

## **Submission on the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, the Criminal and Related Matters Amendment Bill, and the Domestic Violence Amendment Bill**

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**Submitted to:**

Mr V Ramaano

The Portfolio Committee on Justice and Correctional Services

Per email: [Gbvills@parliament.gov.za](mailto:Gbvills@parliament.gov.za)

**Submitted by:**

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## EXECUTIVE SUMMARY

- The Sexual and Gender-Based Violence Unit at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a centre of the University of Johannesburg, welcomes the opportunity to make a written submission on the amendments to three pieces of legislation on gender-based violence (GBV).
- **We would also appreciate the opportunity to make a verbal presentation, preferably virtually.**
- SAIFAC recognises and acknowledges the scourge of sexual and gender-based violence (GBV) in South Africa as a serious crime and human rights violation. The majority of victims of sexual and gender-based violence are women and children, as well as vulnerable persons such as mentally ill, physically disabled, and elderly persons. The need to adopt policies and implement legislative measures to protect these persons are imperative, and the amendments to strengthen existing legislation on gender-based violence are therefore especially timely and welcomed.
- The demands for stricter laws to address the harmful consequences of GBV as well as its root causes have remained largely unaddressed government until now. In order to address the increasing instances of sexual and domestic violence South Africa, it has been argued that harsher sentences have to be imposed on perpetrators of sexual and gender-based crimes, specifically for its deterrent value. However, counterarguments are that harsher sentences serve little to no rehabilitative purpose for offenders, do not address the root causes of these crimes, and do not assist in the prevention hereof. Further, sentencing only occurs once the accused is convicted, therefore victims are only protected long after the crime has been committed.
- Concisely, we submit that any proposed amendments to existing legislation must clearly reflect the various purposes thereof, namely deterrence, retribution, restitution, rehabilitation and reform. Further, placing too much emphasis on the ability of victims to protect themselves perpetuates existing societal stereotypes relating to sexual and gender-based violence (to illustrate: the belief that a victim must fight back against a perpetrator to ward off the attack, that a romantic relationship can easily be ended when there is any form

of abuse taking place, or that a male cannot be raped by a woman or another male). Such interventions play a crucial role in addressing the root causes of sexual and gender-based violence.

SAIFAC makes the following submissions concerning the proposed Amendment Bills:

- Firstly, the provision for certain particulars of persons who have been convicted of sexual offences to be made publicly available in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill is not consistent with certain human rights guaranteed in the Constitution, namely the registrants' rights to equality, dignity and privacy.
- Secondly, it is our submission that the duty on the public to report domestic violence against vulnerable persons, as provided in the Domestic Violence Amendment Bill, has to be extended to also include women as a vulnerable group together with children, older persons and persons with disabilities. This will ensure that the Domestic Violence Amendment Bill corresponds to Chapter 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, which specifically proposes to include females under the age of 25 years under the definition of a "person who is vulnerable".
- Thirdly, it is our view that the use of intermediaries for child victims or witnesses in court proceedings should not be left to the discretion of the court as suggested in the Criminal and Related Matters Amendment Bill. Instead, the imperative must be to protect the best interests of children, and to ensure consistent application of the proposed amendment.
- Finally, we submit that stricter bail conditions and harsher minimum sentences proposed by the Criminal and Related Matters Amendment Bill will not serve the purpose of deterrence. Instead, they will likely violate human rights guaranteed in the Constitution. We recommend that legislative amendments must give due regard to the improvement of reasonable access to bail, the promotion of alternative measures to imprisonment, social reintegration of offenders and the protection of society and the victim.

## MAIN SUBMISSIONS

### 1. CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT BILL [B16 – 2020]

#### 1.1. *Amendments to the National Register of Sex Offenders*

1.1.1. One of the proposed amendments to the Criminal Law (Sexual Offences and Related Matters) is to oblige the Registrar of the National Register for Sex Offenders (NRSO) to “make the full names, surname, identity number and the sexual offence, of every person whose particulars have been included in the Register, available on the website of the Department of Justice and Constitutional Development.”<sup>1</sup> The purpose of this amendment is to protect “persons who are vulnerable against sexual offenders”,<sup>2</sup> hereby expanding the original purpose of establishing the NRSO to protect “children and persons who are mentally disabled”<sup>3</sup> to a much wider group of persons defined as vulnerable.<sup>4</sup>

1.1.2. SAIFAC welcomes this amendment to the purpose of establishing the NRSO, because expanding the persons protected by the NRSO from only children and mentally disabled persons to “females under the age of 25 years”, persons in care-or shelter facilities, the elderly, as well as persons with physical and intellectual disabilities<sup>5</sup> recognises that these persons are particularly vulnerable to sexual violence. Further, the inclusion of “females” is an acknowledgement that women in South Africa are considerably more likely than men to experience violence. Therefore, it is important that legislation expressly recognises women as a vulnerable group in order to effectively monitor State efforts to respond to, prevent and eliminate all forms of violence against women.

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<sup>1</sup> Clause 7(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B16-2020]. The NRSO is similar to the American federal law known as “Megan's Law”, which provides for the release of information, concerning a sexual offender, when it is necessary to protect the public. To this end, websites are created and made available for public viewing. The USA has faced great obstacles in the implementation and maintenance of such registers, as a result, the information obtained from the websites is not always accurate.

<sup>2</sup> Clause 5(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill

<sup>3</sup> Section 43 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

<sup>4</sup> Clause 5(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill. See further: Vetten “Aluta Continua: Police Accountability and the Domestic Violence Act 1998” (2017) *SA Crime Quarterly* 7.

<sup>5</sup> Clause 5(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill.

1.1.3. However, we note with concern that the recognition of the various persons defined as “vulnerable” is not consistently applied throughout the proposed provisions. For instance, clause 7(a) of the Amendment Bill only seeks to include the “particulars of persons convicted of any sexual offence [*against a child or a person who is mentally disabled*] or are alleged to have committed a sexual offence [*against a child or a person who is mentally disabled*]” (emphasis added) in the NRSO, whereas clause 8(a) provides that the purpose of the NRSO is to protect “persons who are vulnerable” against sexual offenders.<sup>6</sup> Vulnerable persons protected by the NRSO as defined in clause 5(c) is wider than only children and mentally disabled persons: the practical implication of this inconsistency is that, in terms of clause 7(a), only the details of perpetrators of sexual offences committed *against children or mentally disabled persons* will be included in the NRSO, and the details of perpetrators that committed sexual offences against any of the other vulnerable persons identified in clause 8(a) will not be included.

## 1.2. ***The Constitutional Challenge of Clause 7(c)***

1.2.1. SAIFAC is concerned about a number of obstacles faced by the NSRO, such as its implementation and maintenance, but most importantly its constitutionality. Should the Bill be passed into law, clause 7(c) is likely to face constitutional challenges on the grounds that it violates the rights to privacy, equality and dignity of the registrants. These rights can be limited in terms of section 36, if it is reasonable and justifiable to do so in an open and democratic society based on the values of human dignity, freedom and equality. Ultimately, the rights of the registrants need to be weighed against the public’s right to information and to freedom and security of the person in terms of the limitation clause. The following factors must be considered in determining whether the limitation of the registrants’ rights is justifiable as provided for in terms of Section 36 of the Bill of Rights:

- **Firstly, the nature of the right:** The proposed provision is likely to affect three fundamental rights; privacy, dignity and equality. In *Bernstein and*

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<sup>6</sup> Clause 8(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill.

*Others v Bester NO and Others*,<sup>7</sup> the Constitutional Court explained that the right to privacy consists essentially of the right to lead one's life with minimum interference. It also concerns "...honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts..." The provision that the personal details of persons listed on the NRSO must be made publicly available inevitably violates the right to privacy as it reveals one's criminal past and will likely lead to community ostracism.<sup>8</sup> Furthermore, in the *Khumalo* case,<sup>9</sup> the link between privacy and dignity was explained as follows: "No sharp lines then can be drawn between reputation, dignitas and privacy in giving effect to the value of human dignity in our Constitution."<sup>10</sup> In addition, clause 7 (c) also violates offenders' right to equal protection of the law as it distinguishes between offenders convicted for sexual offences against children and mentally disabled persons, and offenders, who may have committed similar offences against adult women.

- **Secondly, the importance and purpose of the limitation:** According to clause 8 of the Amendment Bill, the purpose of the register is to ensure the protection of vulnerable persons from sexual offenders. Therefore, public access of the register is imperative for the prevention of contact between potential victims and sexual offenders. However, the objectives of making details of the NRSO publicly available may come at too great an expense to the implicated individuals.
- **Thirdly, the nature and extent of the limitation:** The limitation of the right to privacy by the Amendment Bill will effectively be an additional punishment of offenders who have already served their sentence. Furthermore, public criminal records will have a negative impact on the re-integration of offenders into society. Not only will their prospects of employment be limited, even in cases where they don't have to work with

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<sup>7</sup> *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 par 73.

<sup>8</sup> Mollema "The Viability and Constitutionality of the South African National Register for Sex Offenders: A Comparative Study" (2015) *PER/PELJ* 2711.

<sup>9</sup> *Khumalo and others v Holomisa* 2002 (5) SA 401.

<sup>10</sup> *Ibid* at par 27.

members of vulnerable groups, but their safety may be threatened by possible reprisal action by the community.<sup>11</sup>

- **Fourthly, the relation between the limitation and its purpose:** Evidence from states that have taken the measure of publicising their sexual offence registers indicate that this does not prevent the commission of sexual offences.<sup>12</sup> Although policies of this kind are popular, they are not efficient, effective or equitable. In South Africa, where only a small fraction of reported sexual offence cases are likely to result in a conviction, public access to the NRSO is likely to create a false sense of security amongst citizens: the South African Law Reform Commission warned of “a real threat that communities might take the law in their own hands and cleanse neighbourhoods from offenders, even on the slightest of rumours.”<sup>13</sup>
- **Finally, less restrictive means to achieve the purpose:** Although there are many high-risk sexual offenders that need to be closely and consistently monitored by law enforcement, there are less intrusive measures that can be taken to control sex offenders and achieve public safety. For instance, South Africa could follow the American system of risk assessment screening for sexual offenders prior to their being released from prison, where the risk classification also sets the parameters for the removal of one's name from the register.<sup>14</sup> It is our submission that any measures taken by the State to protect vulnerable groups must be based on empirical evidence while ensuring that any limitation of rights is justifiable. In light of these considerations, the public access of the NRSO will unjustifiably limit registrants' rights to equality, dignity, and privacy, as this proposed amendment does not achieve its intended purpose. Furthermore, the nature and extent of the limitation is not reasonable and justifiable in an open and democratic society based on the values of human dignity, freedom and equality.

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<sup>11</sup> Mollema (n 8 above) at 2709.

<sup>12</sup> Ibid at 2729.

<sup>13</sup> South African Law Reform Commission, Project 107, “Sexual Offences: Process and Procedure”, 2002, at 76-77, retrievable at: <<https://www.justice.gov.za/salrc/dpapers/dp102-execsum.pdf>> (accessed on 9 October 2020).

<sup>14</sup> Mollema (n 8 above) at 2728.

1.2.2. SAIFAC therefore does not support the publicising of the NRSO for the sole purpose of blaming and shaming sexual offenders. While we acknowledge that public access may encourage vigilantism, this measure has no justification, no rehabilitative effect, its deterrent value is controversial, and will most likely give citizens a false sense of security. We submit that the Amendment Bill should make proposals that will address administrative challenges faced in the implementation and maintenance of the NRSO in its current form. Common challenges include missing records and insufficient information to enable law enforcement and the public to identify sex offenders. Legislative steps need to be taken to ensure the effective maintenance and monitoring of the NRSO and compliance of offenders for the updating of any amendments.

## **2. DOMESTIC VIOLENCE AMENDMENT BILL [B20 – 2020]**

### **2.1. *List of Definitions***

2.1.1. SAIFAC welcomes the additional and amended definitions in the Domestic Violence Amendment Bill. We especially note the significance of new definitions such as “controlling behaviour”, “coercive behaviour”, “disability”, “elder abuse”, “harm”, “sexual harassment”, and “spiritual abuse”.<sup>15</sup> The inclusion hereof is a recognition thereof that, in the scope of domestic violence, these are common and central features, and it will undoubtedly aid in the interpretation of what acts can be defined as “domestic violence.”

2.1.2. However, we submit that the removal of “stalking” from the list of definitions<sup>16</sup> forces victims to seek redress from the Protection from Harassment Act 17 of 2001. This definition should be re-inserted into the Domestic Violence Act and recognised as a form of domestic violence. In recent years, stalking has often been placed within the realm of violence against women. Studies show that a former violent relationship increases the risk of stalking and a prior romantic involvement has an influence on the seriousness and duration of the stalking.<sup>17</sup> Therefore, it seems irrational to remove this from the Domestic Violence Act.

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<sup>15</sup> Clause 2 of the Domestic Violence Amendment Bill [B20-2020].

<sup>16</sup> Ibid Clause 2(x).

<sup>17</sup> Van der Aa “Stalking as a form of (Domestic) Violence against Women” (2012) *Rassegna Italiana di Criminologia* 175.

## **2.2. Public Reporting Duty**

2.2.1. We also welcome the public duty to report any knowledge or suspicion of domestic violence. However, it is our submission that “women” should be added to the group of vulnerable persons identified in clause 2B(1)(a), as this would complement clause 5(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill. Although clause 2B(1)(b) provides that persons who are aware or suspicious of domestic violence committed against an **adult** have a duty to report this, we argue that there is a need to have a gender-specific provision that creates the duty to report domestic violence against women as a vulnerable group. It should be noted that we are not advocating for the use of gender-specific language throughout domestic violence legislation. It is our submission that the Bill must combine gender-neutral and gender-specific provisions to reflect the specific experiences and needs of female complainants, while allowing the prosecution of violence against men and boys.

## **2.3. Duties of the South African Police Service**

2.3.1. In light of systemic challenges in the South African Police Service (SAPS), SAIFAC welcomes the special duties imposed on members of the SAPS to assist complainants. The chronic failure by members of the SAPS to fulfil their obligations in terms of the DVA has been a major challenge since its enactment. However, this is not a uniquely South Africa problem: there is a global belief that the police should not interfere or get involved in household disputes. The rationale behind this relates to law enforcement as the primary function of the police – and law can only be enforced when someone lodges a criminal complaint with the police. Once they get involved in household disputes, the police are blamed for interfering in “private” matters. In most instances, police officials also hold the belief that it is not their duty to interfere in such private affairs. Unfortunately, the police are the first point of contact for many survivors of domestic violence. Victims often approach the police in distress, urgently seeking assistance and protection from harm. More often than not, the quality of service that they receive leaves much to be desired.

2.3.2. The DVA, in its current form, contains accountability mechanisms to ensure that members of the SAPS who fail to adhere to their obligations in terms of the Act

will face disciplinary action.<sup>18</sup> However, research indicates that the National Commissioner rarely tables reports before Parliament as required by the DVA.<sup>19</sup> Furthermore, disciplinary action is seldom taken against errant police officers.<sup>20</sup> We are concerned that the Amendment Bill does not adequately address this challenge as it contains nearly identical provisions for the accountability of the SAPS.<sup>21</sup> The current accountability mechanisms in the DVA have proved to be woefully inadequate and the only change proposed by the Amendment Bill is the substitution of the Police Services' Independent Complaints Directorate for Civilian Secretariat.<sup>22</sup>

2.3.3. SAIFAC recommends that an additional mechanism be established for holding the SAPS and the National Commissioner of Police accountable for the performance of their duties in terms of the DVA. This could, amongst other things, include the establishment of an oversight role for the Commission on Gender Equality sitting jointly with a parliamentary committee.

### **3. CRIMINAL AND RELATED MATTERS AMENDMENT BILL [B17 – 2020]**

#### **3.1. *The Use of Intermediaries in Non-criminal Proceedings***

3.1.1. The Amendment Bill seeks to insert a provision for an application to be made for the appointment of an intermediary, *in proceedings other than criminal proceedings* to enable a witness: “(a) under the biological or mental age of 18 years; (b) who suffers from a physical, psychological, mental or emotional condition; or (c) who is an older person as defined in section 1 of the Older Persons Act, 2006” to give evidence through such an intermediary if it appears to the court that the witness will be exposed to undue psychological, mental or emotional stress, trauma or suffering.<sup>23</sup>

3.1.2. SAIFAC is concerned that the discretion given to the courts will likely result in the inconsistent application of this provision. A similar challenge has been

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<sup>18</sup> Section 18(4)(b) of the Domestic Violence Act 116 of 1998.

<sup>19</sup> May and Mudarikwa “Shortfalls in the Implementation of the Domestic Violence Act” in Mudarikwa, May, and Martens (Editorial Board) *In Pursuit of Equality in South Africa: The Experiences of the Legal Resources Centre* (2017) 8, retrievable at: <[http://lrc.org.za/art\\_external/pdf/2017%20In%20Pursuit%20of%20Equality%20in%20South%20Africa.pdf](http://lrc.org.za/art_external/pdf/2017%20In%20Pursuit%20of%20Equality%20in%20South%20Africa.pdf)> (visited on 9 October 2020).

<sup>20</sup> *Ibid.*

<sup>21</sup> Clause 21 of the Criminal and Related Matters Amendment Bill.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid* clause 51A.

highlighted in the interpretation of section 170A of the Criminal Procedure Act (CPA), which gives the court a discretion to order the use of an intermediary when the witness is a child and if such a witness would be exposed to “undue mental stress or suffering” when giving testimony in *criminal proceedings*. This provision has been challenged before in the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development (Transvaal DPP)*, specifically that giving a discretion to judicial officers makes the appointment of the intermediary dependent upon how judicial officers exercise that discretion, and this adds to the inconsistency in the application of section 170A(1).<sup>24</sup>

3.1.3. We submit that when children testify at *any* proceedings, irrespective of whether it is criminal or not, the use of an intermediary should be compulsory unless exceptional circumstances demand otherwise. However, the Constitutional Court rejected this in *Transvaal DPP*. Although the Court held that section 170A(1) is not unconstitutional as the challenge arises from its application, not the provision itself, it is our submission that this provision needs to be amended to protect the best interests of the child in every proceeding where child witnesses are required to testify. The Court itself noted that

“[u]nless appropriately adapted to a child, the effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom that they refuse to say anything are not unknown.”<sup>25</sup>

3.1.4. Furthermore, in most instances, the child has to give evidence in the presence of the accused. In cases where the accused has previously threatened the child with physical harm, the child is faced with the choice to either testify and risk the accused carrying out his threat, or, to stay silent.<sup>26</sup> The Constitutional Court also highlighted that the questioning of a child requires a special skill which most prosecutors are not adequately trained for. The process of cross-examination is often a terrifying ordeal for child witnesses as it is done for the sole purpose of discrediting the witness. Should the cross-examination be

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<sup>24</sup> *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) at par 90 (*Transvaal DPP*).

<sup>25</sup> *Ibid* at par 101.

<sup>26</sup> *Ibid* at par 103.

conducted by a legal representative, “the child will be taken through his or her evidence in the most minute detail. The cross-examination may bring out facts that were so grotesque that the child could never have imagined being forced to recount them.”<sup>27</sup>

3.1.5. The Constitutional Court argued that the discretion of a court is necessary as the appointment of an intermediary should be decided on a case-by-case basis to cater to the specific needs of each child.<sup>28</sup> However, in light of all the factors discussed above, it is difficult to imagine a situation where a child witness would not require an intermediary during such proceedings. The courtroom is a bewildering atmosphere for most child witnesses, yet courts will only allow the use of intermediaries for minors *likely* to experience undue stress or suffering. Even where expert evidence is led to prove that testifying in the presence of the accused may aggravate the distressed state of a child witness or victim, the appointment of an intermediary is not guaranteed as it depends upon the discretion of the court.

3.1.6. We would further like to highlight *S v F*,<sup>29</sup> in which the state applied for the appointment of an intermediary. Expert evidence was submitted by a psychiatrist to the effect that the child in question was suffering from a partially unresolved post-traumatic stress disorder as a result of the rape. In the psychiatrist’s expert opinion, testifying in open court was likely to have an adverse effect on the child’s condition.<sup>30</sup> However, the court concluded that there was not much of a difference between the child testifying through an intermediary and testifying in an open court. The court accordingly declined to appoint an intermediary.

3.1.7. In order to ensure the protection of witnesses that are under the mental or biological age of 18 in all proceedings, we propose that section 170A(1) should be re-worded as follows:

“Subject to subsection (4), whenever criminal proceedings are pending before any court in which any witness under the biological or mental age of eighteen years is to testify, the court *shall* appoint a competent person as an intermediary for each witness under the biological age of eighteen years in order to enable such witness to give his

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<sup>27</sup> Ibid at par 105.

<sup>28</sup> Ibid at par 105.

<sup>29</sup> *S v F* 1999 (1) SACR 571 (C).

<sup>30</sup> Ibid at 584.

or her evidence through that intermediary as contemplated in this section, unless there are cogent reasons not to appoint such intermediary, in which event the court shall place such reasons on record before the commencement of the proceedings; and the court may appoint a competent person for a witness under the mental age of eighteen years in order to give his or her evidence through that intermediary.”

3.1.8. In respect of Clause 1(a) of the Criminal Matters Amendment Bill, we propose that it is re-worded as follows:

“A court *must*, on application by any party to proceedings in terms of Part II of this Act before the court, or of its own accord and subject to subsection (4), appoint a competent person as an intermediary in order to enable a witness under the mental or biological age of 18 to give his or her evidence through that intermediary as contemplated in this section, unless there are cogent reasons not to appoint such intermediary, in which event the court shall place such reasons on record before the commencement of the proceedings; and the court may appoint a competent person for a witness under the mental age of eighteen years in order to give his or her evidence through that intermediary.”

### **3.2. *The Amendment of Bail Conditions***

3.2.1. The explanatory Memorandum on the objects of the Criminal and Related Matters Amendment Bill (the Memorandum) provides that the primary aim of the Criminal and Related Matters Amendment Bill, 2020 (the Bill) is to “amend numerous Acts, which are administered by the Department of Justice and Constitutional Development and are intended to: (i) address gender-based violence and offences committed against vulnerable persons; and (ii) provide for additional procedures to reduce secondary victimisation of vulnerable persons in court proceedings.”<sup>31</sup>

3.2.2. To this end, clause 4(f) of the Amendment Bill places domestic violence on a similar hierarchical scale to Schedule 6 and 5 offences, which demand that the accused remains in custody until he or she is dealt with according to the law, unless the accused can show evidence that it would not be in the interests of justice to detain the him/her further. While there is a need to protect victims and survivors of domestic violence from their abusers, measures to tighten bail requirements must be consistent with the provisions of the Constitution. According to section 35(1)(f) of the Constitution, all accused persons have the

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<sup>31</sup> Clause 1 of the Memorandum on the objects of the Criminal and Related Matters Amendment Bill.

right “to be released from detention if the interests of justice permit, subject to reasonable conditions.”

- 3.2.3. In terms of the Amendment Bill, the interests of justice must be interpreted to include the safety of the person against whom the offence was committed.<sup>32</sup> A number of other factors that must be considered by the Court in a bail application are listed in clauses 4 and 5. These include any threat of violence that the accused may have made to the victim, and any resentment that the accused may harbour. The effect of the proposed amendment is that even where there is no likelihood that the accused will abscond or interfere with state witnesses if released on bail, the court may still deny bail if it is in the interests of justice to do so. The constitutionality of such a provision is questionable. It should be noted that the right to bail is based on the presumption of innocence. This principle is not reflected in the proposed amendment.
- 3.2.4. A similar provision, section 60(11)(a) of the CPA, which requires the accused to satisfy the court that his/her release is in the interests of justice with respect to Schedule 5 offences, was previously subject to a constitutional attack on the basis that it “imposes an onus which is so difficult to discharge that the right to release on bail is illusory.”<sup>33</sup> In dismissing the constitutional challenge, the Court held that an important qualification has been built into this section that the accused must be given a reasonable opportunity to establish the requirements of this section.<sup>34</sup>
- 3.2.5. Despite the existence of such qualification, we are concerned that it will be difficult for most accused persons to meet the requirements for their release. Considering the large scope of actions that constitute domestic violence, obtaining evidence that will satisfy the court is very challenging, especially in cases where no physical violence is involved.
- 3.2.6. While we welcome the mandatory inclusion of considering the victim’s safety during bail decisions, 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 needs to be drafted in a manner that clarifies that the

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<sup>32</sup> Clause 5(e) of the Criminal Matters Amendment Bill.

<sup>33</sup> *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), at par 80.

<sup>34</sup> *Ibid.*

views of victims of gender-based violence regarding their safety during bail proceedings must not be without qualification, specifically to safeguard the rights of the accused under such bail proceedings.

- 3.2.7. The deprivation of a person's liberty merely because he or she is *accused* of having committed a crime, and not found guilty of it yet, cannot possibly reduce the crime rate. There are other proposed measures that will ensure the protection of victims while accused persons are out in bail. For instance, a protection order could be issued against the accused following his or her release on bail if the offence was allegedly committed against a person in a domestic relationship.<sup>35</sup>

### **3.3. *Minimum Sentencing in Respect of the Offence of Rape***

- 3.3.1. Clause 15 of the Bill serves to amend Part I of Schedule 2 to the Criminal Law Amendment Act 105 of 1997, and further provides that the offence of rape is punishable by life imprisonment in cases whereby the victim is (i) an older person as defined in section 1 of the Older Persons Act, 2006; or (ii) is a physically disabled person with a disability who, due to his or her physical disability, is rendered particularly vulnerable; (iii) or is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

- 3.3.2. The inclusion of various categories of "persons" is a welcome development and the rationale of ensuring harsher sentences for offences committed against vulnerable persons is accepted provided it serves the retributive function of sentencing. The retributive theory of justice posits that where a perpetrator breaks the law, he/she must be punished accordingly for the offence perpetrated. Studies have shown that in rape cases particularly, the vulnerability of the victim is inextricably linked to the impunity with which the perpetrator commits the offence, as the latter takes advantage of the fact that his/her victim is devoid of any appreciable means of defence.<sup>36</sup>

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<sup>35</sup> Clause 4 (i) of the Criminal Matters Amendment Bill.

<sup>36</sup> Kennedy LW, Caplan JM, Piza EL and Buccine-Schraeder H "Vulnerability and exposure to crime: Applying risk terrain modelling to the study of assault in Chicago" in 2015 *Applied Spatial Analysis and Policy* at 1-6; and Block R and Skogan WG "The dynamics of violence between strangers: Victim assistance and outcomes in rape, robbery and assault" 1985 at 39-42, retrievable at: <<https://www.ncjrs.gov/pdffiles1/Digitization/102755NCJRS.pdf>> (accessed on 9 October 2020).

- 3.3.3. However, the purposes of criminal sentencing are manifold: the protection of society, deterrence of the offender and of others who might be tempted to offend, as well as retribution, reform and restitution.<sup>37</sup> These purposes of sentencing overlap and none of them can be considered in isolation from the others when deciding on what an appropriate sentence is in any given case. At best, each purpose could indicate which sentence would be the most appropriate, yet sometimes the purposes may point in different directions.
- 3.3.4. It is submitted that there is no empirical evidence suggesting that imprisonment for a longer period of time guarantees that offenders will be rehabilitated, nor does it solve the problem of sexual and gender-based violence, or make victims safer. Sentencing occurs after the perpetration of a crime and the imposition of harsher sentences does not necessarily protect would-be victims from sexual and gender-based violence. Imprisonment does not address or offer solutions to social problems such as substance abuse, domestic violence, child abuse and mental illness for example, all of which have been shown to have a strong correlation with the perpetration of sexual and gender based violence.
- 3.3.5. To this end, the Detention Justice Forum in its April 2020 submissions to the Department of Justice and Correctional Services on the Bill maintained that the implementation of lengthier sentences does not have a deterrent effect on crime, and that:
- “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.”<sup>38</sup>
- 3.3.6. It is submitted that the imposition of longer terms of imprisonment for rape is heavily influenced by the retributive purpose of sentencing, but ultimately fails to take into account its rehabilitative and restitutive functions which may well serve to address many of the contributing factors to sexual and gender-based violence. An adequate response to the scourge of sexual and gender-based

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<sup>37</sup> *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at 476).

<sup>38</sup> Detention Justice Forum “Submission to the Department of Justice and Correctional Services regarding the Criminal Matters Amendment Draft Bill, 2020” 24 April 2020, at page 5.

violence includes, but is not limited to: victim support and counselling, specialised perpetrator interventions including counselling, support and counselling for children and other family members.<sup>39</sup>

3.3.7. With regard to the imposition of minimum sentences for the offence of rape where the victims are either vulnerable persons as defined or persons with which the perpetrator has a domestic relationship with, it is submitted that this provision is inherently discriminatory as it offers no justification as to why rape committed against “non-vulnerable persons” outside the domestic relationship warrants a departure from the minimum sentencing provisions. If legislative intervention seeks to address sexual and gender-based violence in its entirety, such categorisation is nugatory as it should be inconsequential to the determination of whether a sentence is appropriate that the victim had the means or ability to defend himself/herself from the sexual offence so perpetrated. As such, it is recommended that minimum sentences should apply to all instances of rape regardless of the gender or physical, psychological, mental or emotional condition of the victim.

#### **4. CONCLUSION**

4.1. In conclusion, it is the submission of SAIFAC that the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, the Criminal and Related Matters Amendment Bill, and the Domestic Violence Amendment Bill should not be passed for the following reasons:

4.1.1. Firstly, the provision in the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill to publish information of persons who have been convicted of sexual offences may violate the registrants’ rights to equality, dignity and privacy as guaranteed in the Bill of Rights.

4.1.2. Secondly, we welcome the public duty to report any knowledge or suspicion of domestic violence in terms of the Domestic Violence Amendment Bill, but submit that “women” should be added to the group of vulnerable persons identified in clause 2B(1)(a), as this would complement clause 5(c) of the

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<sup>39</sup> Ibid at page 6.

Criminal Law (Sexual Offences and Related Matters) Amendment Act  
Amendment Bill.

- 4.1.3. Thirdly, the Criminal and Related Matters Amendment Bill proposes that courts will have the discretion to appoint an intermediary for child victims or witnesses in non-criminal proceedings. However, we submit that when children testify at *any* proceedings, irrespective of whether it is criminal or not, the use of an intermediary should be compulsory unless exceptional circumstances demand otherwise.
- 4.1.4. Finally, we submit that the proposal in terms of the Criminal and Related Matters Amendment Bill to impose stricter bail conditions and harsher minimum sentences will not serve the purpose of deterrence. Instead, they will likely violate human rights guaranteed in the Constitution, and we recommend that legislative amendments must give due regard to the improvement of reasonable access to bail, the promotion of alternative measures to imprisonment, social reintegration of offenders and the protection of the victim in particular, and society in general.