



**DETENTION
JUSTICE FORUM**

**SUBMISSION TO
THE DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES**

**Regarding the
CRIMINAL MATTERS AMENDMENT DRAFT BILL, 2020**

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1. Introduction

The Detention Justice Forum ('DJF') is a civil society coalition of non-governmental organisations and individuals working to ensure that the rights and well-being of those who are detained are respected and upheld, as enshrined under the South African Constitution, laws, and regional and international human rights norms and standards. Our membership includes community organisations, lawyers, social workers, formerly incarcerated persons, and academics with varied foci and degrees of engagement in the detention and human-rights sectors — spanning direct service provision and (former and current) detainee support and empowerment, advocacy and policy development.

Some of the key issues that our membership are concerned with include: sexual violence and HIV in prisons, access to bail, pre-trial justice, criminal justice, conditions of detention, the treatment of incarcerated persons; oversight and accountability of the Department of Correctional Services ('DCS') and the reintegration of formerly incarcerated persons.

We approach these and other related issues through a human rights and evidence-based lens, avoiding moralistic, conservative, and archaic ways of thinking about incarceration. The fundamental premise of our work is to prevent violence, both inside and outside of prison, in order to create a safer society for all.

The DJF has a great interest in making this submission to the Department, as the content of the Criminal Matters Amendment Draft Bill ('the Bill') has a direct bearing on the work that our members do and the issues that we advocate for and mobilise around.

In what follows, we will present the views of the DJF and highlight the evidence-based submissions made by some of our individual members on the following issues contained in the Bill:

- a. Bail
- b. Parole
- c. Minimum sentences
- d. Specialised Perpetrator and Domestic Violence Intervention Programmes

2. Bail

According to section 35(1)(f) of the Constitution, all accused persons have the right "to be released from detention if the interests of justice permit, subject to reasonable conditions". We recognise bail as a mechanism which underscores the principle of 'innocent until proven guilty'. We advocate for its utilisation by judges and magistrates, especially in cases of non-violent offences, considering that taking away a person's fundamental right to liberty should be a measure of last resort. The denial of bail – and bail awarded at unaffordable amounts –

contributes to South Africa's large remand population, which exacerbates many life-threatening challenges including: high transmission of infectious diseases, staff shortages, and higher risks of exposure to physical and sexual violence.

Ultimately, we are concerned by the implications of the Bill imposing further restrictive bail policies, considering that similar amendments in the past 20 years have not had an effect in curbing violence and have seen several miscarriages of justice for awaiting trial persons.

We understand that in some cases of domestic violence, if an accused is not detained there is a likelihood that the victim may well be in immediate danger. We therefore support the reasonable restriction of police bail and prosecutor bail for these cases, as proposed by the Bill.

However, we do not accept the proposed provisions relating to court bail (i.e. section 3), for the reasons described below.

Firstly, it places the onus on prosecutors to explain why bail is *not* opposed, which effectively makes detention the default and bail the exception. This does not seem to comply with section 35(1)(f) of the Constitution.

Secondly, the Bill places domestic violence on a similar hierarchical scale to Schedule 6 and 5 offences, which demands that the accused will remain in custody until trial, unless the accused can show evidence that satisfies the court that it would not be in the interests of justice to detain the accused further. This shifting of burden from the State to the accused amounts to an unreasonable limit of the accused's right to be released on bail (section 35(1)(e) and (f)), especially considering the wide definitional ambit of 'domestic violence'. Furthermore, it is unclear from the reading of this provision how an offence committed in terms of section 59(1)(ii) or (iii) is escalated to offences in schedule 5 and 6 of the current Criminal Procedure Act. The rights of victims of the offences committed under the Domestic Violence Act, 1998 and the Protection from Harassment Act, 2011 ought to be weighed and balanced with the rights of accused persons as guaranteed in the Constitution. It is therefore proposed that the wording of section 3 is crafted in a manner that does not shift the burden of proof from the State to the accused. This is supported by the independent organisational submissions of both the African Policing Civilian Oversight Forum (APCOF) and Center for Applied Legal Studies (CALs).

Thirdly, as submitted by the Africa Criminal Justice Reform (ACJR) in their individual organisational submission, the Bill fails to address the expeditious processing of bail applications of sexual and gender-based violence (SGBV) cases with the necessary urgency whilst still ensuring that only accused persons who pose a serious threat to victims are detained. This would garner the trust of victims of SGBV in the criminal justice system. Unless this happens, the proposed restrictive bail provisions for SGBV accused persons will have a serious strain on the entire administration of justice.

“No Bail” for all SGBV cases should not be the main focus of this Bill; the DOJ should instead prioritise the finalization of all SGBV cases. Additionally, legislative reforms should be put in place for improving reasonable access to bail and promoting alternative measures to custody. Pre-trial detention should be legislated as a means of last resort in criminal proceedings, with due regard for: a reduction of the overcrowded South African prison population, alternatives to imprisonment, social reintegration of offenders, the investigation of the alleged offence, and the protection of society and the victim.

3. Parole

We acknowledge that parole is not a right, it is a privilege, and that upon serving a certain amount of one’s sentence a person becomes eligible to apply for parole. The DJF considers parole to be an important criminal justice mechanism: it incentivises positive behaviour behind bars, allows incarcerated persons to reintegrate back into their communities earlier, and reduces the prison population. We also advocate against parole being used as a weapon to intimidate or punish incarcerated people and we seek to hold the relevant officials accountable for not effectively and timeously preparing persons for their parole hearings.

In principle we support the inclusion of victims’ voices in the parole process, as suggested by section 5 of the Bill, yet we remain concerned that the absence of a victim’s participation may have a prohibitive impact on the sentenced person’s ability to be granted parole. This is especially of concern considering the practical and logistical challenges that actively informing victims will have on the Department. At present, the system is woefully inadequate for informing and engaging victims and supporting them in making representations to a parole board, much less engaging in supportive processes such as victim offender mediation. These processes have the potential to support the reintegration of offenders and resolving conflict between parties. We propose that mechanisms for drawing on the services of civil society organisations to support the Department in this regard be strengthened.

Furthermore, as evidenced in CALS’ organisational submission, the manner in which these hearings will be conducted is key towards ensuring that there is a balance in interests between the victim and convicted person. It is thus proposed that clear regulations guiding the procedure to be followed should be made available.

It is also important that convicted persons are adequately informed of the procedure as well as the weight the views of the victims and/or their family members during parole hearings carries when it comes to determining the outcome. The more information provided to the convicted persons regarding the revised manner of conducting parole, the better and the transparent the entire process will be. This will curb any expectations which convicted persons may have in regard to the entire parole process. This, once again, speaks to the importance of the parole procedure as a criminal justice mechanism to reduce recidivism.

As supported by NICRO, parole considerations for SGBV should be guided by the following: eligibility to apply for parole; victims' voices; community safety; good behaviour; and completion of a treatment plan during incarceration and/or during parole. Furthermore, given the number of parole violations where women have been killed by an abusive partner, measures must include assessing whether an offender is at high risk to re-offend. Risk Assessment protocols should be in place before offenders are released, and decisions should be made as to whether parole will be granted with stricter conditions, which could include stricter monitoring and supervision with ongoing treatment.

4. Minimum Sentences

We recognize that the Bill seeks to be tougher on domestic violence offenders, but keeping a person in prison for a longer period of time does not necessarily guarantee that they will be rehabilitated, nor does it solve the problem of SGBV or make victims safer. Further imprisonment is based on the false premise that punishment and control can address social problems such as poverty, substance dependency, domestic violence, and mental health.

There is comprehensive evidence that the implementation of 'harsh' lengthier sentences does not have a deterrent effect on crime. South Africa has had minimum sentencing for certain crimes for over 20 years and there is little reliable evidence that the sentencing law has reduced crime in general, or that specific offences targeted by this law have been curbed. Instead of putting people into prison for longer periods of time, we should be focusing on implementing effective rehabilitation programmes, and consider non-custodial measures for those with a low risk of re-offending. With respect to domestic violence perpetrators more specialised programmes should be available both as a custodial and non-custodial measure.

If the aim of the Bill is to not only provide safety for victims and security for societies, but to also transform and heal those societies, it needs to reflect this by doing away with an overreliance on punitive and lengthy custodial sentences in already overcrowded, violent, and inhumane facilities - and rather prioritise rehabilitation, healing, and transformation of the offenders. The replacement of a punitive criminal justice system with a more rehabilitative one will undoubtedly lead to actual transformation.

As submitted by NICRO, crime, as well as its causes, are complex. Perpetrators of domestic violence are often victims of childhood abuse and violence, had poor socialization in treating women, and often carry with them unaddressed trauma. Further, they might not have had an opportunity to be exposed to coping mechanisms to resolve conflict and emotional regulation. This means that there are some mental health issues that need attention, in order to make accurate assessments and put in place risk protocols key for domestic violence perpetrator management.

Further there are victims of domestic violence, including children, that may not want their partner or family member to go to prison, but to rather get help with the abusive behaviour. A comprehensive response to domestic violence includes victim support and counselling, specialised perpetrator interventions, support and counselling for children and other family members, and at a later stage may include family work. Accountability of perpetrators by other family members and the community may decrease domestic violence.

In its submission, APCOF further recommends that the Department reviews section 10 of the Bill and removes the latter part which imputes culpability to co-perpetrators or accomplices before they have been accused, tried or convicted. This submission is made on the basis that as currently drafted, section 10 may undermine the constitutional safeguard of presumption of innocence.

In conclusion, as submitted by ACJR in its independent submission, South Africa needs a new comprehensive sentencing reform that: (a) promotes consistency in sentencing, (b) deals appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, (c) allows for victim participation and restorative initiatives, (d) produces sentencing outcomes that are within the capacity of the State, and (e) have evidence-based results in reducing crime.

5. Specialised perpetrator and domestic violence intervention programmes

As indicated above, increasingly punitive measures are not the answer to crime and other social ills. Therefore, DJF strongly supports the use of alternatives to incarceration, where appropriate, and the utilisation of rehabilitation and reintegration programmes.

As is highlighted in NICRO and Midway's individual submissions, to stop domestic violence, we need to change perpetrators' behaviour, support victims, and rebuild families. There needs to be a greater focus on perpetrator accountability and rehabilitation, both through the legal system, civil powers, and programmes that seek to change abusive behaviour. These can be offered both as a custodial or non-custodial option.

Assessments, including risk assessments, are key to determining the suitability of people in conflict with the law when considering non-custodial measures. Comprehensive and adequate information needs to be provided to courts. Risk Assessment protocols and standardized tools, as well as specialized perpetrator interventions both inside and through non-custodial measures should be prescribed further in regulations. The development of such a risk assessment instrument/tool will require collaboration with a multi-disciplinary team comprising a social worker, criminologist, psychologist, psychiatrist, and an academic with domestic violence training and experience, in collaboration with victims and other community organizations.

Directives should be developed for training curricula for judges, magistrates, probation service staff and others involved in the administration of alternative sanctions and measures. Courts need to be made aware of these alternative measures, and this should be legislated and elaborated upon in regulations and national instructions. Correctional centres in South Africa, in as much as they cater to correcting behaviour, do not actually offer specialised domestic violence programmes. Directives and procedures should be provided for in legislation and regulations for evidence-based specialised programmes for domestic violence perpetrators to be available both as a custodial and non-custodial option.

In South Africa there is a limited number of such programmes available that are community based and non-custodial. NICRO, Mosaic and FAMSA are some of the organizations that run domestic violence interventions for abusive men. Admissions into these programmes are both voluntary and court-mandated, either as a diversion programme or as part of a non-custodial sentence. We support the principle that non-custodial measures should be regarded as the first option offered to offenders, provided that the courts find them to be a low risk for further endangering the victim.

Evidence-based practices considers collaboration between criminal justice agencies, as well as between prison authorities and social welfare and/or probation services to work best in domestic violence cases. Case management processes that track domestic violence cases through the criminal justice system and local coordination models that involve the community (including faith communities) need to be strengthened. These models help in providing multi-disciplinary input in terms of sentencing and can monitor those on parole, or in community-based programmes. At a local level, coordinated community responses (CCR's) to domestic violence bring various government departments in collaboration with the community, including victims and support and accountability groups for perpetrators to solve the domestic violence problem and better protect families and change behaviour.

6. Conclusion

Although we recognise the positive efforts of the Department to combat SGBV in South Africa, and fully support the intent to address widespread impunity in relation to SGBV, we do not fully support the use of increasingly punitive criminal measures to do so. Punitive approaches do not necessarily motivate positive changes in behaviour. The accountability and treatment of domestic violence perpetrators is still key. The implementation of more perpetrator rehabilitative interventions, including specialised and targeted rehabilitation approaches will help transform our criminal justice system.

To tackle South Africa's unprecedented levels of crime and violence, we need to decrease the use of imprisonment and stop relying on the criminal justice system to solve social problems. Were the State to focus interventions away from criminalisation, punishment and retribution

towards harm reduction, social justice, and where appropriate, treatment, reparation, and restorative practices, it would lead to a criminal justice system that is more constructive, socially just, and effective.¹

The global crisis of COVID-19 has shown, not only how potentially inhumane, but also how woefully inefficient and inadequate the solutions proposed in the Bill are, especially in times of national and global crises such as these, when considered together with already existing challenges in detention facilities such as overcrowding, high rates of TB and HIV, and short-staffing. Extensive imposition of longer sentences and an over-reliance on custodial sentences for offences exacerbates overcrowding, thereby creating conditions for catastrophe when pandemics and other crises hit.

Gender-based violence is a social problem and must be treated as such if we are to truly reduce its prevalence and impact. We need to employ policies and interventions that prove to work, rather than simply adopting a “tough on crime” approach, which evidence shows does not curb crime or violence. The time has come to re-evaluate our criminal justice process and policies, reassess the purpose and impact of incarceration, and ultimately move towards a more restorative society. This is necessary to meaningfully address the problem of gender-based violence in our society.

We thank the Department for the opportunity to make this submission, and we highly recommend that the Department considers the submissions of our member organisations.

Please direct any queries or requests for additional information to the contact persons whose details appear on the cover of this submission.

Yours sincerely,

Detention Justice Forum

This submission is endorsed by:

1. *Sonke Gender Justice*
2. *NICRO*
3. *Mid-Way Services*
4. *Restorative Justice Centre*
5. *Just Detention International-South Africa (JDI-SA)*
6. *Africa Criminal Justice Reform (ACJR)*
7. *Center for Applied Legal Studies (CALs)*
8. *African Policing Civilian Oversight Forum (APCOF)*

¹ <https://gsdrc.org/document-library/alternatives-to-prison-in-developing-countries/>