Submission

to the

South African Law Reform Commission

on

Discussion paper 164
Review of The Criminal Justice System:
Alternative Dispute Resolution in Criminal Matters

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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 legal theory and practice together. CALS operates across a range of programme areas, namely: business and human rights; civil and political justice; environmental justice; home, land and rural democracy; and gender justice.

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 primarily 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 has consistently engaged in submissions on legislation and discussion papers that touch on gender-related issues. Most recently, these have included submissions on the Draft National Identification and Registration Bill;[1] the Guidelines on the socio-educational inclusion of SOGIESC in schools;[2] Violence and its impact on the right to health;[3] the Victim Support Services Bill;[4] the Criminal Law (Sexual Offences and Related Matters) Amendment Bill;[5] the Criminal Matters Amendment Bill;[6] and the Domestic Violence Amendment Bill.[7]

[1] See https://bit.ly/4iOe0sK.

[2] See https://bit.ly/3QWZa77.

[3] See https://bit.ly/426FKSs.

[4] See https://bit.ly/41UI5Bd.

[5] See https://bit.ly/4jcJ1GM.

[6] See https://bit.ly/4jxBfrl.

[7] See https://bit.ly/3Y9Wtmw.

In addition, the Gender Justice programme at CALS also supports victims and survivors of sexual violence in navigating the criminal legal system. This includes assisting in reporting sexual offences, liaising with investigating officers and attending court with the individual complainant. CALS further formed part of the research team for the *Rape Justice in South Africa* study which focused on rape attrition in the criminal legal system.[8]

In light of this, we contend that CALS has experience in navigating the criminal legal system, particularly in relation to sexual offences, as well as knowledge around challenges with regard to the successful prosecution of sexual offences. We thus assert that CALS has more than sufficient expertise and institutional knowledge to comment on Discussion Paper 164: Review of the Criminal Justice System: Alternative Dispute Resolution in Criminal Matters (the discussion paper).

CALS welcomes the opportunity to engage on criteria for criminal matters to be referred for alternative dispute resolution (ADR). Our comments below focus on the importance of taking a victim-centred approach to ADR in criminal matters, particularly sexual offences; the criminalisation of women who survive domestic violence and some points on the language used in the discussion paper. We do not distinguish between different forms of ADR identified in the discussion paper but rather comment on them as a group.

2. Reflections on the discussion paper

2.1. Victim-centred approach to alternative dispute resolution in criminal matters

As mentioned above, our comments focus on the importance of taking a victim-centred approach to ADR resolution in criminal matters, but particularly when dealing with gender-based violence including sexual offences and domestic violence. We would argue that mediation between victims and perpetrators of gender-based violence,

[8] See https://bit.ly/4iSP2Zs.

especially for crimes against children, should not be compulsory, but should be informed by meaningful consultation with the victims and their families.

The needs of victims of crime in general, and of gender-based violence in particular, have historically been excluded from the criminal legal system. In South Africa, the state proceeds against the accused as *dominus litus*, and victims are regarded as witnesses and not parties to the proceedings. Some victims may seek legal representation in the form of a "watching brief" or to advocate on their behalf with prosecutors in cases involving gender-based violence. CALS, itself, has supported numerous clients in this manner.

South Africa has obligations to uphold the rights of victims under the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[9] and the Convention on the Elimination of All Forms of Discrimination against Women.[10] Furthermore, the Service Charter for Victims of Crime in South Africa, is intended to protect and promote the rights of victims in accordance with these international obligations.[11] The Charter sets out a framework aimed at eliminating secondary victimisation and ensuring victims are central to the criminal legal process, establishing the rights to give and receive information, protection, assistance, and restitution.

Unfortunately, in our experience, the treatment of victims in the criminal legal system often falls short of these objectives. We have supported several clients who have received little information from prosecutors about the progress of their cases, have had their cases withdrawn without reasons, have not been advised of court dates, and have not even been informed that the person found guilty of sexually violating them had appealed his conviction and was out on bail.

We contend that, at the very least, victims of gender-based violence should be kept informed about the progress (or lack of progress) on their cases and given the space to participate in every stage of the process should they wish to do so. On the other

[9] See https://bit.ly/4j7qCuS.

[10] See https://bit.ly/4ls59yW.

[11] See https://bit.ly/3QZrxSc.

hand, it is essential to recognise that not all victims of gender-based violence will want to engage with the legal system in the same way. Many will seek to avoid the inevitable secondary trauma that comes with facing their perpetrator in court, for example.[12] We argue that they should not be forced to do so, and that this should not mean that their matter is not still pursued.

Similarly, it may not be appropriate to take a blanket approach to ADR when it comes to sexual offences. The current Prosecution Policy Directives state that informal mediation should not be considered in cases involving murder, rape, robbery with aggravating circumstances and any other offences that fall within the mandatory minimum sentencing guidelines.[13] This presumably recognises the gravity of the offences and their impact. We would caution against distinguishing between "serious" sexual offences and "petty" sexual offences, however, especially in relation to crimes against children. In *Levenstein v Frankel*, the Constitutional Court recognised that sexual assault and other "lesser" offences could have as traumatic an effect on victims as rape.[14]

Victims of these crimes should not be forced to engage in ADR processes with their perpetrators either. There is, of course, a power differential between victims and perpetrators of crime – but nowhere is this more so than in sexual offences. Sexual offences have been recognised as crimes which are by definition about power and domination.[15] We contend that victims of sexual offences should be meaningfully consulted on whether their matters undergo ADR. They should also be offered an opportunity to engage in such processes without coming face to face with their perpetrators if they so wish, such as through victim impact statements.

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[12] Nelson, L. 'Testifying in court can amplify trauma for victims of childhood sexual abuse'. *Association for Psychological Science*. Available from https://www.psychologicalscience.org/observer/testifying-in-court-can-amplify-trauma-for-victims-of-childhood-sexual-abuse.

[13] Francke, D. (2023). 'Is mediation an option in sexual violence cases?' *De Rebus*. Available from: https://bit.ly/4cfXSOs.

[14] *Levenstein v Estate of the Late Sidney Lewis Frankel* ZACC 16 2018. Available from: https://bit.ly/4cgNK8a.

[15] See, for example, *Tshabalala v S*; *Ntuli v S* ZACC 48 2020. Available from: https://bit.ly/41XjgVf.

In addition, criminal matters involving domestic violence including the contravention of a protection order, should not necessarily qualify for ADR and should be context specific. Relegating the violation of a protection order to a "lesser" crime that does not warrant detention misunderstands the purpose of protection orders. Often, this may provide the complainant with an opportunity to leave shared housing with the perpetrator and find a safe place to stay. As noted in the discussion paper, victims of domestic violence are frequently pressured to engage in mediation with perpetrators by police and others in their community and to treat domestic violence as a "family matter". Domestic violence should not be discounted as something that "really matters" when deciding on what offences deserve criminal sanction and victims should be consulted and supported during the entire process.

In line with *S v Baloyi*, where the Constitutional Court held that domestic violence must be understood in its historical and systemic context, ADR processes should never assume equal bargaining power between the victim and the offender.[16] The failure to address such power imbalances, especially in cases involving intimate partner violence or familial sexual abuse, risks coercing victims into engagement under the guise of reconciliation. ADR must never be applied in matters involving sexual offences, domestic abuse, or where there is a risk of re-traumatisation.

2.2. Criminalising survivors of domestic violence

2.2.1. Adopting ADR processes as opposed to criminalising survivors

In 2003, Mrs Anna-Marie Engelbrecht killed her husband, Mr Jacobus Johannes Engelbrecht.[17] On the day of the incident, Jacobus was heavily inebriated from alcohol and thus incapacitated. Mrs Engelbrecht placed thumb cuffs on him (restraining his

[16] *S v Baloyi* (CCT29/99) [1999] ZACC 19.

[17] 2005 (2) SACR 41 (W)

arms), put a bag over his head, and secured the bag with a belt. Mrs Engelbrecht intentionally suffocated her husband.[18]

During her murder trial, it became clear that Mrs Engelbrecht had suffered years of escalating and relentless abuse from Jacobus. The intimate partner violence she endured included frequent physical abuse, which she came to see as a regular part of her life, with Mr Engelbrecht forcing her to reenact pornographic videos he had watched, intimidation, constant surveillance of her movements and making her feel like a hostage within her own home. The abuse endured for three years before the incident.[19]

The Court ultimately found that Mrs Engelbrecht's evidence of sustained intimate partner violence constituted a "substantial and compelling" reason to suspend her 12-year sentence.

According to Gore, instances of women who kill when their partner is not "actively" attacking them, similar to Mrs Engelbrecht's case, are known as "non-traditional confrontation cases".[20]

NM, a current client of CALS, was similarly in an abusive relationship with her intimate partner for 18 months. During this relationship, NM was subject to prolonged and repeated physical, emotional and sexual abuse. The abuse included regular beatings, strangulation incidents, death threats, social isolation and humiliation.

On the evening of the deceased's death, he locked her in his home and raped her. NM killed her partner that night while they fought over a knife, which she was trying to use to open the home's door and free herself.

[18] *S v Engelbrecht* at 10 – 11.

[19] As above at 222 – 224.

[20] Gore, R. (2024) 'Rethinking Crime and Punishment: Women Who Kill Their Abusers in South Africa' *Michigan Journal of Gender & Law* 31, no. 2.

Gore describes these types of cases of direct violence incidents as “confrontational” instances of women who kill.[21] The deceased was engaged in an active attack on NM at the time of his death. NM’s case is historically more aligned with what individuals term “self-defence” or “private defence” due to the immediacy of the attack and the proportionality of the response.

Importantly, however, is that both Mrs Engelbrecht and NM were found guilty of murder. However, Mrs Engelbrecht was given a 12-year suspended sentence, and NM is currently serving a 10-year sentence.

Gore explains that the harsher sentencing of criminalised survivors emerged in South Africa in the late 1990s. In the early ’90s, women who had killed their abusive intimate partner were often given community supervision rather than a custodial sentence.[22] However, the introduction of the minimum sentencing regime in 1997 led to criminalised survivors receiving harsher sentencing.[23]

Gore explains that South Africa has historically had an overreliance on the carceral system “inspired by the United States’ tough-on-crime zeitgeist”.[24] The US-styled carceral approach was subsequently extended to include the criminalisation of survivors of intimate partner violence who have killed their abusers.[25]

Currently, due to a lack of detailed reporting by the Department of Correctional Services, it is difficult to ascertain how many women who are in prison are there for the killing of an abusive intimate partner. However, Hopkins, writing in 2017, cited that approximately 4,000 women were incarcerated in South African prisons at the time.[26]

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[21] As above.

[22] As above.

[23] As above.

[24] As above.

[25] As above.

[26] Hopkins, R. (2017). ‘”It Was Him Or Me”: Women Who Killed Their Abusive Partners In Self-Defence’. Available from: https://ruth-hopkins.com/it-was-him-or-me-women-who-killed-their-abusive-partners-in-self-defence/?utm_source=chatgpt.com.

During this time, incarcerated women formed only 2,6% of the total prison population.[27] Although access to current figures of women imprisoned for killing an abusive partner is significantly challenging to access, in 2004, the NPA reported that there were 164 women incarcerated at the time for the murder of an intimate partner or a related crime.[28] Demonstrating that women who kill form a small percentage of women behind bars.

Despite the precedent set out in *Engelbrecht,* which broadens the elements of self-defence for "non-traditional confrontation cases", and the ordinary common law principle of self-defence for "confrontational cases", women are still being sentenced to murder and receiving harsh sentences.

The problem that emerges, according to Gore is that there is no uniform approach to the sentencing of women who kill. She states,

> *All of the cases mentioned [in this article] have resulted in different sentencing outcomes, ranging from suspended sentences to longer terms of imprisonment. While the courts have shifted from correctional supervision to the mandatory minimum sentencing regime (with substantial and compelling circumstances to provide lesser sentences), there are still no established sentencing norms to guide courts on how they should exercise their limited discretion in cases involving women who kill their abusers.*[29]

In light of the information traversed above, CALS proposes the use of alternative dispute or diversion mechanisms for women (and other victims of intimate-partner violence) who are found guilty of killing their violent partners in the context of a prolonged relationship of abuse.

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[27] As above.

[28] Parliamentary Monitoring Group (2004). Women Imprisoned for Domestic Violence: briefing by National Prosecuting Authority. C. S. P. Committee. Available from: https://pmg.org.za/committee-meeting/3826/ .

[29] Gore, R. (2024) 'Rethinking Crime and Punishment: Women Who Kill Their Abusers in South Africa' *Michigan Journal of Gender & Law* 31, no. 2 at 289.

It is noteworthy that in the cases of Mrs Engelbrecht and NM, both were first-time offenders, having not historically been convicted of any crimes.[30] In a study by Shaff tracing 18 South African trials of women who killed their abusive partners, many of the women were not viewed by the court as posing any threat to society (as their violence was isolated to the incident) and had no previous convictions. On this Shaff explains,

> *In many of the sentencing judgments in the dataset the Courts posited two conflicting considerations. First, that many, if not all, of these women did not pose a threat to society because their motive for offending was to escape ongoing abuse from the deceased. But secondly, that a 'message' ought to still be sent to deter future offenders from the same behaviour. These conflicting considerations were relied on by the courts to impose the sentences they did*.[31]

In a study by O'Keefe on women who kill their abusive partners, it was found that 80% of women who had killed their abusive partner had no previous arrest record (the study is silent on convictism as opposed to arrests). They state "[t]his finding is inconsistent with previous studies that found that women who killed their husbands/boyfriends were impulsive, violent and likely to have a prior criminal record".[32]

O'Keefe concurs with Shaff and concludes that "[w]hat is striking in the present study is that vast majority of battered women who killed/seriously assaulted their spouses/partners were not violent, had no prior criminal record, but received lengthy prison sentences—frequently life sentences".[33]

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[30] S v *Engelbrecht* at (sentencing) para 6.

[31] Shaff, M. L. G. (2022). *Defending women who kill* UCT (LLM) at 75. Available from: https://open.uct.ac.za/items/d236db4d-e604-4b51-9e38-1997d8fcdddd.

[32] O'Keefe, M. (1997). 'Incarcerated battered women: A comparison of battered women who killed their abusers and those incarcerated for other offenses' *Journal of family violence* 12: 1-19 at 16.

[33] As above.

CALS emphasises the need for a legal movement away from criminalising women who kill their abusive partners. Thus, we argue that in certain instances, diversion processes should replace the criminal process of trial and sentencing.

CALS notes that currently, the SALRC proposes that crimes which fall under Schedule 8 and Schedule 9 of the Criminal Procedure Act should be included in the ADR/diversion process. We also note that it has been indicated that the list is not a closed one, and thus, we urge the explicit inclusion of women who kill their abusive partners under the proposed legislation.

In terms of the SAHRCs draft legislation, the "Diversion Regime" currently appears as follows:

CALS proposes, for example, the inclusion of the following under section 69*(c)*:

> Provided that, notwithstanding the nature or seriousness of the offence, the Director of Public Prosecutions may, subject to an assessment in terms of section 72, divert a matter where—
>
> (a) the offence arose from a context of prolonged or severe intimate partner violence or abuse suffered by the divertee; and
>
> (b) there is evidence of coercive control, chronic abuse, or a perception of imminent harm leading to the commission of the offence and;
>
> (c) diversion is considered in the interests of justice, rehabilitation, and restorative outcomes for the divertee and affected persons.

2.2.2. Consultations around ADR for criminalised survivors

When women kill their abusive partners, they often do so in circumstances that involve gender-based violence, self-defence and severe psychological distress.[34] The traditional punitive approaches fail to combat and consider these underlying issues.

The Legal Resources Centre highlights a critical gap in the criminal justice system: many presiding officers and prosecutors lack adequate training on the psychological effects of abuse, including battered woman syndrome. [35] This gap often results in a failure to appreciate the nuanced contexts in which survivors of prolonged abuse act in self-preservation.

ADR mechanisms, particularly those grounded in restorative justice principles, offer a more holistic framework to the justice system. Restorative justice reconceptualises crime not merely as a violation of law but as harm done to individuals and relationships, thus placing the victim, offender, families, and community at the centre of the resolution process.[36]

Restorative justice provides a more relational and rehabilitative approach by aiming to repair harm, prevent reoffending, and foster accountability. Importantly, its principles align with constitutional values such as dignity, equality, and access to justice and must be implemented consistently with these rights.[37]

In cases where women have been accused of killing their abusive intimate partners, any restorative justice or diversion process must be guided by a trauma-informed, gender-sensitive framework.

The participation of the deceased's family in such processes may facilitate emotional accountability and a shared sense of closure. However, this participation must always

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[34] Braun, K. (2024) 'Women who kill their abusive intimate partners in non-confrontational circumstances — the need for German criminal law reform' *International Journal for Crime, Justice and Social Democracy* 13(4) 112–120, 117. Available from: https://doi.org/10.5204/ijcjsd.3571.

[35] Deenik, J. (2024) 'When survival becomes a crime' *Legal Resources Centre.* Available from: https://lrc.org.za/when-survival-becomes-a-crime/.

[36] Department of Justice and Constitutional Development. (2011). *Restorative Justice: The road to healing* at 3. Available from https://www.justice.gov.za/rj/rj.html.

[37] As above.

be voluntary and approached with sensitivity to the complex emotions involved, including denial, blame, and unresolved familial trauma.

The inclusion of mental health professionals is essential to assess the psychological impact of prolonged abuse on the woman, to recognise signs of trauma such as PTSD, and to recommend therapeutic interventions rather than punitive outcomes.

Community representatives also play a crucial role in recognising the broader social context of gender-based violence and in supporting the reintegration of the woman, who may have been isolated or stigmatised. Where applicable, consideration must be given to the children of the woman, both to preserve familial bonds and to mitigate the intergenerational impact of violence and incarceration. This holistic, restorative approach challenges the carceral logic that underpins traditional prosecutions and affirms a feminist commitment to justice that is relational, reparative, and rooted in the lived realities of abuse survivors.

2.3. Language used in the discussion paper

2.3.1. Use of the term "offender"

In some places, the discussion paper seems to conflate the terms "offender" with "accused" and "adult in conflict with the law". This leads to constructions such as "once an offender has complied with all obligations set out in a pre-trial ADR agreement, this precludes prosecution on the same facts. None of the processes thus attract criminal convictions" and "this net effect is to saddle the accused person with a criminal record". It is unclear how a person can be referred to at some times as an "offender" when their conduct does not attract a criminal conviction, and yet at other times as an "accused" when they have a criminal record. We would suggest only using the term "offender" when referring to someone convicted of a crime and "incarcerated person" when referring to someone serving a sentence of imprisonment, or using "accused" or "adult in conflict with the law" throughout.

2.3.2. Centering of the offender

The language used throughout the discussion paper is also in tension with a victim-sensitive approach. It often centres the offender's rehabilitation, with phrases such as “the offender heals, the community heals, the victim heals too” on page 5 of the paper. This implies a trickle-down model of healing, in which the victim’s wellbeing is contingent on the offender’s rehabilitation and that can be a deeply problematic and paternalistic assumption.

2.3.3. Use of pronouns

There are instances in the discussion paper where the masculine singular is used to stand for all genders, such as “Consultation must take place with the investigating officer assigned to the case… and the complainant or his representative”. There is a history of legal texts using the generic “he” and a number of arguments have been made to show that this renders invisible marginalised groups such as women and non-binary persons.[38] We would suggest using a more inclusive pronoun, such as the singular “they” throughout. This construction is widely accepted by English speakers who frequently use “they” to discuss situations in which a person’s gender identity is unknown.[39]

2.3.4. Gender inclusivity

The discussion paper fails to be fully inclusive of diverse gender identities and sexualities. The term “victim” is often used in a way that assumes a binary gender framework, rather than acknowledging that LGBTQIA+ individuals experience unique vulnerabilities in relation to sexual and domestic violence. A more intersectional approach is needed, recognising that queer individuals face additional barriers, such as discrimination by law enforcement and lack of safe reporting mechanisms.

[38] Cameron, D. (2016). ‘The pronominal is political’. *Language: A feminist guide*. Available from: https://bit.ly/3E6MGXH.

[39] ‘Singular *they*’. Available from: https://bit.ly/42eRiDd.

The paper does not adopt gender-inclusive or identity-sensitive language, despite South Africa's diverse and vulnerable queer community, who often face barriers to reporting violence and are more likely to experience mistreatment by police and court officials. Terminology in the paper continues to reflect a cis-heteronormative and binary understanding of victimhood and criminality, with references to offenders as "he" and assumptions that victims are female in heterosexual relationships.