



African Policing Civilian Oversight Forum

31 March 2020

Department of Justice and Constitutional Development

By email: HDuPreez@justice.gov.za; Vletswalo@justice.gov.au

Dear Mr. Du Preez and Ms Letswalo,

Re: Criminal Matters Amendment Bill, 2020

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this written contribution to the Department of Justice (DoJ) on the draft Criminal Matters Amendment Bill ('the Bill'). At the outset, APCOF would like to commend the DoJ for developing this Bill which is, *inter alia*, aimed at combatting interpersonal violence in accordance with constitutional norms, the Domestic Violence Act 116 of 1998, regional and international human rights instruments, and other related resolutions and declarations.

In responding to the challenge of interpersonal violence in South Africa, legislative commitments must not only address the underlying causes of the problem, but also ensure that they are compliant with the constitutional human rights framework that underpins our democratic society. In its present form, the Bill raises a number of constitutional concerns, particularly with regard to the presumption of innocence and freedom from arbitrary arrest and detention.

APCOF has previously published research on the challenges regarding bail in South Africa, which is *attached* to this submission. While welcoming the proposed amendments to bail, APCOF cautions that the challenges inherent in the bail system in South Africa require consideration beyond the legislative amendments contained in the Bill. In this regard, APCOF reiterates the recommendations made in the attached study on the use of bail in South Africa, in particular, specific recommendations regarding:

- support to SAPS to reduce the number of premature arrests before a prima facie case is established through proper investigation to reduce the burden on the bail system;

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- improving consistency in the approach by prosecutors to alternative dispute resolution mechanisms, including informal mediation and diversion;
- community perceptions of high and violent crime prevalence in South Africa and the political/South African Police Service leadership response to these concerns creating a barrier to the use of police bail as a means of reducing the burden on the court system;
- lack of utilization of provisions in the CPA that provide for alternatives to bail;
- failure by courts to apply the second leg of the bail enquiry;
- high success rates of section 63A applications which confirm the inadequate use of, and under-reliance on, provisions in law providing alternatives to remand detention.

As regards the current amendment Bill, APCOF recommends amendments to the current sections 3 and 10, in terms set out in detail below.

Section 3: Reversal of the burden of proof

Section 3 of the Bill proposes the remand of persons accused of domestic violence in custody unless they can adduce evidence, to the satisfaction of the court, that it is in the interests of justice to release them on bail. This amounts to imposing of a burden of proof on the accused, rather than the state, which raises concerns regarding the constitutional protections of the accused.

In *S v Van Wyk 2005 (1) SACR 41 (SCA)* - at paragraph 6 – the court held that the function of courts in bail proceedings is to assess the *prima facie* strength of the state’s case against the bail applicant. For this reason, the imposition of burden of proof on bail applicants to lead evidence to the effect that it is in the interests of justice to permit their release on bail has the undesired effect of requiring bail applicants to prove that the state’s case against them is weak, to secure their release. This unjustifiably places heavy burden on the applicants to pre-empt the state’s case, which is particularly problematic as accused persons do not enjoy the right to access police docket for purposes of bail application. Additionally, section 60 (11B)(c) of the Criminal Procedure Act 51 of 1977 allows anything accused persons say in the course of bail proceedings to be admitted as evidence in their subsequent trial. This undermines the constitutional protections afforded to bail applicants, specifically

- The right to bail: Section 35(1)(f) of the constitution guarantees every arrested person the right to be released on bail, if the interests of justice permits. Legal requirements that place burden of proof on the accused to provide evidence that justify their release on bail in circumstances where anything they say can be used in their impending trial leave them in a position of disadvantage.
- The right to liberty: In *S v Dlamini and others (1999) ZACC* - at page 88, the Constitutional Court held that the granting of bail promotes not only the liberty interests of the accused, but also the interests of the public, by reducing the number of awaiting trial prisoners in our already overcrowded correctional facilities, and by reducing the number of families left without their breadwinners.

Recommendation: DoJ should revise section 3 to provide that the onus is on the state to prove why it is against the interests of justice to release the accused on bail.

Section 10: Extension of the applicability of mandatory minimum laws

Section 10 proposes to expand the list of offences for which a minimum sentence is prescribed. While APCOF acknowledges broader concerns regarding the high rates of violent crime in South Africa, there is no substantive, statistical evidence to indicate that the imposition of minimum sentence has a deterrent effect. Indeed, research in other jurisdictions has shown that imprisonment as a form of punishment is a costly and ineffective way of addressing the prevalence of violence. (Terblanche S & Mackenzie G Mandatory Sentence in South Africa: Lessons from Australia?) APCOF is also concerned that mandatory sentencing regimes may have serious implications for overcrowding in our correctional facilities, as highlighted by our Constitutional Court in *S v Dlamini* – cited above.

Section 10, while expanding the list of offences for which minimum sentence is applicable, also includes the crime of compelled rape in circumstances where the accused is convicted of the offence and evidence indicate that the victim was also raped by a co-perpetrator or accomplice, regardless of whether or not the co-perpetrator or accomplice has been convicted of or charged with or is standing trial. APCOF is concerned that this provision may undermine the constitutional safeguard to be presumed innocent until proven guilty. In its present formulation, this section authorises the classification of a crime as a minimum sentence offence partly on the basis of actions of a co-perpetrator or accomplice, whose culpability for the offence in question has not been established in a court of law.

Recommendation: DoJ should review this section by deleting the latter part which imputes culpability to co-perpetrators or accomplices before they have been accused, tried or convicted.

Again, APCOF commends DoJ for inviting public comment on this Bill, and is available to provide further written or oral submissions as requested. To discuss this submission further, please contact the undersigned.

Yours sincerely,



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