



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



**DULLAH OMAR INSTITUTE**  
FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

# SUBMISSION BY AFRICA CRIMINAL JUSTICE REFORM ON THE CRIMINAL MATTERS AMENDMENT BILL, 2020

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# 1. 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.
2. ACJR welcomes the opportunity to provide comment on the Criminal Matters Amendment Bill of 2020 ('Bill').<sup>1</sup>
3. South Africa has a number of progressive laws and policies related to sexual and gender-based violence (SGBV),<sup>2</sup> which conforms with the constitutional rights to equality, human dignity, life and freedom and security of the person and international human rights law.<sup>3</sup> Despite this, SGBV remains a profound problem in South Africa society.
4. Whilst we believe that some of the provisions in the Bill are important to safeguards the rights of victims of SGBV in the criminal justice system, it is also our concern that some may have serious ramifications for the accused, the criminal justice system and society.
5. It is questionable whether existing laws are inadequate and thus need reform or if it is, the systemic failures of the South African criminal justice system to hold perpetrators of SGBV accountable. Existing research on problems faced by victims of SGBV in the criminal justice system highlights the lack of implementation of existing SGBV law and policy, poor investigation of SGBV cases, attrition of SGBV cases in the criminal justice system and low prosecution numbers of SGBV cases. The Bill fails to implement measures to address these problems. In the final analysis tougher sentencing means little if repeat and serious offenders are not prosecuted.
6. We also believe that research is needed to further strengthen law reform of SGBV. Such research may interrogate problems that victims of SGBV face with the criminal justice system with direct relation to the law reform areas this Bill seek to address i.e. in the issuing of bail, the granting of parole and the sentencing of accused (or sentencing reform). It will also be able to assess and project the feasibility of the proposed changes to existing problems in law or policy.
7. South Africa's legal framework on arrest provide adequate guidance to the South African Police Service (SAPS) on dealing with the requirements for arrest without a warrant as it is in these instances that police officers apply the greatest degree of discretion and where there is limited oversight.<sup>4</sup> These rules are important

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<sup>1</sup> Criminal Matters Amendment Bill, 2020 (hereafter referred to as 'the Bill.')

No Bill number was assigned to the copy under review here.

<sup>2</sup> Domestic Violence Act, 116 of 1998, Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

<sup>3</sup> South African Human Rights Commission (2018) *Research Brief: Unpacking the Gaps and Challenges in Addressing Gender-Based Violence in South Africa*, Braamfontein, p.4. Available at:

<https://www.sahrc.org.za/home/21/files/SAHRC%20GBV%20Research%20Brief%20Publication.pdf>

<sup>4</sup> Africa Criminal Justice Reform (2019) *Factsheet 16: Arrest without a warrant: Guidelines against arbitrary and unlawful arrests*, Bellville: Dullah Omar Institute, p.3. The South African Police Service (SAPS) is guided by its Standing Orders derived from the rights afforded to arrested and detained persons in the Constitution as well as the provisions of the Criminal Procedure Act (51 of 1977)

safeguards to ensure that arrests executed without a warrant for SGBV (and all crimes) are not effected on mere allegation of a crime, but that there is a reasonable suspicion or grounds to believe that an offence had been or is about to be committed. For example, the SAPS Standing Orders requires that a police officer must *really believe* or suspect that the person has committed or is about to commit an offence; this belief or suspicion must be based on certain facts from which an inference or conclusion is drawn which any reasonable person in view of the same facts would draw.<sup>5</sup> From the above, it is clear that the legislation provides two levels of discretion, first noting that a police officer ‘may’ arrest and is not compelled to arrest, and secondly, the police officer must have a ‘reasonable suspicion or grounds’ that an offence has been committed or is about to be committed.<sup>6</sup> Thus, whilst reflecting on the proposed amendments in the Bill insofar as it relates to the right to bail and the type of bail process an SGBV accused now face, police officials need to be mindful of the consequences of their arrest powers.

## 2. Available data to inform law reform

8. It is important that legislative amendments be informed by reliable quantitative data that would at least contextualize, if not assess and project the feasibility of the proposed changes to existing problems in law or policy. It is our submission that the proposed amendments in the Bill are not fully supported by quantitative or qualitative data and that the feasibility of the proposed changes have not been considered. The ramifications of implementation of such provisions on the administration of justice have not fully been considered.
9. Available research and official reports on the existing challenges facing victims of SGBV in the criminal justice system show that there are fundamental challenges in the implementation of legislation.<sup>7</sup> Research conducted by the South African Human Rights Commission (SAHRC) found that despite clear progressive laws and policies related to provide protection to victims of SGBV, there are problems with implementation by state actors.<sup>8</sup> For these reasons, victims thus frequently have trouble in accessing the criminal justice system.<sup>9</sup>
10. The SAHRC reported that the Domestic Violence Act ‘introduced a comprehensive set of systems and duties to the SAPS, aimed at providing victims of domestic violence the maximum protection from domestic abuse but members of the SAPS have been found to be slow to intervene as these incidents of violence are seen to be of a private nature.’<sup>10</sup> Further, the SAHRC reported that as a result of the passive and negative attitudes expressed by SAPS officials, victims either felt discouraged to report cases or withdrew their cases.<sup>11</sup> Further, victims of

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<sup>5</sup>South African Police Standing Order (G) 341 para 2(2).

<sup>6</sup> Africa Criminal Justice Reform (2019), *Factsheet 16: Arrest without a warrant: guidelines against arbitrary and unlawful arrests*, Bellville: Dullah Omar Institute, p.3.

<sup>7</sup> South African Human Rights Commission (2018), p. 4; The UN Human Rights Council, Report of the Special Rapporteur UN Human Rights Council, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on her Mission to South Africa*, 14 June 2016, A/HRC/32/42/Add.2, Available at: <https://undocs.org/en/A/HRC/32/42/Add.2>

<sup>8</sup> South African Human Rights Commission (2018), p. 4.

<sup>9</sup> South African Human Rights Commission (2018), p. 13.

<sup>10</sup> South African Human Rights Commission (2018), p. 13.

<sup>11</sup>South African Human Rights Commission (2018), p. 13.

SGBV have also had trouble in navigating the court systems, and under-resourced courts have resulted in a shortage of staff to process their applications for protection orders.<sup>12</sup>

11. Furthermore, research conducted by the South African Medical Research Council highlighted serious challenges with the investigations of SGBV cases by SAPS.<sup>13</sup> Amongst others, dockets of SGBV cases lacked very basic information which would be essential for follow-up of cases, no first report witness statement was taken in 17% of incidents involving victims older than 12 years of age and in only half the cases where another witness was present or near when the rape occurred, did the police take all the other witness statements.<sup>14</sup> The report found that the police only visited the crime scene in about half of cases.<sup>15</sup> The medical examination and sexual assault evidence collection kit (SAECK) was only appropriately collected in 76.7% of adult cases, 57.1% of cases with a 12-17 year old complainant and 33.8% of cases with a complainant under 12 years.<sup>16</sup> Over a fifth of SAECKs completed within the appropriate time were not sent to the forensics laboratory and was therefore never analysed.<sup>17</sup> Arrests were made in only 57% of cases, and sometimes arrests were not made because soon after reporting the victim did not want to pursue the case.<sup>18</sup> Furthermore, in 23.7% of dockets where arrests were not made, the perpetrator had been identified and the victim wanted to proceed with the case.<sup>19</sup>
12. The report also illustrated the attrition of these cases in the criminal justice system. For example, of the 3 952 cases included in the study, an arrest was made in 2 283 (57%) cases and 2 579 (65%) were referred for prosecution. Prosecutors only accepted 1 362 cases (34.4%) and these were enrolled for trial.<sup>20</sup>
13. While there has been a slight improvement in the prosecution of sexual crimes, it is not nearly at a level where it needs to be.<sup>21</sup>
14. In 2011, UN Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) also recommended that the South African government put in place mechanisms to ensure the effective implementation of the Domestic Violence Act and Sexual Offences Act and provide information on measures taken to prevent, investigate, prosecute and punish perpetrators, and provide protection, relief and remedies to victims of SGBV.<sup>22</sup>
15. Unfortunately, the Bill fails to address the above pertinent problems (i.e. lack of implementation of SGBV law and policy, poor investigation of SGBV cases, attrition of SGBV cases in the criminal justice system, low level prosecution rate of SGBV, etc.) faced by victims of SGBV in the criminal justice process.

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<sup>12</sup> South African Human Rights Commission (2018), p. 14.

<sup>13</sup> Machisa, M. et al. (2017) *Rape Justice in South Africa: A Retrospective Study of the Investigation, Prosecution and Adjudication of Reported Rape Cases from 2012*, Pretoria: Gender and Health Research Unit, South African Medical Research Council.

<sup>14</sup> Machisa, M. et al. (2017), p. 14.

<sup>15</sup> Machisa, M. et al. (2017), p. 14.

<sup>16</sup> Machisa, M. et al. (2017), p. 14.

<sup>17</sup> Machisa, M. et al. (2017), p. 14.

<sup>18</sup> Machisa, M. et al. (2017), p. 14.

<sup>19</sup> Machisa, M. et al. (2017), p. 14.

<sup>20</sup> Machisa, M. et al. (2017), p. 13.

<sup>21</sup> Africa Criminal Justice Reform (2018), *Factsheet 8: National Prosecuting Authority: Performance*, Bellville: Dullah Omar Institute, p.2. 'Sexual offence convictions increased by 30% over ten years to 6,990 in 2016/17, dropping slightly in 2017/18 to 6,631. This is reflected in the fact that sexual offence convictions expressed as percentage of reported crime increased to 15% in 2016/17 compared to 9% in 2006/7 and 8% in 1996/7 (dropping to 13% in 2017/18).'

<sup>22</sup> South African Human Rights Commission (2018), p. 10.

### 3. The right to bail

16. The Constitution of South Africa guarantees all persons' fundamental freedoms and liberties including arrested, detained and accused persons to be released on bail if the interests of justice permit.<sup>23</sup>
17. The Bill refers to a number of proposals which may affect the right of persons accused of SGBV to bail. This includes, amongst others, denying police and prosecutorial bail to persons accused of SGBV,<sup>24</sup> requiring the prosecutor dealing with such cases to give reasons for their decision to not oppose bail,<sup>25</sup> requiring the courts, in making decisions about bail, to consider the views of the victims regarding their safety before granting bail,<sup>26</sup> preventing a court from granting bail if it is established that there is a likelihood that the accused will endanger the victim or any other person<sup>27</sup> and the cancellation of bail.<sup>28</sup>
18. We understand the gravity of SGBV in our society and accept that releasing an accused person on police/prosecutorial bail may have devastating consequences for victims of SGBV crime (particularly in domestic cases), and that such situations may require judicial intervention in bail decision-making. Similarly, whilst the mandatory inclusion of the views of victim's safety during bail decisions are largely welcomed, we are equally concerned about how the provisions in the Bill may be interpreted by courts in weighing up or safeguarding accused persons right to bail under the proposed amendments. It is therefore our submission that the Bill must make clear that the views of victims of SGBV regarding their safety during bail proceedings must not be without qualification, thus also safeguarding the rights of the accused under such bail proceedings.
19. The Bill extends the list of offences in four schedules in the Criminal Procedure Act to include assault, where a person is threatened with grievous bodily harm or with a firearm or dangerous weapon.<sup>29</sup> This has various consequences, for example, it may affect the type of bail one is entitled to, if any, and in some instances, one may be arrested without a warrant. This may be a challenge in particularly domestic disputes where threats of violence are common and counter disputes are filed against domestic partners. The consequence is that police and prosecutorial bail may be denied, there will be protracted court proceedings involving both parties and this may have further repercussions for the administration of justice.
20. We question whether the ramifications of the Bill's implementation on the entire administration of justice (i.e. police, correctional services and courts) have been measured and considered and whether the responsible state actors have been adequately consulted on the possible impact for their departments. It is our submission that the Bill should rather focus on ensuring that bail applications of all cases are expeditiously dealt with in the criminal justice system with the necessary urgency that they deserve, as opposed to the current routine

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<sup>23</sup> Section 35 (1) (f), South African Constitution.

<sup>24</sup> Clause 1-2, the Bill.

<sup>25</sup> Clause 3, the Bill.

<sup>26</sup> Clause 3, the Bill.

<sup>27</sup> Clause 3, the Bill.

<sup>28</sup> Clause 4, the Bill.

<sup>29</sup> Schedule 1, Part 2 of Schedule 2, Schedule 7 and Schedule 9.

practice of postponing bail applications for seven days at a time. Further, the Bill should be ensuring that only accused persons who pose a serious threat to victims are detained. Unless this happens, there will be serious strain on the entire administration of justice.

## 4. Mandatory minimum sentences

21. We agree that the SGBV crimes committed against people are reprehensible and that perpetrators should be held accountable for the harms they inflict on others. However, it is not the severity of the punishment that is a deterrent to crime but rather the certainty of detection that is an effective deterrent. As noted in the above, that certainty is by and large absent from our criminal justice system. Expanding the scope and tariff of mandatory sentences will not solve the problem.<sup>30</sup>
22. South Africa's sentencing regime needs a comprehensive sentencing reform. In 2002, the South African Law Reform Commission (SALRC) issued a report proposing a new sentencing framework to address the various problems the sentencing system faced.<sup>31</sup> Some of the problems to be addressed by the new sentencing framework included amongst others, the assertion that 'sentencers do not give enough weight to certain serious offences, that sufficient attention is not being paid to the concerns of victims of crime and that sentenced prisoners are being released too readily.'<sup>32</sup>
23. The SALRC proposed a framework that in its view 'can meet an ideal system that promotes consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term.'<sup>33</sup>
24. In the model that the Commission proposes, courts will continue to make sentencing decisions, but there will be sentencing guidelines for a particular category or sub-category of offences developed by an independent Sentencing Council for guidance by the courts on sentencing, which will take the form of sentencing principles set in legislation.<sup>34</sup> The Sentencing Council guidelines will be informed by research and wide consultation and the Sentencing Council will have to collect and publish on an annual basis comprehensive sentencing data

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<sup>30</sup> Clause 10, the Bill. The Bill extends a minimum sentence of life imprisonment to cases where the death of the victim was caused by domestic violence, in the form of physical or sexual abuse, it adds to the list of minimum sentences, assault, where the victim was in a domestic relationship with the accused and it increases the previous minimum sentences for certain crimes by 5 years.

<sup>31</sup> South African Law Commission (2002) *Project 82 Sentencing (A New Sentencing Framework)*, Pretoria. Available at: [https://www.justice.gov.za/salrc/reports/r\\_prj82\\_sentencing%20\\_2000dec.pdf](https://www.justice.gov.za/salrc/reports/r_prj82_sentencing%20_2000dec.pdf)

<sup>32</sup> South African Law Commission (2002), p.20. These concerns includes the following: there is a perception that like cases are not being treated alike; that sentencers do not give enough weight to certain serious offences; that imaginative South African restorative alternatives are not being provided for offenders that are being sent to prison for less serious offences; that sufficient attention is not being paid to the concerns of victims of crime; and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily.

<sup>33</sup> South African Law Commission (2002), p.20-21.

<sup>34</sup> South African Law Commission (2002), p.21.

including a full list of all sentencing guidelines.<sup>35</sup> The Sentencing Council will also have to publish reports on the efficacy and cost effectiveness of the various sentencing options provided by legislation.<sup>36</sup>

25. The proposals put forward by the SALRC was a step in the right direction. Unfortunately, the proposals were not taken forward. We therefore recommend that the research and proposals highlighted in the report be revisited and we would welcome further deliberations on it in order to inform a fair and comprehensive sentencing framework.
26. South Africa has had minimum sentencing for certain crimes for over 20 years. At present, 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.<sup>37</sup> There is no evidence from South Africa, or elsewhere, that long sentences, including life imprisonment, act as a deterrent to would-be offenders.<sup>38</sup> South Africa also holds the ignoble honour of the jurisdiction in which the use of life imprisonment increased by more than 3500% since 1994; not even the US comes close to this.<sup>39</sup> The excessive use of life imprisonment and harsh sentences has done little to make South Africa safer and make South Africans feel safer. Several US states that had mandatory minimum sentences legislation have repealed it because it was found to make the situation worse.<sup>40</sup>
27. Moreover, it is commonly accepted that harsher sentences do not act as a deterrent to would-be criminals, but it is rather the certainty of detention that has a deterrent value. There is overwhelming evidence that the National Prosecuting Authority is not effective in apprehending and prosecuting violent repeat offenders.<sup>41</sup> Harsher sentences will not change that outcome.

## 5. Conclusion and recommendations

28. It is extremely difficult, to assess the need for some of the proposed law reforms, particularly with reference to bail and sentencing without available data informing the need for law reform in those areas (indicating repeated bail condition violations, lenient sentencing, repeated offenders of SGBV). Data is required to better interrogate problems that victims of SGBV face with the criminal justice system. This will identify overarching gaps in legislation, policy and related implementation and better inform law proposals or policy changes.
29. Furthermore, the question is whether existing laws are inadequate or if it is the systemic failures of the South African criminal justice system to hold perpetrators accountable. As the situation stands now, one should have very limited expectations of the reach of the criminal justice system. The system is either designed or has

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<sup>35</sup> South African Law Commission (2002), p.21.

<sup>36</sup> South African Law Commission (2002), p.21.

<sup>37</sup> Sloth-Nielsen J. & Ehlers L. (2005) *Assessing the Impact: Mandatory and minimum sentences in South Africa*, South African Crime Quarterly No. 14, p. 17.

<sup>38</sup> Muntingh, L. (2017) Re-thinking life imprisonment, Daily Maverick, 2 March 2017, Available at:

<https://www.dailymaverick.co.za/article/2017-03-02-op-ed-rethinking-life-imprisonment/#.WurHjtSFOM8>

<sup>39</sup> Van Zyl Smit, D. and Appleton, C. (2019) *Life imprisonment – a global human rights analysis*, Cambridge: Harvard University Press, p. 98.

<sup>40</sup> Muntingh, L. (2017).

<sup>41</sup> Muntingh, L., Redpath, J. & Petersen, K. (2017) *An Assessment of the National Prosecuting Authority - A Controversial Past and Recommendations for the Future*, Bellville: ACJR.

designed itself by default, to prosecute as few serious and repeat offenders as possible. The relevance of law reform in such a context is therefore called into question. If the legislature needs to fulfil a role, then it should rather focus on ensuring accountability of the main criminal justice system accounting officers.

30. It is our submission that the views of victims regarding their safety in bail decisions must be qualified and may not be the only factor that the court must consider in bail decisions, thus also safeguarding the rights of the accused.
31. It is our submission that before the provisions are considered, the feasibility of the proposed changes be assessed and state actors be consulted in order to mitigate the consequences of such proposals on the criminal justice system otherwise such provisions will be futile. Further, it would be helpful to ensure that bail applications of SGBV cases be dealt with expeditiously without delay, as oppose to the current practice of routine postponements.
32. It is our submission that minimum sentences should not be extended and or increased, as it is a costly and above all ineffective way of punishing criminals. Emphasis must be placed on ensuring that prison sentences allow for rehabilitation, incapacitation, and deterrence. Further, we must be mindful that, where an accused of SGBV has been denied bail due to the implementation of the proposed bail provisions, time spent awaiting trial cannot be counted as part of the sentence to be served.<sup>42</sup>
33. South Africa needs comprehensive sentencing reform. The extension of mandatory minimum sentences and piecemeal reform will not solve the problem. The South African Law Reform Commission's report on sentencing proposed a new sentencing framework, which proposed an independent Sentencing Council responsible for developing sentencing guidelines informed by research and wide consultation. The Sentencing Council would also have to publish reports on the efficacy and cost effectiveness of the various sentencing options provided by legislation.<sup>43</sup> It is thus recommended that the SALRC proposals on sentencing reform be revived.

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<sup>42</sup> Section 51 (4) – (5) Criminal Law Amendment Act 105 of 1997.

<sup>43</sup> South African Law Commission (2002), p.21.