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TO: SELECT COMMITTEE ON SECURITY AND JUSTICE
C/O Shahidabibi Shaikh
Chairperson of Select Committee on Security and Justice
E-mail: CPABill12B2021@parliament.gov.za

SUBMISSION BY MEDIA MONITORING AFRICA:

CRIMINAL PROCEDURE AMENDMENT BILL

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INTRODUCTION

1. Media Monitoring Africa (“**MMA**”) welcomes the opportunity to provide this submission to the Select Committee on Security and Justice (the Committee) on the Criminal Procedure Amendment Bill [B 12B - 2021] (“**the Bill**”). MMA was an applicant in the *Centre for Child Law and Others v Media 24 Limited and Others*¹ (“**the CC judgment**”) and engaged in the public participatory process on this Bill before the Department of Justice and Constitutional Development. We, therefore, appreciate the important purpose of the Bill in seeking to protect the identity of children in conflict with the law, children who are a witness in criminal proceedings, and children who are the victims or survivors of an offence.
2. We note a range of positive changes in the drafting and commend the Committee for the substantial and important revisions and inclusions in the Bill that in many ways support the balance between protecting the best interests of children and ensuring freedom of expression and open justice are not unduly curbed. We endorse several of the proposed inclusions, including those relating to social media as well as the inclusions relating to children whose whereabouts may be unknown.
3. Accordingly, MMA seeks to make four narrowly tailored submissions on select points:
 - 3.1. **First**, further clarity is needed in respect of timing;
 - 3.2. **Second**, the role of the media in supporting the South African Police Services;
 - 3.3. **Third**, the standards of the best interest of the child, the interests of justice, and the public interest should inform the court’s determination when authorising the publication of information; and
 - 3.4. **Fourth**, the provision of ongoing protection, while welcomed, does not fully accord with the Constitutional Court’s findings that ongoing protection is the default position, and does not incorporate the Court’s reasoning in relation to agency.
4. These aspects are discussed in turn below, with proposed textual amendments to the Bill. However, and before turning its core submissions, we provide a brief overview of MMA and briefly touch on two overarching considerations.

OVERVIEW OF MEDIA MONITORING AFRICA

5. MMA is a not-for-profit organisation, based in South Africa, that has been monitoring the media since 1993. MMA’s objectives are to promote the development of a free, fair, ethical, and critical media culture in South Africa and the rest of the continent. Through our work, we engage in a

¹ *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46.

range of legislative, litigious, and advocacy processes relating to the triad of information rights, which include the rights to privacy, freedom of expression, and access to information.

6. MMA has pioneered efforts to assist the media in reporting on children, and ultimately to find the best nexus between children and the media. Of particular relevance, MMA has 18 years of experience in monitoring and analysing the portrayal and participation of children in the media. Our work in this area involves empowering children to analyse and engage with the media, the development of an online digital citizens programme for children, making submissions on media policy matters, as well participating in legal cases where media and children are involved.
7. Notably, we have on behalf of and with children, made submissions to the Press Council and other media bodies that resulted in clauses focused on children being included. We have further made parliamentary submissions, submissions to various Ministries, and submissions to the United Nations Committee on the Rights of the Child.² In addition, and as noted above, MMA participated as an applicant in a Constitutional Court judgment that prompted this Bill.³ Following the judgment, MMA developed a discussion document and guidelines on children, the media and the law, with a focus on the legal positions that inform how children are reported on in the media.⁴ MMA has also developed guidelines for the media on reporting on children.⁵ Further, and in conjunction with UNICEF, MMA launched the 'Reporting on Children in the Media Course' at the University of Witwatersrand in August this year.⁶
8. MMA is therefore well placed to make this submission on an area that has been the subject of much debate and discussion for nearly two decades. For more information about MMA, please visit: mediamonitoringafrica.org.

OVERARCHING CONSIDERATIONS

9. Before turning to the core submissions, MMA makes three brief points:
 - 9.1. **The best interest of the child:** As MMA has recorded elsewhere, section 28, the section on children's rights, in the Bill of Rights, is a particularly powerful provision.⁷ It sets out that in all matters concerning the child the best interests of the child are paramount. In our submission, we seek to highlight that while respect for media freedom, freedom of expression, and the principle of open justice are all essential for the proper functioning

² In addition to these activities MMA engages in strategic litigation on a range of media freedom and children's rights related issues. MMA also runs a unique post graduate University accredited course on reporting on children.

³ CC judgment above n 1.

⁴ MMA, 'Discussion Document: Children, the Media, and the Law' (2020) (accessible [here](#)).

⁵ MMA, 'Identifying Children in the Media' (2020) (accessible [here](#)).

⁶ Joint press release by UNICEF South Africa and Media Monitoring Africa, 'Reporting on children in the media course launches to strengthen journalism on child rights issues' (2021) (accessible [here](#)).

⁷ MMA, 'Submissions on the Children's Amendment Bill' (2020) (accessible [here](#)).

of our constitutional democracy,⁸ we must ensure we are able, as a nation, to continue to live up to the high standard of our Constitution and ensure when it comes to children's rights online our laws are reflective of the principle of the best interests of the child. It is therefore crucial that this principle remains at the fore and shapes and structures our approach to the identity protections afforded in this Bill.

- 9.2. **Open Justice and importance of media freedom:** Protecting and respecting the rights of children should not be seen as limiting or undermining open justice or media freedom but in fact, as integral and interdependent elements, where respecting and promoting each serve to reinforce and deepen the other. This approach has enabled MMA to act as *amicus curiae* in the Eugene Terblanche murder trial where we sought to offer practical means of ensuring the media had to access to the trial but that the rights of one of the accused who was a minor were respected.⁹ We argued that while freedom of expression and open justice are incredibly important, they are not the only relevant considerations. We submitted that it is equally important to consider the best interests of a child, including their right to privacy, dignity, and a fair trial.¹⁰ In *Van Breda* matter – in which MMA was also an *amicus* – further entrenched the principle of open justice as one that enables the media to fulfil its “vital watchdog role in respect of the court process”, ensuring transparency of “governmental conduct in all of its many facets (including courts)”.¹¹ It ultimately requires that justice be done in a manner that promotes openness and accountability. MMA, therefore, affirms, that while there may appear to be tensions between the rights and interests of children and those of the media, it is possible and ultimately imperative, for the media to fulfil its role in advancing freedom of expression and open justice whilst simultaneously ensuring the rights of children are promoted and respected.¹²
- 9.3. **Inclusive terminology:** We note that the Bill predominantly relies on the binary terms, she, her, hers, and he, his, him. We accept that “identity terminology is fast-paced and ever-changing/evolving”.¹³ We similarly recognise the need to prioritise and promote equality and inclusion as envisaged in the Constitution. We, therefore, submit that appropriate and inclusive terminology be “recognised and reflected in legislation and that wide protection is offered to the most vulnerable and marginalised.”¹⁴ Accordingly, and in line with recent efforts by the National Council of Provinces Select Committee on

⁸ *The Citizen 1978 (Pty) Ltd and Others v McBride* [2011] ZACC 11 at para 141.

⁹ *Media 24 Limited and Others v National Prosecuting Authority and Others In re: S v Mahlangu and Another* [2011] ZAGPPHC 64. One of the accused, PN, was a child at the time of the murder and the trial.

¹⁰ *Id* at para 10.

¹¹ *Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others* [2017] ZASCA 97 at para 47.

¹² MMA Discussion Document above n 4.

¹³ South African Research Chair in Equality, Law and Social Justice School of Law, University of the Witwatersrand, Johannesburg. ‘Submission to the Department of Justice and Constitutional Development on Amendments to The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000’ (2021) at 14.

¹⁴ *Id*.

Security and Justice to adopt the use of gender-neutral pronouns throughout the Domestic Violence Amendment Bill,¹⁵ we implore the Committee to rely on non-binary terms such as they and them in order to ensure that all children and persons are equally protected by this provision.¹⁶

CLARITY ON TIMING

10. MMA welcomes the efforts of the Committee to ensure that the protections apply from the earliest possible stage. In this regard, MMA notes that the Bill extends the scope of section 154(3) beyond the stage of a criminal proceeding to “before, during or at any stage after the conclusion of criminal proceedings”.
11. MMA notes that this is a step forward, however, and in order to ensure that there is no uncertainty or confusion in respect of when the protections contained in this provision begin to apply, MMA recommends further clarity be provided. To this end, MMA refers the committee to debates and law reform processes in New South Wales (“**NSW**”), Australia.
12. In 2008 the NSW Standing Committee on Law and Justice inquired into and reported on the legislative prohibition on the publication and broadcasting of names of children in the Children (Criminal Proceedings) Act (“**CCPA**”).¹⁷ Following a call for submissions and public hearings, the Standing Committee delivered a set of 8 recommendations on the CCPA’s identity protection provisions. Notably, the Standing Committee recommended that the identity protecting provision extend the prohibition on the naming of children involved in criminal proceedings to cover the period prior to charges being laid and to include children who are reasonably likely to become involved in criminal proceedings.¹⁸ The Standing Committee advised that the CCPA should make it clear that the prohibition commences at the moment a child becomes the subject of or is reasonably likely to become the subject of, police activity, including a child about whom inquiries are being made, a child from whom information is being sought, or a child who is identified as a person of interest, or a child who is a suspect or who is arrested. A similar position appears to have been adopted in the NSW Children and Young Persons (Care and Protection) Act.¹⁹ It further aligns with the United Nations (“**UN**”) position on justice in matters involving child victims and witnesses of crime.²⁰ The UN defines the “justice process” to encompass (i) the detection of the crime, (ii) the making of the complaint, (iii) investigation,

¹⁵ National Council of Provinces Select Committee on Security and Justice, ‘Announcements, Tabling and Committee Reports’ (2021) (accessible [here](#)).

¹⁶ For more information on gender neutral or gender silent drafting, see: Donald L. Revell & Jessica Vapnek, Gender-Silent Legislative Drafting in a Non-Binary World, 48 CAP. U. L. REV. 103 (2020).

¹⁷ Standing Committee on Law and Justice, ‘Standing Order 231: The prohibition on the publication of names of children involved in criminal proceedings’ (2008) (accessible [here](#)).
Children (Criminal Proceedings) Act 55 of 1987 (accessible [here](#)).

¹⁸ Recommendation 4 of Standing Order 231.

¹⁹ Children and Young Persons (Care and Protection) Act 157 of 1998 (amended and enforce from June 2021) (accessible [here](#)).

²⁰ UN, ‘Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary’ (2009) (accessible [here](#)).

(iv) prosecution and (v) trial and post-trial procedures.

13. MMA supports the position that the identity protections should cover the period prior to charges being laid and should protect children who are reasonably likely to become involved in criminal proceedings. We note further in this regard that there is a need for there to be legal protections that apply to protect the identity of an accused, victim or witness under the age of 18 years well before the start of criminal proceedings, to ensure that this protection is meaningful and effective, and truly safeguards the identity of the affected child. MMA submits that this accords with the underlying purpose of section 154(3) – to protect children. It further aligns with the reasoning of the Constitutional Court, and ultimately it advances the principle that the best interests of the child are of “paramount importance in every matter concerning the child.”
14. Accordingly, MMA recommends that the Bill reflect this position and proposes the following textual amendments:

“(3)(a) No person shall, **from the moment a person under the age of 18 is reasonably likely to become involved in criminal proceedings, including the time at which an offence is committed, the period prior to charges being laid, the time a charge is laid**, and before, during, or at any stage after the conclusion of criminal proceedings, in any manner, including on any social media or electronic platform publish any information which reveals or may reveal the identity of...

ROLE OF THE MEDIA IN SUPPORTING THE SOUTH AFRICAN POLICE SERVICES

15. MMA welcomes the inclusions in section 3A and commends the Committee's recognition that in certain circumstances it may be necessary and helpful to publish and disclose certain information. We further welcome the efforts of the Committee to circumscribe the disclosure of information to what is absolutely necessary. While we welcome the Committee's position, we submit that in order for this provision to meaningfully assist the South African Police Service (“SAPS”) – specifically in respect of children who are victims of kidnapping or abduction – the role of the media should be considered. In this regard, SAPS and the media should work together for the purposes of locating the child's whereabouts. This would be in the public interest and interests of justice, as well as the best interests of the child, and would serve to facilitate the location of children in vulnerable or compromised positions that have been kidnapped or abducted.
16. In order to facilitate a meaningful partnership, and in order to ensure that responses are expedient MMA submits that the authorisation should come from the relevant Station Commander. Authorisation from the National Commissioner of Police and/or delegation from the National Commissioner may not be the most practical approach and may – particularly in urgent situations as is almost always the case in situations where children are missing – not be

in the best interest of the child. MMA proposes the following:

(3A) Notwithstanding subsection (3)(a), and in the event where substantial injustice would result and no other means are available, information may be published by a police official, **the media**, or by any other person, who is authorized by the **relevant Station Commander** ~~by the National Commissioner of the South African Police Service or a person delegated by him or her~~—

BEST INTEREST OF THE CHILD, THE INTEREST OF JUSTICE, AND THE PUBLIC INTEREST

17. MMA submits that the threshold in section 3(b) of “just and equitable and in the interest of any particular person” should be expanded in order to strike the best possible balance between freedom of expression, on the one hand, and the rights to privacy, dignity, and best interests of the child on the other. Our point in this regard is fairly narrow. We support the authorisation of publication “at the discretion of a competent court”. However, MMA submits that the Amendment Bill should stipulate the factors that should inform the exercise of this discretion.

17.1. **The best interest of the child:** We reiterate the position that the principle of the best interests of the child must inform the manner in which this provision applies. It is trite that the paramountcy dictated by section 28(2) requires that children’s interests are to be afforded the “highest value”,²¹ meaning that their interests are “more important than anything else” albeit that “everything else is [not] unimportant.”²² Our Constitutional Court has described this principle as the “benchmark for the treatment and protection of children”²³ that requires a child-sensitive approach in all matters involving the child.²⁴ Notably, it places an obligation on all decision-makers to “ensure that the best interests of the child enjoy paramount importance in their decisions”.²⁵ In addition, the United Nations Committee on the Rights of the Child requires the principle of the best interests of the child to be applied “by systematically considering how children’s rights and interests are or will be affected by their decisions and actions”.²⁶ Accordingly, the best interests of the child must be factored in when a competent court exercises its discretion in terms of section 3(b).

17.2. **The interests of justice:** In the CC judgment, the Court confirmed that courts have the discretion to make a determination in the interests of justice. We note that the “interests

²¹ *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) at para 42.

²² *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (6) SA 632 (CC) at para 29.

²³ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 72.

²⁴ *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 15.

²⁵ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 72.

²⁶ United Nations Committee on the Rights of the Child, “General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child”, CRC/GC/2003/5, 27 November 2003 at 4.

of justice” are not neatly defined in a prescribed list, but rather include various factors that can assist a court in determining an issue. For present purposes, they may include weighing competing rights and interests at stake, the purpose of publication or disclosure and the consequences of publication or disclosure. MMA submits that the interests of justice be factored in when a competent court exercises its discretion in terms of section 3(b).

- 17.3. **The public interest:** Aligned to the interests of justice are public interest considerations. MMA submits that there is a difference between what is interesting to the public and what is in the public interest. What is interesting to the public and what is in the public interest are distinct enquiries, the former should not have a bearing on the court’s consideration of the interests of justice. It is imperative to understand the difference between the two. The Constitutional Court explained that “[t]here may be a temptation to feed public titillation with scandalous and sordid details, but there are also stories of consequence and impact which concern the public that ought to be reported.”²⁷ Public interest considerations are based on facts and contribute towards the advancement of the public’s constitutional right to be informed”.²⁸ Courts should guard against the “real risk of trivialising complex issues and converting what should be public education into public entertainment.”²⁹ The disclosure of the identity of the affected person should be in the public interest, and not just matters that are interesting to the public. Such caveat will serve to safeguard against publications that simply satisfy the interests of entertainment and curiosity, but do not serve a broader public interest purpose in disclosure. Therefore, public interest considerations should also inform the court’s determinations.
18. MMA recommends that section 3(b) explicitly references the above interests, rather than narrowing the interest to “any particular person”. These interests are in line with constitutional imperatives, creating an important mechanism to enable the court to strike an appropriate balance between the rights of children, on the one hand, and media freedom and open justice, on the other. MMA, therefore, proposes the following textual amendments:

3(b) Subject to paragraph (a), the presiding judge or judicial officer at such criminal proceedings, may authorize the publication of so much of any information relating to the proceedings as ~~he or she~~ **they** may deem fit, if the publication thereof would in ~~his or her~~ **their** opinion be just and equitable ~~and in the interest of any particular person~~ **taking into account the principles of the best interests of the child, the interests of justice, and the public interest.**

19. Before turning to the next submission, for the sake of consistency and certainty and in light of the above submissions, MMA recommends that section 3B(c) adopt substantially similar

²⁷ *Centre for Child Law v Media24* above n 3 at para 108.

²⁸ *Id* at para 100.

²⁹ *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* [2006] ZACC 15 at para 69.

factors. MMA proposes the following amendment:

3B(c) In determining whether an order may be granted, a court referred to in paragraph (a) or (b) must take into account all relevant factors, including—

(i) the best interests of the child, to the extent that persons under the age of 18 will be affected by the publication of such information;

(ii) the nature of the charges against the accused;

(iii) the age of the persons referred to in subsection (3)(a);

(iv) the period which has elapsed since completion of the criminal proceedings and the application;

(v) the purpose and consequences of disclosure at this stage;

(vi) public interest considerations;

(vii) considerations in the interest of justice;

~~(iv) the interest of the public or any person or category of persons in the publication of such information;~~

~~(v) the interest of society to encourage the reporting of offences and the participation of witnesses and victims of offences in criminal justice processes;~~

(vii) the likelihood that the publication of such information, which reveals the identity of a person contemplated in subsection (3)(a), will also reveal the identity of any other person contemplated in subsection (1), (2), (3)(a) or (5);

(viii) the nature and extent of any hardship that a person contemplated in subsection (3)(a) or any person related to such person may suffer if such information is published; and

(ix) the effect of the order on—

(aa) a person's freedom of expression; and

(bb) the dignity, security and privacy of a person referred to in subsection 3(a) or any person related to such person.

~~(d) A court may if it deems it is in the interest of the administration of justice, hold a hearing to determine whether an order should be granted.~~

(e) A hearing contemplated in paragraph (d) must take place behind.

DEFAULT POSITION OF ONGOING PROTECTION

20. MMA is concerned that the wording of section 3B(a) regarding the court granting an order that extends into adulthood may create some confusion. The CC judgment was clear that ongoing protection would be the default position, with the option of either a former child participant, who is over 18 consenting to the publication of their identity; or, if consent is refused, a media house approaching a competent court seeking to lift the identity publication ban. The court can then make a determination in the interests of justice.
21. The phrasing of section 3B(a) seems to suggest that the court will need to grant an order extending the protection into adulthood. This appears to be contrary to the default position. MMA's interpretation of the CC judgment is that the Court's finding in favour of the default

position of protection means that an adult – who as a child was a victim, witness or accused – would continue to receive identity protection into adulthood *unless* the affected adult consents to the publication of their identity or competent court lift the identity publication ban if it is in the interests of justice to do so. This position does not seem to require a court order – it is a given.

22. Further MMA seeks to highlight the CC judgments reasoning in relation to agency. The Court reasoned that “[o]ngoing protection as the default position – not the blanket rule – should enable child survivors, even when they become adults, to consider how best to counteract stigma and whether publicity is a worthy means to do so.”³⁰ The Court went on to state that “[i]mbuing individuals with the autonomy (and fundamentally, the power) to decide for themselves when the world may attribute their name to some event in their past is to empower individuals who are systematically marginalised.”³¹ MMA supports Court’s reasoning Court and proposes that the requirement of consent be retained for persons over the age of 18 determining what is in their best interest. In the event that consent is refused, the factors in section 3B(c) must be taken into account by a competent court.
23. Accordingly, MMA proposes the following amendments:

(3B)

(a) persons referred to in subsection 3(a) do not forfeit the protection afforded by that subsection upon reaching the age of eighteen years.

(b) persons referred to in subsection 3(a), upon reaching the age of 18 years, may consent to the publication of their identity.

~~(a) The court before which criminal proceedings contemplated in subsection (3) have been concluded may, on application from a person contemplated in subsection (3)(a) who has attained the age of 18 years and where the court has granted an order that extends into adulthood, grant an order authorising the publication of information which reveals the identity of the applicant, if the court is satisfied that the applicant understands the nature and effect of a court order in terms of this subsection.~~

(c) If consent contemplated in subsection b above is refused the High Court before which, or in whose area of jurisdiction, the criminal proceedings contemplated in subsection (3) have been concluded may, on the application of an interested person, grant an order authorizing the publication of information which may reveal the identity of a person contemplated in subsection (3)(a)...

CONCLUDING REMARKS

24. MMA appreciates the opportunity to provide this submission to the Committee and would welcome the opportunity to make further submissions, including at any oral hearings that may take place. Notwithstanding the important strides that have been made in advancing the

³⁰ CC Judgement above n 1 at para 109.

³¹ Id at para 86.

protection of children in this context, MMA submits there is scope to ensure that the rights of children are properly and appropriately safeguarded. Please do not hesitate to contact us should you require any further information.

Media Monitoring Africa
Johannesburg, 2021