



Africa Criminal Justice Reform  
Organisation pour la Réforme de la Justice Pénale en Afrique  
Organização para a Reforma da Justiça Criminal em África



# ACJR SUBMISSION ON THE JUDICIAL MATTERS AMENDMENT BILL [B7-2023]

26 May 2023

## Introduction

1. Africa Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights at the University of the Western Cape. ACJR engages in research, teaching and advocacy on criminal justice reform and human rights in Africa. ACJR welcomes the opportunity to provide comment on the Judicial Matters Amendment Bill ('Bill').<sup>1</sup>
2. This submission specifically deals with the addition of section 57B, 57C and 57D to the Criminal Procedure Act 51 of 1977 under clause 10 of the Bill. These sections address the issue of expungement of admission of guilt (AOG) fines for specific offences and COVID-19 related offences.

## Payment of AOG fines without appearance in court and previous convictions

3. The Bill provides the Minister the authority to decriminalise certain minor offences and expunge existing criminal records of persons who have committed "such offences." Although there remain questions regarding the exact offence type that would benefit from the amendments and/or decriminalisation, the Bill is welcomed for addressing the issue of criminalisation for minor infractions of the law.<sup>2</sup>
4. Most convictions subjected to AOG fines are trivial in nature, pose a low risk of harm or danger to others and a criminal record in respect of such an offence is an inappropriate response to dealing with such offending behaviour.
5. The manner in which AOG fines have been issued have been a concern for many years.<sup>3</sup> Often, people, mostly poor and vulnerable are issued AOG fines without understanding or being informed by law enforcement officials of the consequences of accepting the fine (criminal record).<sup>4</sup>

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<sup>1</sup> 'Judicial Matters Amendment Bill B7 - 2023', accessed 22 May 2023, <https://www.gov.za/documents/judicial-matters-amendment-bill-b7-2023-30-mar-2023-0000>.

<sup>2</sup> Judicial Matters Amendment Bill B7 - 2023, sec. 57B (1).

<sup>3</sup> Karen Singh, 'Debate Swirls over Admission of Guilt Fines amid Lockdown', *IOL*, 21 May 2020, <https://www.iol.co.za/news/south-africa/kwazulu-natal/debate-swirls-over-admission-of-guilt-fines-amid-lockdown-48294234>; Mwangi Githahu, 'Judge Accuses Police of Picking Low-Hanging Fruit to Boost Their Arrest Rates', *IOL*, 10 August 2021, <https://www.iol.co.za/capeargus/news/judge-accuses-police-of-picking-low-hanging-fruit-to-boost-their-arrest-rates-a5621426-043f-4f69-8603-417d16209364>; 'S v Houtzamer (B7968969/08) [2015] ZAWCHC 25 (10 March 2015)', accessed 26 May 2023, <http://www.saflii.org/za/cases/ZAWCHC/2015/25.html>.

<sup>4</sup> Singh, 'Debate Swirls over Admission of Guilt Fines amid Lockdown'; National Prosecuting Authority, 'National Prosecuting Authority Annual Report 2020/21', 2021; Mwangi Githahu, 'Judge Accuses Police of Picking Low-Hanging Fruit to Boost Their Arrest Rates'.

6. At present, Section 57 of the Criminal Procedure Act (CPA), provides for the admission of guilt in respect of the offence and for the payment of a fine without an appearance in court. Section 57A of the CPA provides for the admission of guilt and the payment of a fine, after appearing in a court, but before the accused has entered a plea. Where an AOG fine was paid, the money, together with the summons or written notice to appear is then forwarded to the clerk of the magistrate's court which has jurisdiction, and the clerk must complete the criminal record book for admissions of guilt.<sup>5</sup> The accused is then deemed to have been convicted and sentenced by the court and has a criminal record for such offence.
7. The immediate effect of paying an AOG fine is that the accused is excused from court appearance but they are not necessarily aware or made aware of the consequences of the admission. Many people only realise that they have a criminal record when a background check is done by, for example, a prospective employer. The Bill is thus commended because it attempts to address prior convictions by making provision for the automatic expungement of such criminal record by the Criminal Record Centre of the South African Police Service (SAPS).<sup>6</sup>
8. The Bill, however, falls short in determining the exact offence type which would be covered by decriminalisation and expungement. We note with concern that the provisions in the Bill, insofar as it relates to the grounds and criteria that must be considered to determine whether or not an offence may be decriminalised and or expunged by the Minister, are vague and urgent clarification is needed.

### Convictions and sentences in respect of AOG fines relating to COVID-19 offences

9. COVID-19 brought unprecedented human rights challenges. Governments had to put measures in place to respond to the global pandemic. The governments pandemic measures enacted under the auspices of the Disaster Management Act (DMA regulations) to curb the spread of the virus created a swathe of new petty offences. They ranged from breaking lockdown and curfew rules, to leaving your house or not wearing a facemask, etc.
10. Some of these measures might have been necessary at the time, but limited consideration was given to context, proportionality and the knock-on impacts of the measures. One major consideration that was overlooked was the impact of a criminal record on the lives of people for the violation of a COVID-19 regulation.

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<sup>5</sup> 'Criminal Procedure Act', Pub. L. No. 51 (1977), sec. 57(6), <https://www.gov.za/documents/criminal-procedure-act-1977-26-mar-2015-1224>.

<sup>6</sup> Judicial Matters Amendment Bill B7 - 2023, 57C.

11. There was a significant increase in the number of people being arrested by SAPS during the COVID-19 period. During 2020/21, SAPS made a total of 2 797 097 arrests for all crimes compared to 1 133 891 arrests made the previous year (2019/2020).<sup>7</sup> This amounted to an increase of 1 663 206 arrests. Moreover, the 2021 Annual Report of the National Prosecuting Authority also shows that for the month of April 2020, which is more or less the first month since the onset of the COVID-19 lockdown, failure to confine oneself to his or her place of residence, accounted for 56.8% of the total new cases enrolled in district courts.<sup>8</sup> Poorer communities in South Africa lack access to basic goods and services and they rely on their freedom of movement and the informal economy to survive.<sup>9</sup> COVID-19 measures restricting freedom of movement, are more likely to be transgressed by the poor, not out of defiance, but out of necessity to provide for their families.<sup>10</sup> Thus, there should be an urgency to address the criminal records meted out against people (predominately poor and black) for COVID-19 transgressions.
  
12. To a limited extent, the Bill, by virtue of the amendment in 57D, seeks to provide for the automatic expungement of criminal records of people who were convicted or sentenced in respect of “specific offences” issued under the DMA regulations. The Bill defines “specified offence” as ‘any offence contemplated in any regulations that have been made in terms of section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002), in respect of the declaration of the national state of disaster in terms of section 27(1) of that Act, as published in terms of Government Gazette No. 43096 on 15 March 2020 and extended from time to time.’<sup>11</sup> This means that all DMA offences will be expunged.
  
13. The Bill however, does not allow for the expungement of all persons criminal records linked to such offences under the DMA regulations. It only allows for the expungement of criminal records of people who were convicted and sentenced by a court by virtue of an AOG fine (as contemplated in section 57(6) of the CPA) or appeared in court in terms of a summons or written notice (referred to in section 57(1) of the CPA.) In other words, the expungement of criminal records of all other persons convicted and sentenced under a normal warrant of arrest for offences under the DMA regulations is not covered under the measures in this Bill.

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<sup>7</sup> South African Police Service, ‘South African Police Service Annual Report 2020/21’, 2020, 144.

<sup>8</sup> National Prosecuting Authority, ‘National Prosecuting Authority Annual Report 2020/21’, 46.

<sup>9</sup> K Petersen, J Mangwanda, L Muntingh & J Redpath, ‘Annexure Four: COVID-19 Restrictions and the Impact on Criminal Justice and Human Rights: South Africa’ (Dullah Omar Institute, University of the Western Cape, 2022), 9.

<sup>10</sup> K Petersen, J Mangwanda, L Muntingh & J Redpath, 9–10.

<sup>11</sup> Judicial Matters Amendment Bill B7 - 2023, sec. 57D (9).

14. It is unfortunately not clear whether all DMA offence cases were only subjected to AOG fines, summons or written notice as referred to in sections 57(1) and (6) of the CPA. If this is not the case, it is obvious that not all people will benefit from this amendment and that some will remain with a criminal record due to a DMA offence and this will have serious implications for their future. There appears to be no rationale for the differential treatment in respect of expungement of criminal records and we are concerned about the unfair treatment that the Bill creates.
15. It is important to emphasise that the COVID-19 regulations under the DMA criminalised behaviour that were not offence under ordinary situations. A criminal record has dire consequences for people and it is therefore important that the government consider the expungement of all criminal records of all persons for infringement of COVID-19 laws that were not considered unlawful or illegal prior to the pandemic

## Conclusion and recommendations

16. Although the Bill should be commended for dealing with the issues regarding decriminalisation of minor offences and the expungement of criminal records related to this, it falls short in providing substance of offences that are subjected to decriminalisation and expungement. The grounds and criteria that must be considered to determine whether or not an offence may be decriminalised and or expunge by the Minister are vague and the scope of these offences are unclear. We therefore look forward to the scope of these offences covered under the amendment and recommend that the public and civil society be consulted on the regulations or directives issued by the Ministers in this regard.

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