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**Submission**

to the

**Department of Justice and Correctional Services**

on the

Criminal Matters Amendment Bill [B – 2020]

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## 1. Introduction

The Centre for Applied Legal Studies (CALS) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALS is also a law clinic, registered with the Legal Practice Council. As such, CALS connects the worlds of academia and social justice and brings together legal theory and practice. CALS operates across a range of programme areas, namely: rule of law, basic services, business and human rights, environmental justice, and gender.

The Gender Justice programme at CALS focuses on ensuring the rights of people of all gender identities and expressions are realised and protected as set out in the Constitution of South Africa. The programme's work largely centres on addressing all forms of gender-based violence and in particular the trauma that victims and survivors face when they are failed by the systems that are meant to protect them.

The Gender Justice Programme at CALS has consistently engaged in various gender-related issues through numerous submissions to Parliament. Most recently, these have included submissions on the South African Law Reform Commission Issue Paper on a Single Marriage Statute (August 2019)[1]; the Prescription in Civil and Criminal Matters (Certain Sexual Offences) Amendment Bill (April 2019)[2], the Cybercrimes Bill (March 2019)[3] and recently the Domestic Violence Amendment Bill (2020)[4].

[1] https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20Comments%20on%20SALRC%20Issue%20Paper%20on%20a%20Single%20Marriage%20Statute%20August%202019.pdf.
[2] https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20%20Comments%20Prescription%20Bill%2015%20April%202019%20.pdf.
[3] https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20-%20Comments%20Cybercrimes%20Bill%208%20March%202019.pdf.
[4] https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/CALS%20submission%20Domestic%20Violence%20Amendment%20Bill%202020.pdf.

The everyday work of the Gender Programme at CALS includes assisting and supporting victims or survivors of sexual violence in navigating the criminal justice system. This includes assistance in reporting sexual offences, liaising with investigating officers and attending court with the individual complainant. Furthermore, and in addition to this CALS formed part of the research team for the *Rape Justice in South Africa* study which focused on rape attrition.

In light of the above it can be seen that CALS has experience in navigating the criminal justice system in relation to sexual offences as well as knowledge around challenges in relation to successful prosecution of sexual violence cases in the country. We thus assert that CALS has more than sufficient expertise and institutional knowledge to comment on the Criminal Matters Amendment Bill of 2020 ('the Bill').

## 2. Reflections on the Bill

### 2.1. Victim-focused approach to criminal procedure

The proposed amendments in the Bill clearly show that the Department acknowledges the serious nature of gender-based and wishes to treat it as such, which we find commendable. We would like to outline a few ways in which the legislation could further incorporate a more victim-centered approach. We believe that properly addressing the harms resulting from gender-based violence means placing the needs of those most affected at the centre of our response.

Victims of crimes generally, and of gender-based violence in particular, have historically been side-lined within the criminal justice system, with processes designed around the state's responsibilities and the rights of the accused. Victims' rights are included in some international provisions such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[5], the International

[5] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf.

Covenant on Civil and Political Rights (ICCPR)[6] and the Convention on the Elimination of Discrimination of Women (CEDAW)[7] which recognises an offender's obligation to make fair restitution to their victim, acknowledges that victims are entitled to fair treatment and access to the mechanisms of justice, and generally draws attention to the need for victims' rights in the criminal justice process.

As the law stands, the state litigates on behalf of the victims of crimes and they are not considered parties to the justice process, but rather witnesses, and on occasion treated as if they have no right to access information about the progress of their case.

The Service Charter for Victims of Crime in South Africa (Victims Charter)[8] envisages a justice process where victims of crime are offered an opportunity to offer and receive information about the progress of their case. However, CALS has various clients who have received no or very little information relating to the progress of investigation in their cases, not being advised of dates that their cases will be heard in court and in one instance, failure to be advised that their attempted rapist had appealed judgment and was free on bail. It is our contention that, at the very least, victims of gender-based violence should be kept informed about their cases and given the space to participate in every stage of the process should they wish to do so.

On the other hand, it is important to recognise that not all victims of gender-based violence will be able to engage with the justice system in the same way. Many will want to avoid the inevitable secondary trauma that comes with testifying in court and facing their perpetrator and likely harsh cross-examination, for example. We believe that they should not be forced to do so. Instead, there should be room for other creative methods such as prepared victim impact statements.

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[6] International Covenant on Civil and Political Rights. Available at https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf.
[7] Convention on the Elimination of All Forms of Discrimination against Women. Available at https://www.un.org/womenwatch/daw/cedaw/.
[8] https://www.npa.gov.za/sites/default/files/resources/public_awareness/victims_charter.pdf.

In addition, a lack of victim participation in bail proceedings and parole hearings should not be taken as disinterest or sanction for the accused to be released but may in fact point to the victims' fear or distrust of the system. We would take this one step further and suggest our criminal justice system may in face benefit from moving forward with 'victimless' or 'evidence-based' prosecutions, as is widely practiced in the United States particularly in cases of domestic violence.

It goes without saying that not every victim of gender-based violence will be the same. There are those people who are acknowledged by our law as being particularly vulnerable, including children and those with disabilities. We would encourage the Department to review the current draft of the Bill through the lens of the rights of the child and consider whether at every stage child victims (and possibly also perpetrators) are sufficiently protected.

### 2.2. Bail (sections 1 – 3)

***Purpose of bail***

We submit that the basic principle underlying the law on bail is that bail is not a form of punishment. This principle has been echoed in the case *Nazarus v S where it was stated that '[a]n accused person cannot be kept in detention pending his trial as a form of anticipatory punishment'*.[9]

We acknowledge that an accused person is entitled to bail where the interests of justice permit such. This is closely related to the principle within the adversarial criminal justice system that an accused is innocent unless proven guilty at trial. However, with the rising rates of domestic violence and femicide in the country, we are of the view that bail should not be easily granted for domestic violence, femicide and sexual offences cases.

[9] *Nazarus v S* (9123/2014) [2014] ZAECGHC 39.

***Police Bail***

Police bail refusal is dealt with at section 1 of the Bill, and predominantly focuses on the alleged offences committed someone in a domestic relationship with the complainant. Furthermore, it deals with the violation of one or all the provisions of Domestic Violence Act 116 of 1998 ('the Domestic Violence Act'). CALS agrees with the proposed amendment however, would like to propose that section 1(ii) read, 'against a person in a domestic relationship and those close to the complainant'. [10] The basis for this suggested addition is that domestic violence often comprises of an intersection of violence against other members of the household. For example, in a study by it was found that 45% of mothers of 116 children in hospital for child abuse related injuries had medical histories which showed domestic violence related injuries.[11] Furthermore, anecdotally, DispatchLive recently reported that an individual, Telang Bitsoana, shot and killed his mother-in-law, shot and wounded his wife and then killed himself, in an act of violence against his family members.[12]

The delay in releasing the accused by having bail refused by the police is advantageous for victims of violence. Not only can this act as a 'cooling-off' period for the accused but can also give the complainant time to physically get away from the place of violence. This can ultimately act as a break in the continuum of violence and potentially (but not definitively) prevent escalated violence.[13]

***Prosecutor bail***

The risk of further domestic violence can be exasperated when the complainant has either reported or opened a case against the perpetrator.[14] If the perpetrator is

[10] At page 2 of the amendment.
[11] R, Magen *et al*, 'Identifying domestic violence in child abuse and neglect investigations', *Journal of Interpersonal Violence*, (2001), 580 – 601, 582.
[12] L, Feni, *Domestic violence leaps to crisis level during lockdown,* DispatchLive, (5 April 2020). Available at https://www.dispatchlive.co.za/news/2020-04-05-domestic-violence-leaps-to-crisis-level-during-lockdown/.
[13] It is important to acknowledge that in some instances reporting the abuser can escalate the degree of violence.
[14] In a study around mandatory reporting and screening relating to domestic violence half of the women in the study believed that mandatory reporting may lead to an increased risk of violence by their abuser. A Gielenn et al, 'Women's opinions about domestic violence screening and mandatory *American journal of preventive medicine*, (2000) 19(4), 279-285, 282.

immediately released on prosecutor bail (or police bail), the perpetrator could easily return to the place of violence and harm the complainant or those close to the complainant. In light of this, it is imperative to exercise caution in consenting to the release of an accused charged with an offence involving family and domestic violence.

***Bail in court***

The Bill does not remove the right of the accused to be released on bail but it rather place measures which are more 'victim-centered' when considering the release on bail of a person accused of domestic violence or charged in terms of the Domestic Violence Act or the Protection from Harassment Act 17 of 2011 ('the Harassment Act'). The law would now require prosecutors to give reasons for not opposing bail in respect of serious Schedule 5 and 6 offences. The introduction of this provision (section 60(2)(d)) is likely to have the effect of forcing the prosecution to apply its mind to the question. This may indirectly reduce the likelihood of bail being granted.[15]

Section 60(2)(d) corresponds with section 59(1)(ii) and (iii) in that it may possibly lead to postponement of a matter for longer than 7 days in situations where the court is not satisfied about the reasons given by the prosecutor for not opposing bail. It allows the court to be acquainted with the matters in dispute between the prosecutor and the accused person and such matters may well result in the court denying or granting bail. The requirement to place reasons for not opposing bail on record and adduce evidence for matters in dispute will enable the courts to ensure the safety of the person against whom an alleged offence was committed against and other family members.

The proposed amendment in Section 60(2A) (b) is an example of a 'victim-centered' approach as it places the duty on the courts to consider the view of the victim when considering whether to grant or refuse bail. However, this should also be extended to other people who have been previously been abused or witnessed the abuse such

[15] V, Kath and M, Donovan, *Between a Hard and a Rock Place' Bail decisions in three South African Courts*, Open Society Foundation for South Africa (2008).

as the children or other family members. We view this as a balanced approach as the accused also has an opportunity to bring evidence as to why they should be released on bail.

Section 60(10) outlines that:

> *'[n]otwithstanding 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*: 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'.

The above section should also include the safety of persons such as family members and children who might have witnessed or experienced violence.

In terms of section 60 (12)(a) we submit that in order for a court to properly interpret the interests of justice to be inclusive of the victim, the court will have to consider whether granting the release of the accused will result in both accused and victim living in the same house or on the same property and how this will affect the safety of the victims as well as children and other family members. The court must balance the safety of the victim against the accused's right to be released on bail.

### 2.3. Cancelation of bail (section 4)

Section 68 (1)(cA) states that if an accused person has contravened any prohibition, condition, obligation or order imposed in terms of section 7 of the Domestic Violence Act or section 10(1) and (2) of the Harassment Act or any similar 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, that person could see the termination of their bail.

In relation to this section, we would question whether *all* contraventions of any prohibition, condition and order imposed in terms of a protection order should

amount to a cancellation of the bail and an order an immediate arrest of the accused pending the outcome of the trial. Although this is a well-intended provision, it will be shown below that the drafting of this section could result in an overly strict and at times nonsensical approach to the cancelation bail.

In terms of section 7 of the Domestic Violence Act there is a certain degree of discretion for presiding officers to make specific orders in relation to the protection order. For example, a presiding officer may include in an order that the respondent should have no contact with the complainant via electronic means, yet the respondent may 'like' a post on Facebook made by the complainant. This in essence would be a contravention of the protection order yet would not in and of itself amount to a contravention which should result in the cancellation of the accused/respondent's bail. In light of this, not every listed provision in a protection order, when contravened, would perhaps be of sufficient seriousness to result in bail being cancelled. And thus, we submit that if there is an allegation that the accused has contravened a condition, an enquiry ought to be opened and evidence led to ascertain the nature of the contravention and whether it amounts to a cancelation of the bail.

Section 68 (1)(e) which states that the accused person could face the cancellation of their bail if they fail to disclosed or has not correctly disclosed all previous convictions in the bail proceedings or where their true list of previous convictions has come to light after his or her release on bail. Although we do welcome this provision we would like to suggest that the state moves towards vetting and digitisation of the information of persons who may have such previous convictions but also a database of protection orders (which are not offences in terms of our law).

### 2.4. Evidence, Parole and Sentencing (section 5)

The Victims Charter in South Africa envisages a criminal justice system where victims have the right to offer information during the criminal investigation and trial.[16] This should be facilitated by the police, prosecutors and correctional service officials

[16] Service Charter for Victims of Crimes in South Africa page 2. Available at: https://www.npa.gov.za/sites/default/files/resources/public_awareness/victims_charter.pdf.

who should take measures to ensure that any contribution that a victim wishes to make to the investigation, prosecution and parole hearing is heard and considered in the final decision.

Section 5 of the Bill seeks to change the law on parole to ensure that when a court sentences an accused to 10 or more years' imprisonment, for an offence committed by a person against someone with whom they are in a domestic relationship, the court must inform the victim that they have a right to attend the accused's parole board hearings, and to tell the parole board how they would feel about the accused being paroled. We agree that victims of sexual and domestic abuses should have a say at the parole hearing of the accused, if they so wish, even if the accused is sentenced to less than 10 years. The emotional and psychological effects of abuse on the complainant may be the same, imposing a number of 10 years or more is artificial.

States with the most advanced victim-friendly laws like Nevada[17] acknowledge that the criminal justice process can still be difficult and stressful for victims of crime. Victims of sexual and domestic abuse more often than not suffer from trauma as the consequence of the offence and being involved in the criminal justice system. We therefore submit that a social worker, psychologist or any other professional who had interaction with the victim and has knowledge about the state of the victim should be allowed to represent the victim in the parole hearings.

Furthermore, in instances whereby the victim is no longer alive, professionals may attend the parole hearings, in addition to relatives of the victim because the perpetrator and the victim share the same relatives as such the involvement of relatives might result in a conflict of interest.

***Sentencing***

We note that this is not something that the invited comments on, however, we submit that in sentencing proceeding, the court should order that the pre-sentence report

[17] http://ag.nv.gov/Hot_Topics/Citizen/CA/The_Rights_of_Victims_of_Crime/. Nevada Attorney General.

that contains information concerning the effect that the crime had on the victim including any physical or psychological harm and financial loss, if that information is reasonably available.

At the sentencing hearing, the court must afford the victim an opportunity to appear personally, through counsel, or by a personal representative, and reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim, and how the crime has affected the family of the victim, include children.

### 2.5. Extending offences (sections 6 – 9)

Section 9 of the Bill appears to extend the list of offences in Schedule 8 in the Criminal Procedure Act, to also include assault where a person is threatened with grievous bodily harm or with a firearm or dangerous weapon. This would mean that people accused or suspected of these kinds of offences will always have their buccal sample (mouth swab) taken, even if they are already on bail, or have received a summons for this kind of assault. We would like to seek clarification as to what the purposes of taking mouth swab or buccal sample is and what is this information going to be used for. We would additionally appreciate clarification on what is meant by "threatened" and whether this would constitute verbal or written threats or only physical threats of violence.

### 2.6. Minimum sentencing (section 10)

CALS supports the inclusion of certain offences relating to intimate femicide (where this form of femicide is not isolated to one's intimate partner but can include other family members and relations), assault committed in the context of a domestic relationship as well as the broadened scope of rape and compelled rape, as now attracting mandatory minimum sentencing.[18]

[18] For a discussion on the different forms of femicide see S Swemmer, 'Femicide and the Continuum of Gender Based Violence'. In: Leal Filho W., Azul A., Brandli L., Özuyar P., Wall T. (eds) *Gender Equality. Encyclopedia of the UN Sustainable Development Goals*. Springer, Cham, (2019) 1.

It is extremely important that legislation has begun to respond to the severity of sexual offences and offences related to domestic violence and is now suggesting their inclusion under already existing frameworks such as that of section 51 of the Criminal Law Amendment Act of 1997, or the minimum sentencing framework.

The inclusion of intimate femicide as well as certain domestic violence related offences (including rape) under this sentencing framework is significant as this in effect acknowledges these forms of violence as being as serious as those offences already attracting such sentencing, such as premeditated murder, rape and compelled rape, aggravated robbery, and terrorism.

Importantly such an inclusion achieves some of the work that the Prevention and Combating of Hate Crimes and Hate Speech Bill B9 of 2018 ought to have achieved, which is acknowledging that these crimes are acts of prejudice and intolerance culminating in violence against marginalised group based on their gender identity and due to the pernicious nature of such should attract the harshest form of sentencing permitted.[19]

The Bill reflects an understanding of the idea that rape is beyond mere unlawful penetration and is instead concerned with power. This is reflected in the proposed inclusion of offences such as common purpose and conspiracy to commit rape. This is in accordance with the recent decision of the Constitutional Court *in Tshabalala v S.*[20] In this case the Court found that the doctrine of common purpose applies to common law rape and importantly Mathopo AJ stated that

> The facts of this case demonstrate that for far too long rape has been used as a tool to relegate the women of this country to second-class citizens, over whom men can exercise their power and control, and in so doing, strip them of their rights to equality, human dignity and bodily integrity.[21]

[19] The Prevention and Combating of Hate Crimes and Hate Speech Bill was originally introduced to the National Assembly on 13 April 2018 and was revived on 29 October 2019 by the National Assembly. Up until and including the date of writing this submission the Bill has not become an act. See https://pmg.org.za/bill/779/.
[20] (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC).
[21] Above at para 1.

In conclusion, the inclusion of the above forms of rape under the minimum sentencing framework is supported by CALS and is a progressive approach which acknowledges the severity of these forms of offences not only due to the physical infliction of violence against the victim but also the long-term psychological trauma as well as limitation of rights that occurs.

***Issue around judicial discretion in sexual offence matters***

Although, and as discussed above, we support the inclusion of the proposed offences under the minimum sentencing framework, there is evidence to show that judges/magistrates very often decide to deviate from the prescribed sentencing by arguing that substantial and compelling reasons exist in far too many sexual violence cases.

This statement is supported by evidence from the 2017 report *'Rape Justice in South Africa'* study where findings suggest that judges/magistrates deviated from minimum sentencing requirements in 59% of cases.[22] The mitigating circumstances that were considered by presiding officers often did not on the face of it seems to be able to classified as substantial and compelling reasons, and instead seemed to indicate that sexual offences were not viewed as serious by the presiding officers. The 'substantial and compelling' factors included that the accused is a breadwinner (37.8%), age of the accused (50%), the accused was a first time offender (27.8%) and the accused had children (20.4%). The study went on to find further that that prosecutors did not argue for weighty sentences for accused persons and that;

> [p]rosecutors rarely mentioned the scourge of sexual violence in South Africa as an aggravating factor, furthermore, prosecutors did not refer to infringements of the complainant's rights in terms of the Bill of Rights as necessitating a harsher sentence.[23]

[22] M Machisa et al, *Rape Justice In South Africa: A Retrospective Study Of The Investigation, Prosecution And Adjudication Of Reported Rape Cases From 2012*, Gender and Health Research Unit, South African Medical Research Council, (2017), 103. https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/RAPSSA%20REPORT%20FIN1%2018072017.pdf.
[23] As above, 103.

It can be seen from the above that, although it is important for the Bill to include various other offences relating to femicide and domestic violence under the minimum sentencing regime, it will be rendered useless if presiding officers continue to deviate from the prescribed sentencing in so many cases (59%) and for reasons that are plainly neither substantial nor compelling.