibiting a judicial officer who presides over proceedings in a Superior Court from holding an enquiry, at any stage of proceedings, regarding the competence of a person to act as an intermediary.

Section 37C

Evidence through remote audiovisual link in proceedings other than criminal proceedings

37C. (1) A Superior Court may, on application by any party to proceedings before that court or of its own accord, order that a witness, irrespective of whether the witness is in or outside the Republic, if the witness consents thereto, give evidence by means of audiovisual link.

We agree with the amendment.

<p>(2) A court may make an order contemplated in subsection (1) only if—</p> <p>(a) it appears to the court that to do so would—</p> <p>(i) (aa) prevent unreasonable delay;</p> <p>(bb) save costs;</p> <p>(cc) be convenient; or</p> <p>(dd) prevent the likelihood that any person might be prejudiced or harmed if he or she testifies or is present at such proceedings; and</p> <p>(ii) otherwise be in the interests of justice;</p> <p>(b) facilities therefor are readily available or obtainable at the court; and</p> <p>(c) the audiovisual facilities that are used by the witness or at the court enable—</p> <p>(i) persons at the courtroom to see, hear and interact with the witness giving evidence; and</p> <p>(ii) the witness who gives evidence to see, hear and interact with the persons at the courtroom.</p> <p>(3) The court may make the giving of evidence in terms of subsection (1) subject to such conditions as it may deem necessary in the interests of justice.</p> <p>(4) The court must provide reasons for—</p> <p>(a) allowing or refusing an application by any of the parties; or</p> <p>(b) its order and any objection raised by the parties against the order, as contemplated in subsection (1).</p> <p>(5) For purposes of this Act, a witness who gives</p>					
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<p>evidence by means of audiovisual link, is regarded as a witness who was subpoenaed to give evidence in the court in question.</p> <p>(6) For purposes of this section “audiovisual link” means facilities that enable both audio and visual communications between a witness and persons at a courtroom in real-time as they take place.”</p>					
<p><u>Short title and commencement</u></p> <p>This Act is called the Criminal and Related Matters Amendment Act, 2020, and comes into operation on a date fixed by the President by proclamation in the Gazette.</p>					

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