

## Submission

to the

## Minister of Police

on the

Firearms Control Amendment Bill [B – 2021]

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**c/o Mr Ntwana**

Per Email: [comments.fcabill@csp.gov.za](mailto:comments.fcabill@csp.gov.za)

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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: business and human rights; environmental justice; civil and political rights; environmental justice; land, home, 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 largely centers 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 [Prescription in Civil and Criminal Matters \(Certain Sexual Offences\) Amendment Bill](#) (April 2019); the [Cybercrimes Bill](#) (March 2019), and recently the [Domestic Violence Amendment Bill](#) (April 2020).

In light of this experience, we assert that CALs has sufficient expertise and institutional knowledge to comment on the above Bill.

## 2. Reflections on the Bill

- 2.1. CALS commends the Minister in pursuing amendment of legislation around firearms and firearm control in the country. This is especially important where the Bill explicitly acknowledges that firearms are ‘one of the main contributors to the cause of death’ in the country.<sup>1</sup>
- 2.2. CALS’ interest in the Bill is primarily based on the use of firearms in the commission of offences related to gender-based violence in the country. This is where Smythe found that a quarter of applications for domestic violence protection orders explicitly mentioned the use of a weapon.<sup>2</sup> Furthermore, as found by Abrahams et al, firearms play a significant role in violence against women in South Africa, most notably in the killing of intimate partners.<sup>3</sup>
- 2.3. CALS’ submissions will focus primarily on amendments that have implications on the commission of offences related to gender-based violence. However, our silence on any other part of the Bill does not necessarily imply support or opposition thereto.
- 2.4. **Theme: Gender-based violence**
- 2.5. **Section 10(e)**
- 2.6. **Discretion of the Registrar**
- 2.7. The proposed inclusion suggested by section 10(e) deals with ‘first-time’ competency certificates. The suggested addition would permit the Registrar to suspend the processing of an application for competency pending the finalisation of an interim protection order (in terms of the Domestic Violence

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<sup>1</sup> Bill, page 98, para 1.1.

<sup>2</sup> D, Smythe, ‘Missed Opportunities – Confiscation of Weapons in Domestic Violence Cases’, *SA Crime Quarterly*, 2004.

<sup>3</sup> N, Abrahams, et al, ‘Guns and gender-based violence in South Africa: Original Articles’, *SA Medical Journal*, 2010.

Act 116 of 1998 ('DVA') or/and the Protection from Harassment Act 17 of 2011).

- 2.8. The first issue with this section is that it leaves the decision around the suspension of the application to the discretion of the Registrar. The problem around this suggested provision is that does not acknowledge the continuum of domestic violence in the home and that gender-based violence has been described as 'South Africa's secondary pandemic' in so far as the extremely high numbers of commission and high-risk levels for women and other vulnerable groups.<sup>4</sup>
- 2.9. It is well documented in studies that domestic violence occurs as a continuum of violence. This, for example, according to Buzawa et al, is where domestic violence includes acts that cause trauma to individuals such as 'stalking, isolation, and control tactics' which 'harm a victim's rights and liberties as well as their sense of physical or sexual autonomy and safety'.<sup>5</sup> The South African Domestic Violence Act acknowledges that domestic violence can take the form of various *degrees* of violence such as economic abuse, psychological and emotional abuse, controlling behaviour, physical abuse, and sexual abuse.<sup>6</sup>
- 2.10. Importantly, there is also the acknowledgment that abuse can escalate over time. This is where domestic abuse may have begun as verbal and psychological and escalates to physical and/or sexual abuse. The ultimate culmination of domestic abuse is intimate partner femicide.<sup>7</sup> This is where the abuse has escalated to such a degree that the woman is murdered/killed by her intimate partner.<sup>8</sup>

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<sup>4</sup> K, Modise, 'SA's Second Pandemic of 2020: Gender-based Violence', *EWN*, 29 December 2020.

<sup>5</sup> E, Buzawa, et al, *Responding to Domestic Violence*, (5<sup>th</sup> ed), 35.

<sup>6</sup> DVA, section 1.

<sup>7</sup> S, Swemmer, 'Femicide and the Continuum of Gender Based Violence' in *Gender Equality*, W, Filho, et al.

<sup>8</sup> As above.

- 2.11. South Africa has one of the highest rates of intimate partner femicide globally.<sup>9</sup> This is highlighted by the fact that a South African Medical Research Council report in 1999 found that a woman was murdered/killed by her intimate partner every 6 hours in South Africa.<sup>10</sup> This rate improved slightly by 2009 where it was found that women died at the hands of their intimate partners every 8 hours in the country.<sup>11</sup>
- 2.12. In considering how violence can occur on a continuum and escalate in severity, it is extremely problematic for the Bill to suggest that the Registrar may suspend the application process, based on their discretion and the consideration of 'particular relief sought'.<sup>12</sup> With domestic violence always having the potential to be life-threatening when it escalates, it is naïve to think that the Registrar can adequately determine from the interim protection order whether the individual woman (and often her children) are at risk. With the high rates of domestic violence in the country and the scourge of intimate partner femicide, it is entirely justifiable that the Registrar must suspend processing the application when an interim protection order (or harassment order) has been applied for. We cannot risk the lives and well-being of victims of violence on a mere discretion in the face of evidence of the nature and consequences of violence in the home.
- 2.13. **The applicant must disclose to the Registrar**
- 2.14. Section 10(e) of the Bill states that if an interim protection order is pending against the applicant, they (the applicant) must disclose this to the Registrar.
- 2.15. Creating a legal duty (linked to a criminal sanction) on the applicant to disclose any domestic violence or harassment interim orders pending against them can only have been retrospective in consequence. By this, we mean that failing to

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<sup>9</sup> As above.

<sup>10</sup> N, Abrahams, et al, 'Every eight hours: intimate femicide in South Africa 10 years later' *South African Medical Research Council Research Brief*, (2012).

<sup>11</sup> As above.

<sup>12</sup> Bill, page 2, section 10(e).

disclose this fact and potentially proceeding to violate an intimate partner with the use of a firearm is then dealt with in criminal law and can potentially result in criminal sanction. This, however, is not preventative and will not protect victims from potential violence.

- 2.16. Instead, and in an undisputable age of digitalisation, there should be the establishment of a register of interim orders and final orders related to both the Domestic Violence Act and the Protection from Harassment Act. This should be able to be accessed easily by both the South African Police and the National Prosecuting Authority and the Judiciary.
- 2.17. By creating this system, a Registrar would not need to rely on the disclosure of the applicant and could simply access this data themselves.
- 2.18. This prevents the situation where the applicant has failed to disclose and proceeds to violate the victim with a firearm. It is preferable to be proactive against domestic violence than to wait for an individual to commit an offence related to the Bill and/or the Domestic Violence Act and/or the Protection from Harassment Act and/or the common law.
- 2.19. **Inclusion of reference to orders under the cyber crimes**
- 2.20. It is important to recognise the interim application procedures for protection orders in terms of both the Domestic Violence Act and the Protection of Harassment Act, however, this Bill is silent on the application of the Cybercrimes Act 19 of 2020. This is where section 20 of the Act also provides for application for a protection order where offences set out in sections 14 - 16 of the Act have been reported to the police.
- 2.21. Section 14 of the Cybercrimes Act deals with the transmission of a data message to incite damage to property or violence, section 15 deals with a data message with a threat to damage property or to commit violence and section 16 is the disclosure of data with an intimate image.

- 2.22. These provisions are closely linked to acts associated with domestic violence and gender-based violence. They can also form part of a continuum of harm, where the seriousness of the degree of violence against the victim can escalate over time.
- 2.23. Consequently, the Bill must be reworked to include a suspension of the consideration of a new application where there has been a section 20 application in terms of the Cybercrimes Act.
- 2.24. **Section 60**
- 2.25. **'May' versus 'must'**
- 2.26. As set out above under the discretion of the Registrar, the Bill should require that the Registrar must (not may) suspend licences where they have become aware that the licence holder has been charged with a violence offence or been served with an interim protection order in terms of the Domestic Violence Act or the Protection from Harassment Act.
- 2.27. With the escalation of violence, already discussed above, being a risk factor for victims of domestic violence and gender-based violence the discretion to suspend this licence is poses too much of a risk. This is where an individual Registrar, will be left with the discretion to suspend a licence without having any knowledge of the risks associated with such a decision. One must again, err on the side of caution, and require that the Registrar must suspend the licence.
- 2.28. **The issue with the requirement that suspension be based on an interim order whose nature involves "an element of violence"**
- 2.29. As stated above, domestic violence occurs on a continuum and can include emotional, psychological, economic, and physical abuse in the same period of time. This is already explicitly acknowledged in the Domestic Violence Act, as various forms of violence. Thus, when the Bill permits the Registrar to



determine if an interim order has an element of violence, it would be ludicrous for the Registrar to find a situation where this is not present, as the court would have determined if the incident(s) 'qualified' as acts of domestic violence or violence (in the instance of the Protection from Harassment Act) for the order to have been made.

2.30. All licences must be suspended where there is an interim order in terms of the Domestic Violence Act and/or the Protection from Harassment Act as an act of violence has already been determined and is the threshold for which the order is issued.

2.31. **Inclusion of the Cybercrimes Act**

2.32. As set out above, the Bill must acknowledge the protection order provision contained in the Cybercrimes Act and include this in decisions around suspending licenses.

2.33. **Theme: Self-defence**

2.34. **Sections 15**

2.35. **Gun use and violence in South Africa**

2.36. Section 15 of the Bill aims to repeal sections 13 and 14 of the Firearms Control Act, No 60 of 2000 ('the Act'). These sections deal with the licence to possess a firearm for self-defence and the licence to possess restricted firearms for self-defence.<sup>13</sup>

2.37. South Africa has a high prevalence of violence and violent crime. The 2019/2020 SAPS crime statistics show that sexual offences, which are often committed with a firearm, have increased for the third consecutive year, with

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<sup>13</sup> Firearms Control Act, 60 of 2000 at section 13 and section 14.

a total of 53 293 sexual offences committed.<sup>14</sup> There were 21 325 murders, 53 293 attempted murders, and 166 720 assaults with the intent to inflict grievous bodily harm during the same period.

- 2.38. A research report carried out by the University of Washington's, Institute for Health Metrics and Evaluation, released on 28 August 2018, shows the number of recorded fatalities attributed to firearms across the world.<sup>15</sup> The data on South Africa shows that the country ranks number 12 in the global statistics for firearm deaths with a total of 3 740 deaths, or 6.9 deaths per 100 000 people.<sup>16</sup>
- 2.39. A 2018 Crime against Women in South Africa report compiled by STATS SA reported that 250 out of every 100 000 women were victims of sexual offences.<sup>17</sup> Furthermore, up to 6 women, a day are killed at the hands of their intimate partners.<sup>18</sup> In the report by the Gender, Health and Justice Research Unit based at the University of Cape Town, of the people that were interviewed, sexual abuse by a known adult (just one category of sexual offences) with a firearm, was used in 16.7% of sexual assaults.<sup>19</sup> This is just a small portion of sexual assaults in the country and already shows the dangers of being attacked with a weapon in South Africa.
- 2.40. Section 15 of the Bill would ensure that it would be increasingly more difficult to be able to legally purchase a firearm in South Africa. Section 13 and 14 of the Act creates a 'catch-all' policy where anybody can purchase a firearm for no other reason except self-defence or where they 'cannot reasonably satisfy that need by means other than the possession of a firearm'.<sup>20</sup> Other than illegal

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<sup>14</sup> South African Police Service, *Crime Stats Presentation 2019/2020*. Available at <https://www.saps.gov.za/services/crimestats.php>

<sup>15</sup> The Global Burden of Disease 2016 Injury Collaborators, 'Global Mortality From Firearms, 1990-2016' *JAMA* (2018).

<sup>16</sup> As above.

<sup>17</sup> Stats SA, *Crime against women in South Africa*, (2018) at 8. Available at <https://www.statssa.gov.za/publications/Report-03-40-05/Report-03-40-05June2018.pdf>.

<sup>18</sup> L, Artz, 'The Prevalence of Violence against Women and Children: What the data tells us about law and policy reform' *Gender, Health, and Justice Research Unit, University of Cape Town* (2018) [https://www.westerncape.gov.za/assets/day\\_2\\_session\\_2\\_gbv\\_lillian\\_artz.pdf](https://www.westerncape.gov.za/assets/day_2_session_2_gbv_lillian_artz.pdf), at 4

<sup>19</sup> As above, at 11.

<sup>20</sup> Firearms Control Act, No 60 of 2000, s13(2).

obtaining a firearm, one can obtain a firearm without training and with no controls in place to prevent its use for violent crimes. This will reduce access to firearms and thus reduce firearm deaths.

- 2.41. The argument in favour of firearms used for self-defence is often that vulnerable groups, particularly women, can use them to protect themselves. However, to date, there has been no comprehensive, peer-reviewed study on the relationship between firearm ownership and crime deterrence done in South Africa. Therefore, the 'only publicly available evidence on the potential deterrent effects of firearm ownership that we have to work with is media reports'.<sup>21</sup> Although there have been several anecdotal stories where a firearm has deterred crime there, have been far more where a firearm has significantly increased the risk of violence.
- 2.41. Firearms are often misused and misfired and lead to the death of a family member, employee, or innocent victim. In June 2018, a man shot his son who knocked on his car window, mistaking him for a hijacker.<sup>22</sup> With the high levels of crime in South Africa, it is common for there to be high levels of fear and anxiety. This may, unfortunately, form part of firearm-related accidents and deaths in the country.
- 2.42. In relation to gender-based violence, infamously, Oscar Pistorius shot and killed his girlfriend Reeva Steenkamp on Valentine's Day in 2013. He too claimed that he believed there was an intruder in his bedroom.<sup>23</sup> He shot indiscriminately through the bathroom door and killed his girlfriend who was inside the room. He claimed he had the firearm for self-defence and was at a higher risk due to his disability, but he was also previously known to be violent towards women. Yet again, even if it was an intruder in that room, that is not a reasonable action to a perceived intruder. People, especially men, can and

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<sup>21</sup> G, Lamb, 'Licensed to kill: Does owning a firearm in South Africa make you more or less safe? Well it depends' *Daily Maverick* (2021). Available at <https://www.dailymaverick.co.za/article/2021-06-23-licensed-to-kill-does-owning-a-firearm-in-south-africa-make-you-more-or-less-safe-well-it-depends/>

<sup>22</sup> N, Seleka, 'Father who accidentally shot his son, gets suspended sentence', *News24*, (2019). Available at <https://www.news24.com/news24/southafrica/news/father-who-accidentally-shot-killed-son-gets-10-years-20190604>

<sup>23</sup> *S v Pistorius* [2014] ZAGPPHC 793.

will often use the defence of self-defence in order to hide behind while committing violent crimes, especially against their partners and women. SAPS, while releasing their annual crime statistics, consistently emphasise that when firearm-related killings/murders are committed, this predominantly occurs in the middle of an argument or fight.<sup>24</sup>

#### 2.43. Sections 7, 10, 23

#### 2.44. Age and firearm possession

2.45. South Africa has a crime problem. Advocacy group, Gun Free SA, states that the country's 1.4% increase in murder rates is largely attributed to firearm violence. Police Minister Bheki Cele presented the annual crime statistics on Friday, reflecting crimes committed from April 2019 to March 2020. Over 21,000 people were killed between that period. That equates to 303 more murders than the previous period. Firearms have again topped the list of the most common weapons used to commit murders and attempted murders in the country.

2.46. CALS supports the call to increase the age of possession to 25, as requested by organisations such as Gun Free SA. Strengthening firearm legislation may decrease the number of weapons and ammunition in circulation and contribute to a spike in firearm violence. There is a need to reduce the number of firearms used and sold in South Africa.

2.47. In comparison, in Brazil, a person must be 25 years or older before being legally able to register for a firearm license to own a firearm. In his PhD thesis on the causes and consequences of crime in Brazil, the economist Daniel Ricardo de Castro Cerqueira, argued that the effect of the disarmament law was particularly noticeable in the state of Sao Paulo because restrictions and age limit age 25 were implemented effectively and combined with other measures such as addressing unemployment, poverty and the lack of access to education also play

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<sup>24</sup> See n21 above.

a role, as well as limited investment in public safety and in investigating violent crime. Reducing access to firearms reduces firearm violence, saving lives, including the lives of women and children, to stricter firearm control.<sup>25</sup>

2.48. Consequently, the age limits set out in terms of sections 7 and 10 of the Bill should read:

- A person at the age of 25 may only be issued with a firearm competency certificate, licence, permit, or authorisation if there are compelling reasons; deletes being a private collector of firearms as a compelling reason.
- Allows a person who is 25 years of age and the holder of a valid firearms licence for at least three years to let a person aged 21 years and older use that firearm while under their immediate supervision.

#### 2.49. **Theme: Gun-free zones**

#### 2.50. **Section 140**

#### 2.51. **The implementation of Gun-free zones**

2.52. Section 140 of the Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

'The Minister may, after consultation with the National Commissioner and the Secretary for [Safety and Security] the Police Service appointed in terms of the Civilian Secretariat for Police Service Act, 2011 (Act No. 2 of 2011), by notice in the Gazette, declare any premises or categories of premises to be firearm-free zones, if it is—'.

2.53. Across the world, Gun Free Zones ('GFZ') is used as a tool to reduce armed violence and promote public safety in communities. When there are no firearms

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<sup>25</sup> D, Cerqueira, 'Causas e conseqüências do crime Brasil', (Phd), (2014).

in a space, it becomes safer and more secure for everyone in it. The advantages of GFZ is that they can be easily implemented, as little technical knowledge is required. For example, they deliver impact in a shorter period compared to most firearms control policies; they address issues of social norms related to firearms and demand for them, which are rarely addressed by other firearms control initiatives; they also serve as a vehicle to mobilise communities to participate in a wider debate about firearm control and violence prevention policy; and can promote dialogue among national and local authorities, police and communities on firearm violence and safety issues.<sup>26</sup>

- 2.54. What limits the effectiveness of GFZ is the unlikely to end firearm violence, without supplementary measures to control small arms supply and improve community security. GFZ is unlikely to achieve the desired results if the zone's gun-free status is not well-communicated to or understood by the public; may not deter all individuals from carrying firearms into GFZs, and can be undermined if violations are not adequately dealt with.<sup>27</sup>
- 2.55. It is, therefore, prudent that the legislators factor in the above when drafting this section. An added responsibility on the Minister and various counterparts must be empowering and supporting communities with GFZ drives and ensuring that they undertake to promote awareness and firearm violence educational workshops. It should not be left only to communities and the government must ensure that the implementation of firearms safety is followed up on by providing people with alternative means of securing their safety.

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<sup>26</sup> A, Kirsten, 'Gun Free Zones: Making our communities safer', *Safer Spaces* (2017). Available at <https://www.saferspaces.org.za/blog/entry/gun-free-zones-making-our-communities-safer>.

<sup>27</sup> As above.