

An assessment of relevant national laws, policies and practices used to apply non-custodial measures,

with a focus on
women in conflict with the law



An assessment of relevant national laws, policies and practices used to apply non-custodial measures,

with a focus on
women in conflict with the law

A stocktaking exercise of relevant national laws, policies, and practices in South Africa, aiming to identify legal, policy, and practical gaps and obstacles for using alternatives to imprisonment with a specific focus on women arrested or detained for drug offences.

UNODC Regional Office for Southern Africa (ROSAF)

February 2021

Validated at a Webinar on 8th March 2021 attended by 70 participants: Keynote Speaker for the event was the Minister of Justice and Correctional Services, with Key Panellists from key governmental and civil society sectors.

TABLE OF CONTENTS

Acknowledgements.....	4
Executive Summary.....	5
1 Background.....	7
Guiding Principles	8
2 Methodology.....	10
- Desk Research: Legal Stocktaking Exercise.....	10
- Qualitative Multi-stakeholder Consultations	11
- Triangulation and Generation of Recommendations	11
3 Triangulation of Findings.....	11
- Women in conflict with the law in South Africa	12
- The nexus of gender, drugs and crime in South Africa	15
- A case of criminalising poverty? Criminalisation of women who use drugs and those who engage in sex work	15
- Arrest and pre-trial detention: Gender neutral systems and disproportionate law enforcement rights abuses against women	16
- Approaches to judicial decision-making - A question of gendered lens?	20
- Women as victims of trafficking and defendants of drug and sex work related offences	23
- Non-custodial sentencing in general.....	26
- Identified gaps in coverage and institutional capacity to implement non-custodial sentences	28
- Application of alternative measures regarding drug offences, and drug treatment and rehabilitation.....	30
- Custodial sentences and the community reinsertion of women	33
- COVID-19	36
4 Conclusions and Recommendations	37
- Moving towards proportionate and non-discriminatory criminal justice policies and a health centred response to drug use and drug use disorders.....	38
- Holistic and rights based approaches to women who use drugs, and/or those exploited in drug related crime.....	38
- Rights based approach to treatment of pre-trial detainees and adoption of specific sentencing guidelines to promote non-custodial sentences	40
- Rights based approach to treatment of convicted offenders	40
- Capacity building and Training of the CJS stakeholders.....	41
- Rehabilitation and reintegration.....	41
- Monitoring and evidence based policy	42
Annexes	
I Table of Participants	43
II Case Law	44
III Data Collection Instruments	44
IV Webinar Invitation	46

Acknowledgements

This report was written for the United Nations Office on Drugs and Crime (UNODC) by Dr Marie Claire Van Hout, consultant in the areas of drugs and crime, gender-based violence, prison health and HIV. Contributing throughout the assessment were Dzie Chimbga, Jakkie Wessels in providing an expert legal review, and Pelmos Mashabala for responding to requests for specific information and data.

UNODC wishes to equally acknowledge the support provided by the following Experts: Mike Batley, Justine Gericke, Sasha Gear, Unathi Mahlati, Sanja Bornman, Clare Ballard, Angela McBride, Lukas Muntingh, Pritima Osman, Stephan Terblanche, Siza Mogangoe, Glory Coetzee, Mpho Kgabi, Wilna Lambley, Veronica Gauld, Thembi Msane, Clara Monnokgotla, Livhuwani Nemuthenga, Lungile Ngwenya, Emmison Muleya, Pierre Smith, Tania Buitendag, Refilwe Matlemela, Thokozani Mathonsi, Vuyo, Noncembu, Refilwe Mathews, Cantalle Stevens, Bronwyn Pithey, Caroline Peters and Nomzamo Gcwensa.

The following UNODC staff contributed to the development of this report: Sven Pfeiffer, Signe Rotberga, Linda Naidoo, Anja Busse

UNODC gratefully acknowledges the funding provided by the Government of Sweden for the assessment of relevant national laws, policies and practices used to apply non-custodial measures, with a focus on women detained for drug-related offences.

Executive Summary

Background

As 2020 marks the 10th anniversary of the Bangkok Rules, global dialogues on gender-sensitive responses to the distinctive needs of women prisoners continue to emphasize the need to give priority to implementing non-custodial measures for women in contact with the law. The international drug control conventions expressly allow the provision of measures such as treatment and education as alternatives to conviction or punishment for personal drug consumption offences and all other relevant offences in “appropriate cases of a minor nature”. As the custodian of the Bangkok Rules, UNODC is supporting countries in their implementation. This assistance ranges from comprehensive assessments of the situation of women in contact with the criminal justice system, the promotion of gender-sensitive legal aid services, to the improvement of health, safety and security of women prisoners, training of prison staff and support for prison-based rehabilitation for women.

The recently published UNODC Toolkit on Gender-Responsive Non-Custodial Measures provides an overview of international & regional standards and recommends that policymakers incorporate provisions of the Bangkok Rules and Tokyo Rules into domestic law & practice. The Toolkit has been designed to provide a basis for guidance on applying non-custodial measures for women in conflict with the law as well as gender-sensitive application of criminal laws, policies and procedures. It is aimed at judges and prosecutors as well as other criminal justice professionals working with women in contact with the criminal justice system, such as defence lawyers, probation officers, and civil society organizations. It is a useful toolkit for policymakers when considering how best to implement non-custodial measures, reduce imprisonment, and can enable the criminal legal system to recognize and address existing gender norms, roles and inequalities. It can also be used to further provide insight for the media to better understand why non-custodial measures and a gender-responsive approach are important to consider and implement when responding to women in conflict with the law.

Methodology

The assignment sought to identify and address legal, policy, and practical gaps and obstacles for using non-custodial alternatives to pretrial detention and imprisonment in South Africa. The focus was specifically on women arrested or detained on drug-related offences. The objective was to gain a baseline understanding that will guide the planning of future UNODC technical assistance and included an investigation on the impact of the COVID-19 pandemic on the use of non-custodial measures for these women. A doctrinal approach was used to underpin a detailed stocktaking exercise of relevant national laws, policies and practices used to apply non-custodial measures in South Africa, with a detailed examination of relevant case law and forms of enquiry focused on application to women arrested or detained on drug-related charges (drug possession, drug use, and drug trafficking offences). This was supported by an in-depth socio-legal investigation and analysis to study the patterns within judicial decisions more broadly, and identify instances of discretion, key concepts and evidence to inform practice, capacity building, policymaking, and priorities for technical assistance and make practical recommendations for action with a specific focus on women arrested for drug offences. An evaluative framework was used to assess adequacy in terms of institutional capacity to effectively use alternatives to imprisonment and assess whether they are in line with relevant international standards and norms on alternatives to imprisonment, including the Tokyo Rules and the Bangkok Rules, and accountability and a - victim-centred approach spanning all relevant moral, gender, health, legal, policy and medical issues. It included a contextual focus on identifying the specific impact of such measures on women during State efforts to address the COVID-19 pandemic. A series of virtual - interview-based consultations (n=34) were conducted with a range of governmental and non-governmental multi-stakeholders (criminal justice, law enforcement, health, social development, gender, substance use, correctional) to obtain in-depth information on practical challenges and good practices in the implementation of non-custodial measures for women who use drugs or are affected by- drug-related criminal activity in South Africa.

¹ United Nations Office on Drugs and Crime (UNODC) (2020). Toolkit on Gender-Responsive Non-Custodial Measures. Available at: [Toolkit on Gender-Responsive Non-Custodial Measures \(unodc.org\)](https://www.unodc.org/unodc/en/toolkit-on-gender-responsive-non-custodial-measures.html)

Triangulation of the socio-legal analysis and qualitative data subsequently occurred and informed the generation of corresponding detailed action points for UNODC and recommendations for government action in terms of response and directives to amend and improve the situation in South Africa. The findings will be presented to a national online workshop in 2021 which brings together relevant stakeholders from the criminal justice system, health, social development, civil society and academic sectors, and where the objective will be to further discuss proposed recommendations, the potential for integration unto current legislation, identified best practices, gaps in application, challenges, and identified priority areas.

Conclusions

The South African Constitution has been shown to place a strong emphasis on a rights-based approach towards the liberty, dignity and security of an individual. South Africa has a legal and policy framework that favours -gender-neutral custodial and non-custodial regime across the various stages of the criminal justice delivery system. Some subsidiary laws contain provisions that give effect to the applicable rights enshrined in the Constitution and relevant international human rights instruments. The current legal, policy and administrative framework lack a focus that deliberately takes into account the particular,

often victim-centric pathways of women arrested and detained on drug offences into the South African criminal justice system. The present blanket gender-neutral approach whilst operating well can be further gender sensitised by greater attention to, and consideration of such gendered dimensions experienced by women as victims, by caregivers and women who use drugs, and cognisant of the intersectionality between GBV, drugs and women's responsibility as caregivers in the community. It is suggested that there is a need for the State to improve its legislative, judicial, law enforcement, policy and other measures to ensure that there is specific attention on such victim-centric pathways in women who find themselves in contact with the law regarding drug offences, not limited to those in South Africa, but also with a focus on South African women exploited and detained in foreign countries on drug offences. This approach is supported by various international human rights instruments and normative standards that South Africa subscribe to. It will require public and law enforcement sensitization resources policy and practice reform and a cohesive multi-agency response spanning all stakeholders across the social, health, criminal justice system, civil society and community continuum. Further attention is warranted to ensure -gender-appropriate community sentencing for women and -gender-sensitive -evidence-based drug treatment for women.

1. BACKGROUND

As 2020 marks the 10th anniversary of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*Bangkok Rules*)², global dialogues on -gender-sensitive responses to the distinctive needs of women prisoners continue to emphasize the need to give priority to implementing non-custodial measures for women in contact with the law. Since 2000, there has been a 30% increase in the number of pretrial and remand prisoners and a 53% increase in the number of women and girls in prison globally³. As of 2017, almost three million people are held in pretrial detention and remand prisons. In many countries, the proportion of women held in pretrial detention is equivalent to, or larger than that of convicted women prisoners. In some countries, the rate is growing faster than that of male pretrial detainees⁴. A higher proportion of women are also incarcerated due to drugs offences⁵.

Some of the key factors behind this increase include the punitive responses to women with substance use disorders or women involved in minor drug offences, as well as the targeting by criminal laws of behaviours related to sexuality. Prior victimization and gender-based violence (GBV) is another key issue for women in conflict with the law, which is often part of the pathways to, conditions and consequences of imprisonment of women. Most women in contact with the law have not committed violent offences and a large majority do not pose a risk to society⁶. Their imprisonment hampers their rehabilitation and social reintegration prospects, further entrenching the gender discrimination and vulnerability of women⁷.

The international drug control conventions expressly allow the provision of measures such as treatment and education as alternatives to conviction or punishment for personal drug consumption offences and all other relevant offences in “appropriate cases of a minor nature”. Examples of this approach are the diversion of minor cases from the criminal justice system through the exercise of police or prosecutorial discretion, and the use of non-custodial measures as an alternative to pretrial detention or imprisonment. For minor charges where the woman in contact with the law does not pose a serious or dangerous threat to safety and society, alternatives to prosecution such as case dismissal, depenalization/ decriminalization, gender-responsive diversion and treatment programmes, restorative justice and other related alternatives can be considered by police and prosecutors.



Noncustodial measures can reduce the social and economic cost of imprisonment, the prison population and rates of recidivism. Non-custodial measures should be considered at every stage of the criminal justice process. The community is better served by community-based interventions that address the underlying

cause of women encountering the law and pretrial detention should be used as a means of last resort. To address criminality, a focus on rehabilitation is needed and proportionate responses must include non-custodial measures (that promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society). Non-custodial measures additionally help strengthen local communities by redirecting investment from prisons.

Many non-custodial measures and sanctions however overlook the typical characteristics, roles and backgrounds of women. Gender-responsive approaches are needed to account for women's pathways to prison, their basic needs, their relationships, community ties, investing in community-based solutions tackle external needs like housing, childcare, and education as well as internal change through treatment, and therapy, producing the strongest possible outcomes for pro-social behaviour. Successful reintegration requires knowledge and understanding of women's pathways to prison (poverty, substance use disorders, victimization, mental health, caretaking, etc.) and post-release barriers (low self-esteem, gender-based stigmatization, employment, family breakdown, housing, etc.)

The United Nations Office on Drugs and Crime (UNODC), with its unique combination of mandates and expertise in this area, provides Member States with specialized assistance to implement the Bangkok Rules and other related standards and norms, including the UN Standard Minimum Rules for Non-custodial Measures (*Tokyo Rules*) and the UN Standard Minimum Rules for the Treatment of Prisoners (*Nelson Mandela Rules*)⁸. This contributes to achieving some of the most crucial targets of SDGs 5 (“Achieve gender equality and empower all women and girls”) and 16 (“peace, justice and strong institutions.”), and to ensure that women – particularly those facing intersectional discrimination – are not being left behind in justice reform efforts.

² UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, 6 October 2010, A/C.3/65/L.50

³ Penal Reform International (2020). *Global Prison Trends 2020*. Available at <https://cdn.penalreform.org/wp-content/uploads/2020/04/Global-Prison-Trends-2020-Penal-Reform-International.pdf>

⁴ Van den Bergh BJ, Gatherer A, Fraser A, Moller L. (2011) Imprisonment and women's health: concerns about gender sensitivity, human rights and public health. *Bull World Health Organ.* 89:689–94

⁵ Global Prison Trends (2020). *Special Focus Alternatives to Imprisonment*. 2020. Available at <https://cdn.penalreform.org/wp-content/uploads/2020/05/Global-Prison-Trends-2020-Penal-Reform-International-Second-Edition.pdf>

⁶ Ginn S (2013). Women prisoners. *BMJ*. 2013;346:e8318

⁷ United Nations Office on Drugs and Crime (UNODC) (2009). *Women in prisons*. Available at: https://www.unodc.org/documents/hiv-aids/Women_in_prisons.pdf

⁸ UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, (8 January 2016) A/RES/70/175.

International standards provide for provisions on alternatives to sentencing, rehabilitation & social reintegration measures to be taken. Examples include:

- **International Covenant on Civil and Political Rights:** *'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'* (Art. 10/3)⁹
- **UN Standard Minimum Rules for Non-custodial Measures (Tokyo Rules)** *'To provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of noncustodial measures, from pretrial to post-sentencing dispositions.'*
- **UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules):** *"(...) prison administration and other competent authorities should offer education, vocational training and work as well as other forms of assistance (...) in line with the individual treatment needs of prisoners"* (Rule 4)
- **United Nations Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (Bangkok Rules)** *"Women prisoners shall have access to a balanced and comprehensive programme of activities which take account of gender appropriate needs".* (Rule 42)

Notwithstanding the detailed international normative framework, Member States face various obstacles in the use of non-custodial measures, including gaps in legal and policy frameworks, a lack of capacity and awareness among criminal justice practitioners or insufficient public awareness and acceptance of alternatives to imprisonment. As the guardian of the Bangkok Rules, UNODC provides support to countries in their implementation. This assistance ranges from comprehensive assessments of the situation of women in contact with the criminal justice system, the promotion of gender-sensitive legal aid services, to the improvement of health, safety and security of women prisoners, training of prison staff and support for prison-based rehabilitation for women.



The recently published UNODC Toolkit on Gender-Responsive Non-Custodial Measures¹⁰ provides an overview of international & regional standards and recommends that policymakers incorporate provisions of the *Bangkok Rules* and *Tokyo Rules* into domestic law and practice.

The Toolkit has been designed to provide a basis for guidance on applying non-custodial measures for women in conflict with the law as well as gender-sensitive application of criminal laws, policies and procedures. It is aimed at judges and prosecutors as well as other judicial officers working with women in the criminal legal sector, such as defence lawyers, probation officers, and civil society organizations, is useful for policymakers when considering how best to implement non-custodial measures, reduce imprisonment, and can enable the criminal legal system to recognize and address existing gender norms, roles and inequalities. It can also be used to further provide insight for the media to better understand why non-custodial measures and a gender-responsive approach are important to consider and implement when responding to women in conflict with the law.

Guiding Principles

Pre-Charge & Pre-Trial Stage

- Pretrial detention should be used as a means of last resort. Gender-specific criteria should be considered when making decisions on alternatives to pretrial detention e.g., bail conditions or conditions around house arrest should consider a woman's caregiving obligations.
- Case dismissal, depenalization/decriminalization (for example personal consumption and other minor drug-related offences), gender-responsive diversion and drug disorder treatment programmes, restorative justice and other related alternatives (especially for minor charges where a woman does not pose a serious threat) are alternatives that can be considered (for example diversion programme offering women individualised programmes (counselling, drug treatment & job training))

Trial Stage

- Gender-specific mitigating factors should be considered during sentencing and mandatory sentences eliminated e.g., caring responsibilities, history of victimization (for example coercion by partners, criminal networks and/or threat by drug traffickers) or mental health care needs etc (this can be enhanced using the Toolkit in preparing appropriate pre-sentence reports). Where resource limitations are evident, prison officers, university clinics and paralegals can also support the court by providing background information for sentencing.
- The least interventionist non-custodial sentences should be imposed considering a woman's circumstances. Non-custodial sentences should be preferred for pregnant women or women with dependent children. Custodial sentences should be considered only: where the offence was serious and violent, where the woman represents a continuing danger and after

⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 2 December 2020]

¹⁰ UNODC (2020). Toolkit on Gender-Responsive Non-Custodial Measures. Available at: [Toolkit on Gender-Responsive Non-Custodial Measures \(unodc.org\)](https://www.unodc.org/toolkit-on-gender-responsive-non-custodial-measures)

considering the best interests of the child or children (examples include a suspended sentence, deferred sentence, community service or community sentence treatment order, gender-sensitive community service pilot programme). Community service placements are also more gender-responsive, such as considering the distance from a woman's home, safety, need to take care of dependent children etc.

- Fines: Many women cannot pay fines due to poverty and marginalization, particularly women from ethnic minority backgrounds. Other non-custodial sentences should be explored first or the fine set as low as possible, considering the background and circumstances of the woman in contact with the law. Women should not be imprisoned because they cannot pay fines due to poverty and marginalization.

Post-Sentencing Stage

- If a woman has been sentenced, any form of release from an institution to a non-custodial programme or measure should be considered at the earliest possible stage e.g. early conditional release or, community work release.

Implementation of all types of Non-Custodial Sentences (pre and post sentencing)

- It is important to make sure that non-custodial sentences do not widen the net of criminal justice control over women through administrative sanctions. The least interventionist measure should be taken.
- Key implementation issues regarding non-custodial measures include the following as per *Tokyo Rules 10-14*, with specific assessment on if and how women are affected differently than men in this regard

- Supervision
- Duration
- Conditions
- Treatment process
- Discipline and breaches of conditions

Women Survivors of Gender-Based Violence

- GBV is a key pathway to women's imprisonment.
- International standards¹¹ urge States to provide that courts can take into account, during the prosecution and sentencing, claims of self-defence by women who are survivors of violence. In many countries, there is a need to reform legislation and/or sentencing guidelines to ensure that histories of abuse are considered in relevant cases.

Foreign National Women

- Law enforcement officers need to take measures to identify, protect and support victims of trafficking at an early stage and avoid prosecuting them for offences committed because of their exploitation by traffickers.
- Policymakers need to examine their laws and policies foreign national women in contact with the law to ensure they are not discriminated against, that they have access to justice services and access to non-custodial measures and are assisted with resettlement or transfer.

Drug Offences

- Women often commit drug offences due to drug dependency, situations of manipulation and coercion and/or poverty.
- There have been several recent reforms, namely in Latin America, to address the over-incarceration of women for drug offences which have included preferring non-custodial sentences, offering sentence reductions for low-level drug offences and gender-responsive amnesties and pardons for low-level drug offences.
- Gender-specific, trauma-informed, women-only treatment programmes should be prioritized in cases where the woman suffers from drug dependency. Access to evidence-based drug disorder treatment in the community is important. Compulsory drug treatment or rehabilitation in detention should never be enforced^{12; 13; 14; 15}.

COVID-19 and its implications on women's rehabilitation and reintegration

Criminal justice and prison systems face unprecedented challenges that are amplified by the COVID-19 global pandemic¹⁶. Recent global UNODC research has found:

- There were relatively few measures that conferred release upon women offenders based on their gender. It was more common for sentence-based criteria to be applied generally. Further, women more often benefited from release measures where they were pregnant, breastfeeding and/or had an infant or young children in or outside of the prison
- In many cases, these criteria were used in combination with general 'scope' provisions e.g., the exclusion of more serious offences. However, it appeared that such criteria were less commonly combined with others, e.g., a pregnant woman need not also have served ½ a sentence qualify for release, whereas others did.

¹¹ UNDAW (2008). Good practices in legislation on violence against women. Available at [Good Practices in Legislation on Violence against Women - World | ReliefWeb](#)

¹² United Nations Office on Drugs and Crime (UNODC) (2009). From coercion to cohesion Treating drug dependence through health care, not punishment Discussion Paper. Available at https://www.unodc.org/docs/treatment/Coercion/From_coercion_to_cohesion.pdf

¹³ United Nations Office on Drugs and Crime (UNODC), WHO, UNAIDS AND OHCHR (2020) JOINT STATEMENT ON COVID-19 IN PRISONS AND OTHER CLOSED SETTINGS. Available at https://www.unodc.org/documents/Advocacy-Section/20200513_PS_covid-prisons_en.pdf

¹⁴ United Nations Office on Drugs and Crime (UNODC) / World Health Organization (WHO) (2019). Treatment and care for people with drug use disorders in contact with the criminal justice system Alternatives to Conviction or Punishment. Available at [UNODC_WHO_Alternatives_to_conviction_or_punishment_ENG.pdf](#)

¹⁵ United Nations Office on Drugs and Crime (UNODC) / World Health Organization (WHO) (2020). International standards for the treatment of drug use disorders . Available at https://www.unodc.org/documents/UNODC-WHO-Interational_Standards_Treatment_DrugUseDisorders_121217.pdf

¹⁶ United Nations Office on Drugs and Crime (UNODC) (2020). Position paper COVID-19 preparedness and responses in prisons. Available at https://www.unodc.org/documents/hiv-aids/publications/UNODC_position_paper_COVID-19_in_prisons_-_FINAL.pdf

- Given the numbers of women serving prison sentences for nonviolent or minor offences, it should follow that countries prioritising the release of such offenders would include significant numbers of female prisoners. Statistics were not however available to confirm this. Given the large numbers of women convicted of drug-related crimes, they are likely to have been disproportionately impacted in places where drug crimes were specifically excluded from the release criteria (e.g., Iran, Cameroon, Namibia, Turkey and Portugal).
- There has also been an impact on the provision of and accessibility of drug disorder treatment services worldwide during the COVID-19 pandemic^{17; 18}.

Regarding the COVID-19 pandemic, there are enormous challenges faced in Africa¹⁹. In African prison systems primarily designed for men, gender-responsive approaches to address women's situation are crucial to ensure no one is left behind²⁰. Sustained action is needed in Africa to address the disproportionate increase in the imprisonment of women and the lack of gender-specific health care and social reintegration programmes in prisons²¹. With the current COVID-19 pandemic and challenges of controlling outbreaks in African prisons, promoting non-custodial measures is more relevant now than ever before, especially for certain categories such as pregnant women with dependent children²². Arrest and placement of people in pretrial detention and incarceration increase the risk of transmission, and COVID-19 outbreaks, given that prisons and other closed settings constitute high-risk environments for those who live and work there²³.

2. Methodology

The assignment sought to identify and address legal, policy, and practical gaps and obstacles for using non-custodial alternatives to pretrial detention and imprisonment for women arrested/detained - drug-related offences in South Africa. The objective was to gain a baseline understanding that will guide the planning of future UNODC technical assistance and included an investigation on the impact of COVID on the use of non-custodial measures for these women.

The process was conducted under the supervision of the UNODC Regional Office for Southern Africa (ROSAF) and the Criminal Justice Section, UNODC Vienna. It was guided by the United Nations assessment materials, such as the UNODC Criminal Justice Assessment Toolkit's modules on alternatives to incarceration and gender in the criminal justice system, and employed a gender-sensitive approach, paying particular attention to the specific challenges and needs of women in contact with the criminal justice system. It considered alternatives at all stages (pre-trial, sentencing and post-sentencing). It was not restricted to availability in law and whether or not the measures are used, but also how they are implemented, for example in terms of conditions, treatment process, supervision, discipline and responding to breaches of conditions (*Tokyo Rules 10-14*) (see *Annexes*).

The methodology consisted of three distinct yet complimentary phases;

Desk Research: Legal Stocktaking Exercise

A doctrinal approach was used to conduct a detailed stocktaking exercise of relevant national laws, policies and practices used to apply non-custodial measures in South Africa, with a detailed examination of relevant case law (see *Annexes*) and forms of enquiry focused on application to women arrested or detained on- drug-related charges (drug possession, drug use, and drug trafficking offences).

This was supported by an in-depth socio-legal investigation and analysis was used to study the patterns within judicial decisions more broadly, and identify instances of discretion, key concepts and evidence to inform practice, capacity building, policymaking, and priorities for technical assistance and make practical recommendations for action with a specific focus on women arrested for drug offences. An evaluative framework was used to assess adequacy in terms of institutional capacity to effectively use alternatives to imprisonment and assess whether they are in line with relevant international standards and norms on alternatives to imprisonment, including *Tokyo Rules* and the *Bangkok Rules*, accountability and a victim-centred approach spanning all relevant moral, gender, health, legal, policy and medical issues.

It included a contextual focus on identifying the specific impact of such measures on women during State efforts to address the COVID-19 pandemic.

¹⁷ World Health Organization (WHO) (2020). The impact of COVID-19 on mental, neurological and substance use services. Available at <https://www.who.int/publications/i/item/978924012455>

¹⁸ Farhoudian, A., Baldacchino, A., Clark, N., Gerra, G., Ekhtiari, H., Dom, G., ... & Schütz, C. (2020). COVID-19 and substance use disorders: recommendations to a comprehensive healthcare response. *An international society of addiction medicine (ISAM) practice and policy interest group position paper. Autonomic Neuroscience: Basic & Clinical*, 11(2), 129-146.

¹⁹ Nkengasong, J.N Mankoula, W (2020). Looming threat of COVID-19 infection in Africa: act collectively, and fast. *Lancet*. Available at [https://doi.org/10.1016/S0140-6736\(20\)30464-5](https://doi.org/10.1016/S0140-6736(20)30464-5)

²⁰ Van Hout, M.C., Mhlanga-Gunda, R (2019). 'Mankind owes to the child the best that it has to give': Prison conditions and the health situation and rights of circumstantial children incarcerated in Sub Saharan African prisons. *BMC International Health and Human Rights* 19 (1): 13.

²¹ Van Hout, M.C., & Mhlanga-Gunda, R (2018). Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in Sub Saharan Africa: A scoping review of extant literature. *BMC International Health and Human Rights*. 18(1):31.

²² Van Hout, MC (2020). Leaving no one behind: The human tragedy of children in African prisons during COVID-19. *Health and Human Rights Journal*. Available at <https://www.hhrjournal.org/2020/05/leaving-no-one-behind-the-human-tragedy-of-children-in-african-prisons-during-covid-19/>

²³ Van Hout, MC. (2020). Prison staff exposure to pathogenic disease and occupational health research in African prisons: A neglected area. *Journal of Sustainable Development: Africa*. 22(1); 166-171.

Qualitative Multi-stakeholder Consultations

A series of interview-based consultations (n=34) using MS Teams were conducted with a range of governmental and non-governmental multi-stakeholders (criminal justice system, health, social development, civil society, academic) to obtain in-depth information on the current situation, the practical challenges and good practices in the implementation of non-custodial measures for women who use drugs or are affected by drug-related criminal activity in South Africa (see *Annexes*). A semi-structured interview guide was drafted by the consultant based on the socio-legal investigation and in consultation with UNODC-ROSAF and key staff at UNODC HQ (see *Annexes*).

Qualitative data were analysed using the thematic analysis (TA) framework²⁴ approach. This involved several key steps: (1) reading and rereading the transcription to note early ideas; (2) coding systematically and logically using a data-driven approach and paying attention to interesting concepts and ideas within the data; (3) organisation of codes into corresponding groups using an iterative process in developing themes and subthemes; (4) refining and reviewing of themes as a collective in terms of internal homogeneity and external heterogeneity, examination of coherence of patterns across themes and development of a thematic map; and (5) final clear definition and naming of themes, with data extracts representing and articulating the essence of the theme, and overall analysis.

Triangulation and Generation of Recommendations

Triangulation of the socio-legal analysis and qualitative data subsequently occurred, and informed the generation of corresponding detailed action points for UNODC and government in terms of response and directives to amend and improve the situation in South Africa.

The findings will be presented to a national online workshop in 2021 which brings together relevant stakeholders from the criminal justice system, health, social development, civil society and academic sectors, and where the objective will be to further discuss proposed recommendations, potential for integration unto current legislation, identified best practices, gaps in application, challenges, and identified priority areas.

3. Triangulation of Findings

Triangulated socio-legal and qualitative data analysis presented here considered the pathways of women who use drugs or exploited by drug-related criminal networks (including the overlapping nature of those engaged in sex work) into the criminal justice system, particularly focussing on the applicable legal, policy and administrative framework in South Africa. It juxtaposes the domestic framework with the minimum standards set out in the United Nations Standard Minimum Rules for Non-custodial Measures (*The Tokyo Rules*) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*The Bangkok Rules*).

It should be noted that at the time of writing, several legislative amendments are under consideration at National Assembly in South Africa reflective of current progressive legislation reformation cognisant of the various aspects of domestic and sexual violence against children, use of intermediaries and audio-visual links to proceedings, cannabis use for private use and expungement of criminal records, and regulations around parole (Domestic Violence Amendment Bill 2020, Criminal Law (Sexual Offences and Related Matters) Amendment Bill 2020, the Criminal and Related Matters Amendment Bill 2020, Cannabis for Private Purposes Bill 2020, Correctional Services Amendment Bill 2020)^{25; 26}.

Whilst not explicitly referring to gender, these Bills are largely victim centric (as opposed to that of the perpetrator) and support the pathways of women affected by GBV in the criminal justice system, for example as victim of intimidation, drug and commercial sex trafficking or exploitation in criminal networks, and regarding their re-insertion into society (post custodial sentencing, or during non-custodial sentencing in the community)²⁷.

²⁴ Braun, V., Clarke, V., Hayfield, N., & Terry, G. (2019). Thematic analysis. *Handbook of research methods in health social sciences* (pp. 843–860). https://doi.org/10.1007/978-981-10-5251-4_103.

²⁵ Detail on the Bills are available at: Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill | PMG; Criminal and Related Matters Amendment Bill | PMG; Cannabis for Private Purposes Bill | PMG; Domestic Violence Amendment Bill | PMG; and Correctional Services Amendment Bill | PMG

²⁶ Domestic Violence Amendment Bill, 2020;

The Amendment Bill aims to amend the Domestic Violence Act, 1998 (Act No. 116 of 1998), so as to further facilitate the obtaining of protection orders against acts of domestic violence and to impose obligations on relevant functionaries in the Department of Social Development and the Department of Health to provide certain services to victims of domestic violence. The Bill also aims to align the provisions of the Domestic Violence Act, 1998, with the provisions of the Protection from Harassment Act, 2011 (Act No. 17 of 2011), and to provide for matters connected therewith.

3. The following sections are hereby inserted in the principal Act after section 2:

"2A Obligations of functionaries relating to domestic violence" & "2B Obligation to report domestic violence and to provide information" – These amendments place a duty on functionaries to inter alia report suspected cases of domestic violence to e.g. a social worker or the South African Police Service AND to provide the complainant with a prescribed list containing the names and contact particulars of accessible shelters and public health establishments. In many instances, substance abuse and domestic violence go hand-in-hand. As these amendments place a duty on functionaries to report and advise, this might just be the much needed "push"

Women in conflict with the law in South Africa

Like many countries across the globe, South Africa continues to struggle with the problem of overcrowding in correctional facilities, with the prison population consistently remaining above the prison capacity. According to the Department of Correctional Services (DCS), at the end of 2019, there were 162,875 inmates against the approved space of 118,572 of the inmate population²⁸. This reduced to 154,449 in 2020²⁹. Women constitute a minority of the detained population in South Africa, either as pretrial detainees or convicted prisoners. For the past five years, incarcerated female offenders have remained at a steady average percentage of just under 3% of the total prison population in South Africa³⁰. In 2019 South African correctional centres held 4,316 female inmates compared to 158,559 male counterparts, and in 2020, held 3,982 female inmates compared to 150,467 males³¹. **See Table 1**

Table 1. Pre trial and sentenced female population trend from 2014/2015 to 2019/2020³²

Period	2014/2015	2015/2016	2016/2017	2017/2018	2018/2019	2019/2020
Sentenced	3 029	3 036	2 979	2 956	2 957	2354
Unsentenced	1 089	1 157	1 195	1 370	1 359	1448
Total Inmate population	4 118	4 193	4 174	4 326	4 316	3982

that an addicted and abused complainant/victim needs to break free from an abusive relationship and seek help for her addiction at an accredited shelter.

The Bill further provides for the online submission of an application for a protection order.

6. The following section is hereby substituted for section 4 of the principal Act:

"Application for protection order"

4. (1) Any complainant may, in the prescribed manner, apply to the court for a protection order.

(1A) The prescribed application may be submitted to the clerk of the court remotely by way of a secure online submission or in person.

(1B) The clerk of the court must upload all electronic and hard copies of the applications onto the integrated electronic repository established in terms of section 6A of this Act.

The effect of this is that a victim may be able to apply for a protection order without her leaving her home. During the "hard lockdown" (Level 4 and 5 during 2020), reports of domestic violence appeared to have decreased. It was however established that many victims were unable to report the abuse, due to them being unable to leave their homes. Therefore, an online system will increase access to legal remedies/legal protection for victims.

11. Section 7 of the principal Act is hereby amended—

...by the insertion of the following subsection after subsection (4):

"(4A) The court may conduct an enquiry in respect of the respondent in terms of section 35 of the Prevention and Treatment for Substance Abuse Act, 2008 (Act No. 70 of 2008), and commit the respondent to a treatment centre for substance abuse."

This extends the powers of the court (in terms of Section 7 of the Act) when considering the granting of a protection order against a respondent, to commit such a respondent to a treatment centre for treatment/rehabilitation. To use the Ellen Pakkies-narrative: in terms of this amendment, she could have applied for a protection order against her son, and he could have been committed to a treatment centre.

²⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, 2020;

The Amendment Bill aims to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), so as to extend the ambit of the offence of incest, introduce a new offence of sexual intimidation and to further regulate the reporting duty of persons who are aware that sexual offences have been committed against children. The Bill also aims to amend the Act by further regulating the inclusion of particulars of persons in the National Register for Sex Offenders, making provision for certain particulars of persons who have been convicted of sexual offences to be made publicly available, extending the list of persons who are to be protected in terms of Chapter 6 of the Act, further regulating the removal of particulars of persons from the National Register for Sex Offenders and providing for matters connected therewith.

Criminal and Related Matters Amendment Bill, 2020;

The Amendment Bill aims to amend a number of Acts, namely, the—

Magistrates' Courts Act, 1944 (Act No. 32 of 1944), so as to provide for the appointment of intermediaries and the giving of evidence through intermediaries in proceedings other than criminal proceedings, the oath and competency of intermediaries and the giving of evidence through audio-visual link in proceedings other than criminal proceedings;

Criminal Procedure Act, 1977 (Act No. 51 of 1977), so as to further regulate the granting and cancellation of bail, the giving of evidence by means of closed-circuit television or similar electronic media, the giving of evidence by a witness with physical, psychological or mental disability, the appointment, oath and competency of intermediaries and the right of a complainant in a domestic related offence to participate in parole proceedings;

Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), so as to further regulate sentences in respect of offences that have been committed against vulnerable persons; and

Superior Courts Act, 2013 (Act No. 10 of 2013), so as to provide for the appointment of intermediaries and the giving of evidence through intermediaries in proceedings other than criminal proceedings, the oath and competency of intermediaries and evidence through audio-visual link in proceedings other than criminal proceedings, and to provide for matters connected therewith."

This Bill amends inter alia the Criminal Procedure Act, 1977, so as to further regulate the granting and cancellation of bail; the giving of evidence by means of closed-circuit television or similar electronic media; the giving of evidence by a witness with physical, psychological or mental disability; the appointment, oath and competency of intermediaries; and the right of a complainant in a domestic related offence to participate in parole proceedings.

4. Section 60 of the Criminal Procedure Act, 1977, is hereby amended—

"(2A) The court must, before reaching a decision on the bail application, take into consideration—

(a) any pre-trial services report regarding the desirability of releasing an accused on bail, if such a report is available; and

(b) the view of any person against whom the offence in question was allegedly committed, regarding his or her safety."

A practical example may for instance be when a victim of trafficking fears for her safety should the brothel madam be released on bail; the court MUST take this in consideration before a decision on bail can be reached.

6. Section 158 of the Criminal Procedure Act, 1977, is hereby amended—

(a) by the substitution in subsection (2) for paragraph (a) of the following paragraph:

"(a) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness, irrespective of whether the witness is in or outside the Republic, or an accused, if the witness or accused consents thereto, may give evidence by means of closed-circuit television or similar electronic media."

In practice this amendment will address inter alia the issue of secondary trauma caused by testifying in court and the pure nature of criminal proceedings. It will furthermore curtail the potential of secondary victimisation as physical presence will not be a requirement. In addition to the aforementioned, this amendment may assist in the speedy finalisation of cases, as witnesses will be able to testify from literally anywhere in the world.

9. Section 299A of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) When a court sentences a person to imprisonment for—...

(g) offences as provided for in sections 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013; or

(h) a period exceeding seven years for any offence, which that person committed against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with that person, it shall inform—

(i) the complainant; or

(ii) in the case of murder or any other offence contemplated in paragraph (a), any immediate relative of the deceased, if he or she is present that he or she has a right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board."

This is amendment provides to, inter alia victims of trafficking and domestic violence, the opportunity to provide input on the decision whether to release their perpetrator on parole, day parole or correctional supervision. In practice, offences in terms of the Prevention and Combating of Trafficking in Persons Act as well as the Domestic Violence Act, are in many instances committed alongside offences in terms of the Drugs and Drug Trafficking Act, hence the relevance and importance of this amendment.

Cannabis for Private Purposes Bill 2020;

To—respect the right to privacy of an adult person to possess cannabis plant cultivation material; to cultivate a prescribed quantity of cannabis plants; to possess a prescribed quantity of cannabis; and to smoke and consume cannabis; regulate the possession of cannabis plant cultivation material; the cultivation of cannabis plants; the possession of cannabis; and the smoking and consumption of cannabis by an adult person; protect adults and children against the harms of cannabis; provide for the expungement of criminal records of persons convicted of possession or use of cannabis; delete and amend provisions of certain laws; and provide for matters connected therewith.

Correctional Services Amendment Bill 2020

To amend the Correctional Services Act, 1998, so as to amend a certain definition; to insert, delete and amend certain provisions related to parole of offenders; and to provide for matters connected therewith

²⁸ Department of Correctional Services (2020). Annual Report. Available at http://www.dcs.gov.za/wp-content/uploads/2020/12/DCS-Annual-Report_web-version.pdf

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

Regarding further details, a search was conducted to identify relevant government level data on the topic of non-custodial sentences applied to women arrested or detained on drug-related offences. At the South African Police Service (SAPS) level, there is no published information on data regarding police arrests, and those in police custody, i.e., those sentenced by the court, those sentenced from custody. In the judicial system, there is no published or access data on the type of sentence imposed by the magistrate. The search revealed a lack of data in the public domain, particularly gender-disaggregated data about:

1. The number of women, and transwomen arrested for drug-related offences (use and dealing)
2. The number of women awarded a non-custodial sentence for drug-related offences nationally (and regionally).
3. Data on the sentence imposed, particularly regarding the type of non-custodial sentences awarded (fine, suspended sentence, referral to drug treatment, house arrest, community orders and so forth)
4. The number of foreign non-national women detained in immigration detention/holding before deportation, and if any have been arrested for drug offences.
5. The number of foreign non-national women detained in prison on drug offences.
6. The number of South African women detained on drug trafficking offences in foreign countries.
7. The number of women detained in prison for drug offences nationally (and regionally).
8. The number of women detained for drug offence with children in prison nationally (and regionally).
9. The number of women detained in prison for sex work offences where drugs and/or GBV are a factor nationally (and regionally).
10. Numbers of women released into halfway houses.

A request for further detail was submitted to the Central Drug Authority in late November 2020, which yielded the following unpublished information presented in **tables 2-3**.

Women with drug related offences						
	Community Corrections		Correctional Facility			
Region	Awaiting Trial	Parolee	Probationer	Sentenced	Unsentenced	Grand Total
RC EASTERN CAPE		18	2 979	2 956	2 957	36
RC GAUTENG		36	7	18	27	88
RC KWAZULU/NATAL		14	3	2	1	20
RC LIMPOPO, MPUMALANGA & N.W.		6	3	8	2	19
RC NORTHERN CAPE & FREE STATE		9		9		18
RC WESTERN CAPE	1	6	25	48	37	48
Grand Total	1	89	50	88	70	298

Table 2 Women with drug related offences.

FOREIGN NATIONALS			
Region	Sentenced	Unsentenced	Grand Total
RC EASTERN CAPE	1		1
RC GAUTENG	10	8	10
RC LIMPOPO, MPUMALANGA & N.W.	5		5
RC NORTHERN CAPE & FREE STATE	4		4
RC WESTERN CAPE		2	2
Grand Total	20	10	30

NUMBER OF WOMEN IN PRISON FOR SEX WORK OFFENCES			
Region	Sentenced	Unsentenced	Grand Total
RC KWAZULU/NATAL	1		1
RC WESTERN CAPE		1	1
Grand Total	1	1	2

NUMBER OF WOMEN DETAINED FOR DRUG OFFENCES WITH CHILDREN IN PRISON			
Row Labels	Sentenced	Unsentenced	Grand Total
RC GAUTENG	4	6	10
RC WESTERN CAPE		1	1
Grand Total	5	7	11

Table 3 Foreign national women, women detained on sex work offences and those detained for drug offences with children^{33; 34}

Whilst it is self-evident that women prisoners consist of a small proportion of the South African prison population, they remain disproportionately affected by a penal system designed for men and not sensitive to the unique nature and circumstances of women offenders. Firstly, women are often detained in adverse prison conditions characterised by overcrowding, violence, exposure to infectious diseases and insufficient resourcing and consideration of their unique gendered medical and rights-based needs^{35; 36}. Secondly, female offenders who end up incarcerated tend to have unique pathways that, if considered with a nuanced lens, reveal a pattern of victimhood making them mostly non-suited for incarceration. This is especially the case for victims of trafficking, exploitation by criminal networks and GBV. Most of these women commit nonviolent and victimless crimes such as using drugs, suggesting that incarceration may neither be the most appropriate nor proportionate response. Further, female offenders tend to be linked to some common underlying social determinants rooted in, among other things, exposure to extreme violence, coercive relationships, mental health issues, lack of gainful employment and poverty.

³³ Under two years of age.

³⁴ Personal Communication. Source Central Drug Authority.

³⁵ In a press statement issued by the Judicial Inspectorate for Correctional Services, it was stated that, "What is most alarming, and has not been taken cognisance of, is the large amount of females (732) incarcerated which includes 8 infants. The majority of cases that have been reported and published in the media have mostly focused on the male population, but in this instance the totals of the female centre is almost 200% over capacity. There are only two other female centres in the Western Cape, Worcester (which is at 90% capacity) and Oudtshoorn which is 28% overcrowded, but due to the fact that it is more than 400 km from Cape Town, this makes family contact almost impossible, especially for people in the poorer communities..... Many of these women are awaiting trial prisoners who have lengthy stays in prison and several of these cases are often thrown out of court or postponed indefinitely." (See the full statement: Judicial Inspectorate for Correctional Services, Pollsmoor Correctional Centre still in violation of the Overcrowding Court Order of 2016, 4 May 2018. Available at http://jics.dcs.gov.za/jics/wp-content/uploads/2019/04/Pollsmoor-Press-Release_May2018.pdf

³⁶ Mail & Guardian (2016). Filth, disease, sex and violence for Pollsmoor's female inmates, 3 Mar. 2016. Available at <https://mg.co.za/article/2016-03-03-filth-disease-sex-and-violence-for-pollsmoors-female-inmates/>

This forms the basis of the subsequent mixed-method enquiry into the use of alternatives to imprisonment in South Africa with a specific focus on women arrested or detained for drug offences.

The nexus of gender, drugs and crime in South Africa

The intersectionality of gender, poverty, drug use and sex work are well evidenced in the global literature, and indeed South African literature^{37, 38}. One negative consequence of the impact of the gross economic inequalities that characterise the socio-economic outlook of South Africa³⁹, is the resort to crime by women in efforts to fend for themselves and their children. Consequently, some women use drugs while others engage in commercial sex work, bringing them into conflict with the South African law which criminalises both acts⁴⁰. Others are exploited or trafficked by criminal networks to carry drugs/engage in commercial sex work, both in South Africa but also in foreign countries⁴¹.

Participants⁴² described a myriad of vulnerabilities and harms experienced by women who use drugs or are exploited by drug and sex trafficking gangs in South Africa. These vulnerabilities and harms were described as underpinned by their unique socio-economic circumstances, marginalisation, poverty, caring responsibilities, mental illness, the impact of gangsterism and exposure to trauma including GBV. Poverty and GBV appeared central to the pathways of women, often caregivers, into drug and sex-related criminal activity.

Consultations with stakeholders occurred just before the 16 days of activism against GBV in South Africa. Alcohol was deemed by many as contributing to the high levels of GBV within South African society, both in relationships and outside relationships; and contributing to inter-generational substance abuse and cycles of physical and sexual violence. Several participants referred to the interplay of alcohol and drug use as not limited to illicit drugs but including the non-medical use of prescription medications (opioids and sedatives), with some reports of women engaging in prescription medication abuse and fraudulent prescriptions at community pharmacies

From consultations, there appeared a broad range of women arrested on drug offences, not limited to women who use drugs and are arrested in possession of small quantities of drugs (other than cannabis) for personal

use, and women who sell drugs, but with a notable greater emphasis of discussion around the exploitation of both South African and non-national women for drug dealing and drug/sex trafficking purposes. The impact of gangsterism was described by many as strong in South Africa, with women used as drug mules in the trafficking of drugs by intimate partners involved in gangs and exploited for sex in trafficking networks. There were reports of trafficked women and women in high-risk communities exposed to serious violence by gangs, manipulated and exploited without consent into commercial sex work, and exposed to drug use and dependence. Many described how vulnerable women of all ages are at risk of criminal exploitation to act as mules (often unaware) in international drug trafficking routes due to the low perceived risk of police detection, or detection at airports to allow a larger quantity to pass through behind them.

Those consulted identified several **especially vulnerable** groups of women in South African society who are arrested or detained on drug offences. These include; elderly women and single mothers or pregnant women living in poverty; victims of coercion and GBV; commercial sex workers; trafficked or migrant/undocumented/non-national women; women with psychiatric or learning disabilities, homeless women, those with albinism and transgender women.

All participants highlighted the imperatives for enhanced understanding of women's situation and development of gender sensitized criminal justice responses cognizant of the histories and pathways from victim of GBV or trafficking, to that of perpetrator of drug, commercial sex work or trafficking (human and drug) related crimes.

A case of criminalising poverty? The Criminalisation of women who use drugs and those who engage in sex work

Despite the existence of growing evidence across the globe of the futility of fighting the problem of drug use through criminal sanctions, South Africa, like many other countries, still retains a comprehensive and somewhat harsh legal framework to arrest, prosecute and sentence offenders on a range of drug-related offences⁴⁴. South African law criminalizes three categories of what are known as "dependence-producing drugs" namely dependence-producing substances, dangerous dependence-producing substances, and undesirable dependence-producing substances⁴⁵.

³⁷ Artz, L., Hoffman-Wanderer, Y., Moul, K (2012). Hard Times: Women's Pathways to Crime and Incarceration. University of Cape Town, Cape Town. Available at <http://detentionjusticeforum.org.za/wpcontent/uploads/2013/09/GHJRJ-Hard-Times-Report-on-Women-in-SA-Prisons.pdf>

³⁸ Steyn, F., & Booyens, K (2018). A profile of incarcerated female offenders: implications for rehabilitation policy and practice. University of Pretoria, Pretoria. Available at repository.up.ac.za

³⁹ World Bank Report (2018). South African Economic update 2018. Available at <http://pubdocs.worldbank.org/en/798731523331698204/South-Africa-Economic-Update-April-2018.pdf>

⁴⁰ Steyn, F., & Booyens, K (2018). A profile of incarcerated female offenders: implications for rehabilitation policy and practice. University of Pretoria, Pretoria. Available at repository.up.ac.za

⁴¹ Ibid.

⁴² In order to protect the anonymity of those consulted for this report no identifying information regard sector will be provided.

⁴³ See later section on the legislative changes regarding cannabis.

⁴⁴ The primary legislation creating criminal sanctions for drug-related offences is the Drugs and Drug Trafficking Act No. 140 Of 1992

⁴⁵ See generally Chapter IV of the Drugs and Drug Trafficking Act No. 140 Of 1992

SAPS dedicates considerable time, resources and personnel towards fighting drug-related crimes. The overall numbers of persons arrested annually for drug-related crimes are staggering⁴⁶. SAPS crime statistics indicate that 170, 510 drug-related cases were recorded in the past year⁴⁷. While exact statistics breaking down the actual number of women who get arrested, detained and/or end up convicted for using drugs are not readily ascertainable, studies in South Africa have shown that women who use drugs contribute a significant number to the women offenders who find themselves in prisons⁴⁸. The criminal sanctions on drug use and commercial sex work in South Africa merely serve to exacerbate the situation as these women resultantly face further stigmatisation, hence hindering their re-integration into the wider social and economic fabric of the community⁴⁹.

The sentencing regime for any drug-related offences is quite serious with a possibility of penalties up to life imprisonment depending on the nature of the offence involved⁵⁰. The severe criminal sanctions and prescribed punishments applied in South Africa are consistent with the dated approach of “zero tolerance” and the “war on drugs” mantra that has borne limited results over the years⁵¹; ⁵². The pending Cannabis for Private Purposes Bill 2020 however indicates progression beyond this punitive approach⁵³.

Concerning sex work, despite spirited campaigns to push for decriminalisation by various organisations over the years, sex work remains illegal in South Africa. The Sexual Offences Act, 1957 read together with the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 are the primary legislative tools prohibiting prostitution, brothel-keeping and procuring and other activities related to prostitution. Together they criminalise and penalise the act of soliciting by the sex worker (the service provider) and paying for sex (the client). These national laws are supplemented by local municipal by-laws that are often used by the police to target sex workers. The By-laws and regulations contain archaic petty offences such as “loitering” and “public nuisance” that are routinely used by SAPS to target both women who use drugs and those who engage in sex work. In the Western Cape, municipal by-laws contain articles with an expansive

schedule of offences that are invoked to target women who engage in sex work. SAPs often resort to invoking these petty offence laws to fine women who engage in sex work, given the difficulties in sustaining charges in courts of law (due to the victimless nature of the offence and the unlikelihood of finding a willing witness in court proceedings). In general, the witness will be the client who is also committing a crime in terms of Act 32/2007, or otherwise SAPs themselves in the case of entrapment.

Given that ‘*Women often commit drug offences due to drug dependency, situations of manipulation, coercion and/or poverty*’, the strong bias towards criminalisation of such infractions of the law regarding drug and commercial sex work offences by women in South Africa is somewhat misplaced and ill-informed, given the complexity and multi-layered gender inequalities disproportionately affecting women, their experience of poverty and social exclusion, trauma and GBV victimisation.

Arrest and pretrial detention: Gender-neutral systems and disproportionate law enforcement rights abuses against women

In the South African legal system, the Constitution of South Africa, Act 108 of 1996 (as amended), is supreme and sets the benchmark for all legislation in the Republic. As presented below, the Constitution itself is based on principles of gender equality. During consultations, many participants described how South Africa’s focus on gender equality is underpinned by a recognition of human rights based on acceptance of equal and inalienable rights of all women and men⁵⁶. Excerpt:

⁴⁶ According to the South African Police Service (SAPS) crime statistics, there were 232 657 drug related cases in 2018 and 170 510 in 2019. However, the official data is not disaggregated on gender and the data does not also reflect the specific nature of the crimes. SAPS Crime Statistics report is available at <https://www.saps.gov.za/services/crimestats.php>

⁴⁷ South African Police Service (SAPS) (2019). SAPS Crime Statistics 2019. Available at <https://www.saps.gov.za/services/crimestats.php>

⁴⁸ Artz, L., Hoffman-Wanderer, Y., Mout, K (2012). Hard Times: Women’s Pathways to Crime and Incarceration. University of Cape Town, Cape Town. Available at <http://detentionjusticeforum.org.za/wpcontent/uploads/2013/09/GHJU-Hard-Times-Report-on-Women-in-SA-Prisons.pdf>

⁴⁹ The AIDS and Rights Alliance for Southern Africa (2019). Don’t treat us as outsiders, Drug Policy and the Lived Experiences of People Who Use Drugs in Southern Africa, ARASA, Windhoek. Available at: “Don’t treat us as outsiders” - Drug policy and the lived experiences of people who use drugs in Southern Africa (idpc.net)

⁵⁰ Ibid.

⁵¹ It should be noted that the 1988 Convention requires State Parties to criminalize the supply of drugs (art. 3, para. 1), whereas the requirement to criminalize the possession, purchase or cultivation of drugs for personal consumption is subject to a State Party’s constitutional principles and legal system (art. 3, para. 2). It should also be noted that drug consumption itself is not among the kinds of behaviour that States Parties are expected to establish as criminal offences pursuant to the international drug control conventions.

⁵² UNODC-WHO (2018). Treatment and Care for People with Drug Use Disorders in Contact with Criminal Justice System- Alternatives to Conviction or Punishment. Available at [UNODC_WHO_Alternatives_to_conviction_or_punishment_ENG.pdf](https://www.unodc.org/unodc/en/publications-and-publications/alternatives-to-conviction-or-punishment-eng.pdf)

⁵³ See footnote 27. While moving out of punitive approaches for non-medical use of controlled substances is deemed as progress, recreational drug use is not foreseen in the framework of the Int Drug Control Conventions.

⁵⁴ Human Rights Watch (2019). Why Sex Work Should be Decriminalised in South Africa, 2019. HRW, London. Available at <https://www.hrw.org/news/2019/08/07/south-africa-decriminalise-sex-work>

⁵⁵ See for example, Regulation 2 of the By-Law relating to Streets, Public Places and The Prevention of Nuisances PG 6469 of 28

⁵⁶ Bill of Rights of The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

The Constitution of South Africa 108 of 1996 (as amended) provide as follows:

"Equality

9. (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."*

And

The aforementioned should be qualified by stating that SAPS Standing Orders determine that an arrested person may only be searched by a person of the same gender, and males and females are never to be detained together⁵⁷.

During consultations, a participant observed the following regarding such constitutional (gender and age) equality principles during arrest;

'as the right to equality is enshrined in the Constitution, no differentiation is made between males/females to the processes followed during of arrest/methods to secure attendance in court (the only exception is children under the age of 18 years, who are dealt with in terms of the Child Justice Act 75 of 2008);

Another participant remarked the following; *'Actually, it can be argued that because of the right of equality in section 9 of Constitution, there can and should be a difference as the right to equality is a right to substantive equality (not formal equality) which means that there can be differentiation for example between males and females in this regard'. There are varying opinions on this complex issue in the academic literature in South Africa, and highlights the argument for a substantive, nuanced and gender-sensitive approach to be followed during sentencing: see later section^{58; 59}.*

Methods of securing an accused person's attendance at court are governed by the provisions of Section 38 of the Criminal Procedure Act 51 of 1977, as amended (CPA). Excerpts below:

"(1) Subject to section 4(2) of the Child Justice Act, 2008 (Act No. 75 of 2008), the methods of securing the attendance of an accused who is eighteen years or older in court for his or her trial shall be arrest, summons, written notice and indictment following the relevant provisions of this Act.
(2) The methods of securing the attendance of an accused who is under the age of eighteen years at a preliminary inquiry or child justice court are those contemplated in section 17 of the Child Justice Act, 2008."

One participant provided detailed commentary (in italics) on the practical aspects of applying Sec. 38, as follows:

(i) Written notice to appear (section 56 of the CPA)—When the alleged offence is so minor that the peace officer on reasonable grounds believes that a magistrate's court will not, on conviction for that offence, impose a fine exceeding an amount determined in the Government Gazette by the Minister of Justice and Constitutional Development, he or she may issue a notice to the accused to pay an amount specified by the peace officer.

"However, the problem with the effect of this section is that by paying the admission of guilt fine, he/she will be deemed to have been convicted in court of the offence (without having appeared in court, having had the benefit of facing his or her accuser, having had legal representation or having exercised the right to call a witness in an open court) and that the conviction will be recorded as a previous conviction against his or her name and will appear on his or her criminal record.) Not many persons realise that paying a fine in terms of this notice, will (may) result in him/her having a criminal record".

(ii) Summons (section 54 of the CPA)—When the state intends to prosecute someone who is not in custody and arrest is not deemed necessary, a summons is served, calling upon the accused to appear on a certain day on a particular charge. The charge and certain further particulars appear on it.

(iii) Indictment (section 144 of the CPA)—This is a document which in high courts fulfils the same function as a summons in the case of lower courts. It contains the charges and a summary of substantial facts. *"In practice, an accused person would already have appeared in a lower court at the time the indictment is served on him/her and the case transferred to the High Court for trial."*

(iv) Arrest (section 50 of the CPA)—This is intended for all cases regarded by peace officers as serious enough to deprive the accused of his or her liberty. After arrest three possibilities arise for the suspect: he/she may be:

- (i) released because the prosecutor decides not to prosecute; or
- (ii) detained for a maximum of 48 hours, after which release becomes compulsory. If the suspect is released, any of the two preceding processes can still be used (i.e. summons and/or indictment); or
- (iii) brought, before the expiry of the 48 hours, before a magistrate, where a decision on the release or further detention will be taken.

⁵⁷ African Policing Civilian Oversight Forum (APCOF) (2019). Independent Monitoring of Police Custody in South Africa. APCOF, Cape Town. Available at <http://apcof.org/wp-content/uploads/apcofindependentmonitoringofpolicecustodyinsouthafricatrainingmanualannexures.pdf>

⁵⁸ Smith, A (2014). Equality constitutional adjudication in South Africa. African Human Rights Law Journal, 14(2);609-632.

⁵⁹ Van Staden, M (2017). Substantive equality cannot override formal equality. Available at [Free Market Foundation](http://www.free-market-foundation.org)

Several areas of ineffectiveness in ensuring court attendance were described by participants (impacting on both genders) and illustrated the complexities particular to South Africa below

"On failure to either pay the admission of guilt fine as stipulated on the written notice / appear in court on the stipulated date, a court may issue a warrant of arrest. On arrest, such an accused may be convicted of failure to attend court and sentenced (in addition to the original fine) to a further amount or imprisonment. The aforementioned is relevant due to the fact that many persons blatantly ignore written notices as they are aware of the fact that the SAPS suffers from serious resource constraints, and executing the warrant of arrest, will be costlier than the value of the fine payable. Populated areas in South Africa may vary from extremely densely populated urban areas (e.g. Johannesburg), to very rural areas with limited or no formal road infrastructure (e.g. villages in the Eastern Cape Province). Tracing suspects when many have no formal addresses, is like finding a needle in a haystack.

In a country plagued by serious and/or violent crimes, tracing an accused issued with a written notice (who failed to appear in court), has to be prioritised versus for instance tracing a serial rapist who violated his bail conditions.

South Africa is a country of immense economic inequality. Many accused issued with written notices and do attend court, simply don't have the means to pay the fine. In many instances such a person would have had to pay for transport to and from court; money most likely meant to buy food or supply shelter. Having to choose between paying a R300.00 fine or supporting your family for two weeks, many citizens will "take their chances and hope not to be arrested". Arrest remains the most effective manner to secure an accused person's attendance at court. However, the effectiveness of this process may be vitiated by the granting of bail to an underserving accused.

At a practical level, another participant further illustrated how arrest, pre-trial, detention and imprisonment occurs as follows;

"When a case is reported to the police, and the suspect is known the police go out and arrest the suspect and bring him/her to police custody. The person will be allowed to inform his/her attorney and they may approach a

magistrate for bail to be granted. The conditions of bail are discussed before the magistrate/judge. Otherwise, some cases take a while before they are brought before the judge and a bail hearing date is set as soon as possible. However, once the case has gone through the whole criminal justice process including the trial, when evidence is adjudged and the suspect is found guilty the sentencing will determine if it is custodial or not. If a custodial sentence is imposed the convicted person is sent to the closest prison from where the incident took place. For women, if it is the case that a women's prison is not available the next nearest one is accepted to be close enough to accommodate women. The practice is not different as it affects both men and women, and the only noticeable difference comes in the custodial sentences as women will go to the prisons made for them".

The journey of human rights violations against women appears to commence from the point of arrest by the SAPS until their cases are finalised. The Criminal Procedure Act (CPA) grants SAPS very wide powers to effect arrests even in the absence of an arrest warrant⁶⁰. Whilst the law enjoins police officers to exercise great restraint and discretion in exercising powers of arrest⁶¹, the practice on the ground has been of wanton abuse of policing authority and human rights abuses targeting women who use drugs and those who engage in sex work⁶². Research conducted over the years consistently flags SAPS as the chief perpetrators of gross human rights violations⁶³ that include extreme levels of violence targeting women who use drugs and those who engage in sex work under the guise of enforcing the law^{64; 65; 66}.

From research⁶⁷ conducted in selected cities in South Africa, it was reported that women who use drugs are driven deeper into substance abuse because of GBV which they experience from intimate partners, close people known to them and people they would ordinarily expect to protect them (for example SAPS). Gross violence and abuse at the hands of the people in uniform, who should be the custodians of the law are reported, with horrific accounts of violence and human rights abuses at the hands of the SAPS under the guise of arresting women on drug-related and sex-work offences⁶⁸. This research was supported by anecdotal observations by participants during consultations, who described gender maltreatment, excessive force and sexual exploitation by SAPS of women who were cautioned or arrested on drug/sex work offences. Many observed the lack of police

⁶⁰ See generally, section 40 of the Criminal Procedure Act.

⁶¹ See Section 12 (1) (a & b) of the Constitution entrenches the inherent right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial. Any arrest is therefore prima facie wrongful and unlawful, unless proven otherwise

⁶² Human Rights Watch (2019). Why Sex Work Should be Decriminalised in South Africa, 2019. HRW. Available at <https://www.hrw.org/news/2019/08/07/south-africa-decriminalise-sex-work>

⁶³ Some complaints directed at the police recorded from the sex workers include cases of torture, rape, assaults at police stations, deprivation of medical treatment, being kept in unhygienic conditions without food or adequate bedding, in violation of the Police Standing Orders and constitutional rights.

⁶⁴ Fick, N (2006). Sex Workers Speak Out – Policing and the sex industry. SA Crime Quarterly, 15: 13-18.

⁶⁵ Ibid.

⁶⁶ Manoeck, S. (2012). 'Stop Harassing Us! Tackle Real Crime!': A Report on Human Rights Violations by Police Against Sex Workers In South Africa. Women's Legal Centre, Cape Town. Available at [210812-FINAL-WEB-version.pdf](https://www.wlcc.co.za/210812-FINAL-WEB-version.pdf) (wlcc.co.za)

⁶⁷ United Nations Office on Drugs and Crime (UNODC) (2019). Were you really raped, or did you just not get paid? A Needs Assessment of Women Who Use Drugs In Four Cities In South Africa. Available at https://www.unodc.org/documents/southernafrica/Publications/Health/UNODC_WWUD_506_web.pdf

sensitization toward the histories of GBV in arrested women or how coercion and abuse are aggravating factors in drug-related crimes committed by women who often have little choice and live-in fear. Others identified gaps in interagency working between SAPS, social development, justice and penal systems concerning recording of GBV crimes and following up on those affected.

South Africa has a comprehensive legal framework that is largely aligned to the *Luanda Guidelines* which aim at improving the treatment of persons subject to arrest, police custody and pretrial detention in Africa⁶⁹ and related human rights norms and standards. Despite such provisions which recognise the fundamental rights of detained persons and provide for alternatives to remand detention, the continued general unwillingness to grant bail, particularly by SAPS is reported to result in rights violations and inefficiencies in the South African criminal justice system⁷⁰. Many participants during consultations observed the structural inequality (education, access to resources and legal processes) experienced by women in South Africa. For example, women are held in pretrial detention in South Africa due to the inability to afford bail or pay fines. This breaches the guiding principles that gender-specific criteria should be considered when making decisions on alternatives to pretrial detention, for example, bail conditions or conditions around house arrest should take into account a woman's caregiving obligations.

The conduct of the SAPS runs afoul of the *Tokyo Rules* that exhort States to use pretrial detention as a means of last resort in criminal proceedings⁷¹. Whilst the *Tokyo Rules* require States to implement alternatives to pretrial detention as early a stage as possible, resort to pretrial incarceration without due cause seems to be the default approach by SAPS⁷². In a case⁷³ decided by the Constitutional Court, it was established that SAPS were in the habit of arresting women who engage in sex work, for purposes of harassing and punishing them, without any legitimate reason or intention to have them prosecuted⁷⁴.

Generally, women who engage in sex work are coerced to pay a spot fine to the arresting officer to secure their release, or, they are taken to the police cells where they are detained overnight and eventually given an option to pay a fine⁷⁵. The resort by SAPS to the most drastic remedy to secure sex workers' attendance in court, in circumstances

where no prosecutions are ever instituted points to the malicious nature of the actions of law enforcement, which is at variance with provisions of the *Tokyo Rules*⁷⁶. There is also a gendered nature of the violations by law enforcement given that most of the sex workers are female. The GBV perpetrated by SAPS is reflective of the power dynamics that are created, in part, by the criminalisation of sex work and other layers of vulnerabilities linked to the socio-economic status of women in one of the most unequal countries in the world. As outlined in the previous section, women who use drugs should generally be spared the burden of incarceration, taking into consideration the cumulative underpinning social factors and their impact on female offenders' pathways to crime.

The trauma of pretrial detention of women does not end at the police station, with the South Africa criminal justice system notorious for keeping accused persons in custody for long periods once they have been remanded and are awaiting trial. It is widely recognised that alternatives to pretrial detention enhance the protection of the right of accused persons who at that stage enjoy a presumption of innocence. Studies have also shown a direct relationship between the use (and length) of pretrial detention and the imposition of a custodial sentence, for example in countries like the Netherlands and the USA . Concerning these pretrial detainees, it is important to remember three key aspects. **First**, they are still to be convicted of any offence, and thus clothed with a presumption of innocence. **Second**, they may be acquitted and therefore undeservedly detained in the first place. **Third**, they could receive non-custodial sentences. It is therefore very concerning that the South African legal system consistently maintains an unacceptably high number of female detainees, contributing to congested prisons, and in circumstances where offenders should not have been held in pretrial detention in the first place. Unsentenced female offenders have consistently contributed a worryingly high percentage of the total female population in correctional centres in the past five years, with the latest 2019/2020 figures reporting on 1448 (31.4%) unsentenced women out of the total female population of 3982⁷⁸. This is similar to the situation of males, with 50,160 (33.3%) unsentenced males out of the total male population of 150, 467 reported in the same timeframe⁷⁹.

⁶⁸ Ibid.

⁶⁹ The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) were adopted by the African Commission on Human and Peoples' Rights (the Commission) during its 55th Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014. Articles 2, 3, 5, 6, 7 and 26 of the African Charter on Human and Peoples' Rights (the African Charter) set out States' obligations to provide all people with the rights to life, dignity, equality, security, a fair trial, and an independent judiciary. The Luanda Guidelines will assist States in implementing these obligations in the specific context of arrest, police custody and pre-trial detention.

⁷⁰ De Ruiter, N and Hardy, K (2018). Study on the use of bail in South Africa. APCOF. Available at [023-apcof-research-study-on-the-use-of-bail-in-south-africa-nicola-de-ruiter-and-kathleen-hardy-.pdf](https://cdn.apcof-research-study-on-the-use-of-bail-in-south-africa-nicola-de-ruiter-and-kathleen-hardy-.pdf)

⁷¹ Article 6.1 of the Tokyo Rules.

⁷² In the case of Ex parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002(4) SA 613 (CC), 640 H- 641 A (para. 50). It was stressed that the purpose or object of an arrest must be to bring the suspect before a court of law, there to face due prosecution.

⁷³ The Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009).

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Rule 6 of the Tokyo Rules.

⁷⁷ Penal Reform International (2020). Global Prison Trends 2020-Alternatives to imprisonment. Available at: <https://cdn.penalreform.org/wp-content/uploads/2020/05/Global-Prison-Trends-2020-Penal-Reform-International-Second-Edition.pdf>

The South African criminal justice system has serious procedural flaws that unnecessarily contribute towards rights abuses and the unjustified pretrial detention of accused persons of both genders, contrary to the unequivocal language⁸⁰ in the Constitution, and provisions in the *Tokyo Rules*⁸¹ and *Bangkok Rules*⁸² including; 'Pretrial detention should be used as a means of last resort.' and 'Women should not be imprisoned because they cannot pay fines due to poverty and marginalization'

Approaches to judicial decision-making - A question of the gendered lens?

Mandatory sentences have been part of South Africa's penal landscape for many years. South African law provides minimum sentences of imprisonment for a relatively small range of serious offences, which include murder, rape, robbery and serious economic crimes. In consultations, some participants observed an increase in the application of minimum sentencing in recent years, creating increased congestion in South African prisons.

South Africa's approach towards trial proceedings, sentencing and punishment are, in the main, **gender-neutral**. Whilst all participants consulted were of the view that the rationale and underpinning of the Tokyo Rules are still as relevant today as ever in South Africa, several commented that it is notable that no South African judgement however explicitly refers to the Tokyo Rules. In trial proceedings, courts **do not** consider gender, on its own, as a factor in determining the guilt or otherwise of accused persons. However, in limited circumstances, gender considerations come into play at the mitigatory stage before sentencing⁸³. For example, in a number of decided cases⁸⁴ the courts have applied the so-called "*battered woman syndrome*" to reduce the sentence where it is shown that GBV or other forms of abuses contributed to the commission of a crime by women. In the celebrated *Ferreira case*⁸⁵, the court made the following remarks *viz* the impact of GBV on women's' pathways to crime:

"Her decision to kill and to hire others for that purpose is explained by the expert witnesses as fully in keeping with what experience and research has shown that abused women do. It is something which has to be judicially evaluated not from a male perspective or an objective perspective but by the court's placing itself as far as it can in the position of the woman concerned, with

*a fully detailed account of the abusive relationship and the assistance of expert evidence such as that given here. Only by judging the case on that basis can the offender's equality right under s 9 (1) of the Constitution be given proper effect. It means treating an abused woman accused with due regard for gender difference in order to achieve equality of judicial treatment. Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women. It also, therefore, means having regard to an abused woman accused's constitutional rights to dignity, freedom from violence and bodily integrity that the abuser has infringed."*⁸⁶ (emphasis added).

While the cases cited above apply to women who would have murdered in circumstances where they had been victims of GBV and/or other forms of abuse, it is argued that the same approach and fundamental principles should apply, **a fortiori**, in cases where women get into contact with the law for drug offences.

More generally, the approach to sentencing in South Africa has anchored on the premise that a trial judge is best-suited and retains **wide discretion** to decide on the most appropriate sentence only subject to limited specified legislated parameters⁸⁷. A few statutorily provided for sentencing guidelines to certain offences, the trial court retains the primary prerogative to determine the most appropriate sentence for a convicted person in form and extent. This judicial exercise of discretion towards sentencing is guided by the well-established, broad sentencing principles⁸⁸ which require that, when making sentencing determinations, judges consider four things: the victim must be **heard** and impact on the victim considered, the **personal circumstances** of the offender, the **nature of the crimes** including the gravity and extent thereof and the **interests of the community**⁸⁹. These factors ensconced in the original "*triad of Zinn*" should lead the court to determine a fair, balanced, and appropriate sentence.

They were subsequently supplemented by the Victim Impact Assessment (**VIS**)⁹⁰ requirement to enable the court to determine a fair, balanced, and appropriate sentence. Further detail regarding the differences between the Victim Impact Report (**VIR**) versus Victim Impact Statement (**VIS**) is provided below:

⁷⁸ Department of Correctional Services (2020). Annual Report. Available at http://www.dcs.gov.za/wp-content/uploads/2020/12/DCS-Annual-Report_web-version.pdf

⁷⁹ Ibid.

⁸⁰ See, for example Section 32(1)(f) of the Constitution.

⁸¹ Rule 6 of the Tokyo Rules.

⁸² Rule 57 of the Bangkok Rules.

⁸³ The approach of courts in South Africa is that certain factors which, on their own, do not necessarily constitute full defences at law, can be relied on as mitigatory factors that can reduce the sentence. The factors include physical and mental abuse of the offender (*S v Kgabo and Others* (CC 11/1994) [2005] ZANWHC 63 (13 September 2005))

⁸⁴ See for example, *S v Ferreira and Others*; [2004] 4 All SA 373 (SCA) (1 April 2004); *S v Engelbrecht* 2005 (2) SACR 41; *S v Engelbrecht* 2005 2 SACR 163; *S v Potgieter* 1994 (1) SACR 61; *S v Kgabo and Others* (CC 11/1994) [2005] ZANWHC 63 (13 September 2005)

⁸⁵ *S v Ferreira and Others*; [2004] 4 All SA 373 (SCA) (1 April 2004).

⁸⁶ Ibid. Para 40.

⁸⁷ There are two ways in which the discretion of trial courts is qualified. Firstly, appellate courts can overturn sentences imposed by lower courts. But appellate courts will only interfere with a sentence imposed by a trial court only if there is gross irregularity or misdirection, or if a sentence is inappropriate or disproportionate. The second qualification kicks in where the statute has provided for mandatory minimum sentencing regime in relation to certain serious offenses including murder, rape, drug dealing, firearms smuggling, and human trafficking for sexual purpose. Even in such cases, it remains permissive for trial courts to depart from the prescribed minimum sentences whenever they find a "substantial and compelling circumstance" warranting such a departure.

⁸⁸ *S v Zinn* 1969 (2) SA 537, 540; *Mhlongo v S* (140/2016) [2016] ZASCA 15; *S v Matyitiyi* (695/09) [2010] ZASCA 127

VIR - A victim impact report is compiled by a professional (i.e., expert). Professionals are better resourced to report adequately the suffering of victims than the victims themselves, particularly by psychologists with access to standardised measuring instruments and a thorough understanding of emotional trauma. The use of a VIR provides indirect participation of the victim but enables him/her to avoid the distressing nature of having to personally recall their harrowing experience in court.

VIS - It can take the form of a statement drawn up by the victim herself/himself OR the victim may address the court *viva voce*. Secondary victims may provide statements as well. He/she can discuss specifically the direct harm or trauma they have suffered and problems that have resulted from the crime such as loss of income. Medical and psychiatric reports that demonstrate harm to the victim can also be included. It includes the impact the crime has had on their day-to-day life and/or plans for the future, also how it impacted their extended family.

Substantial or mitigating circumstances were presented to the court for both genders are carefully considered by magistrates when applying sentences. Assessment reports at pretrial and at trial made by social workers or probation officers dictate the mitigating and aggravating factors in the committal of the offence. Other factors include first time or repeat offences and the trajectories of the same. Gender-specific criteria are then considered by both prosecution and magistrates when making decisions. These can include women's histories about socio-economic circumstances, exposure to GBV, the type of drug-related and other offence, and gender-specific mitigating factors such as caring responsibilities, the best interest of the child/children, history of victimization or mental health care needs, and other factors. There is heavy reliance on legal presentation of sufficient detail regarding the histories and circumstances of the offender as *qua* victim of GBV, and how this aggravated their committal of an offence⁹¹. Of concern is that if this information is insufficiently sought or presented it falls by the wayside. Many participants described how legal aid and social work systems are insufficiently equipped and capacitated to deal with numbers who cannot afford private legal representation. Those with good legal representation benefit. This capacity issue impacts negatively on the level of pre-sentence documentation and subsequently the full

presentation and consideration by the justice system of social or extraneous circumstances of the offender (i.e., GBV, coercion, disability) at sentence enquiry⁹².

The application of the "*battered woman syndrome*" at sentencing, as discussed above, seems to be considered **when** it is provided for by probation reporting. Of note is that including dimensions of GBV or its severity is not always provided for. See *Mhlongo v The State* where gravity of rape as the offence committed was considered⁹³, and also the 2008 case of the *State v Ellen Pakkies*⁹⁴ which involved a mother strangling her Tik⁹⁵ addicted son in his sleep. She was found guilty of his murder, and a non-custodial sentence imposed. Her attorney argued:

"Ellen Pakkies is not a villain, she is a victim. She has been punished all her life. Imprisonment is not the only appropriate sentence given the facts of the case". He further argued that the motive for the killing was "self-preservation".

Depending on a court's evaluation of these considerations, the court has a **wide scope**, to order custodial or non-custodial sentences from quite a generous menu provided for by the legislature⁹⁶. When considering a sentence, the purpose of the sentence must also be considered by the judicial officer, namely, rehabilitation, prevention, deterrence, and retribution^{97; 98}. This reliance on judicial discretion can represent a double-edged sword. On one hand, it can be viewed positively as it does not limit a judge's ability to exercise his/her mind judiciously and weigh the personal/individual circumstances of an offender against other relevant considerations before coming up with the most appropriate sentence. The downside to this approach is that, in the absence of sentencing guidelines and/or adequate pre-sentencing assessments, courts apply a **gender-neutral approach** to the law and may end up missing some nuances linked to women who find themselves in contact with the criminal justice system. This can be traced to the fact that criminal proceedings hardly take into consideration the psycho-social factors influencing the pathway to crime by women, nor the factors underpinning victim to the perpetrator (for example as in the case of trafficking). These concepts which do not strictly fall within the discipline of law are not usually part of the training of and remain foreign to the judicial officers presiding over cases of women offenders. Further, the criterion for determining moral blameworthiness is subjective, meaning the judicial

⁸⁹ Ibid.

⁹⁰ S v Matyityi (695/09) [2010] ZASCA 127, para 16.

⁹¹ The quality of the presentence reports compiled by social workers appointed by the Department of Social Development, are mostly on standard, measured against Tokyo Rule 7.1.

⁹² Whilst it is beyond the remit of this consultation to examine whether these pre-sentence reports comply with Tokyo Rule 7.1 and the requirements of the Bangkok Rules to take into account the specific needs, circumstances and backgrounds of women offenders (including victimization, GBV and trauma, caretaking responsibilities, mental health, etc), it also remains important to underscore that the court exercises judicial discretion taking into account all other factors.

⁹³ Mhlongo v The State (140/16) [2016] ZASCA 152 (3 October 2016)

⁹⁴ See weblinks <https://www.dfa.co.za/south-african-news/desperate-cape-town-mom-chains-up-drug-addict-son-to-keep-him-safe> and <https://www.iol.co.za/travel/south-africa/relief-as-pakkies-walks-free-428798>

⁹⁵ Methamphetamine.

⁹⁶ See generally, Chapter 28 of the Criminal Procedure Act.

⁹⁷ S v Swart 2004 (2) SACR 370 (SCA). In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that rehabilitation of the offender will consequently play a smaller role.

⁹⁸ Kumalo 1973 (3) SA 697 (A) Holmes JA. Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.

officer must focus solely on what the accused believed and intended when deciding for purposes of the sentence whether moral blameworthiness has been reduced⁹⁹.

This represents a blind spot¹⁰⁰ that can lead to injustices given that research has shown that South Africa remains one of the countries with the most serious problems of GBV in the world which contributes to the pathway to drug use and crime by women. The pathway of women offenders to crime is distinguishable from that of the male counterparts¹⁰¹. The commission of a crime by women is inextricably linked to a combination of socio-economic factors that disproportionately affect them and, it is submitted, that this should be taken into consideration when women meet the law. As previously mentioned, most of these women end up engaging in drug and alcohol abuse, drug distribution and sex work (or are trafficked) as a way of supporting their families and a form of coping mechanism¹⁰². This brings into question the necessity of the criminal sanctions, which have proven to be the pivot for further human rights abuses against the predominantly women population that use drugs and engage in sex work. The cumulative factors disproportionately affecting women are further compounded in cases where foreign nationals encounter the law.

Although no set rules obliging judicial officers to wear the gendered lens when sentencing female offenders, there have been some precedent-setting judgments whose net effect is to encourage the diversion of women offenders from incarceration. In the leading case of *M v. The State*¹⁰³ the court needed to deal with the question of a non-custodial sentence and the mitigatory weight that could be placed on the fact that an offender was a caregiver. Through a purposive interpretation of the best-interests-of-the-child provision in the Constitution, the constitutional court was able to infuse the caregiving principle into the sentencing laws of the land¹⁰⁴. The Court qualified the long-standing precedent set by the Zinn case, of focussing on the offender's circumstances, and instead, spotlighted the impact of incarceration on the offender's dependants. In overturning the traditional rationale adopted by the lower court in this case, the Constitutional Court held that,

*"Every child has his or her dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children"*¹⁰⁵.

The Court added that section 28 of the Constitution requires the law to make the best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. The court concluded that, where possible, **primary caregivers of young children should not be imprisoned** because children need them for their survival and proper guidance. Finally, if there is a range of appropriate sentences using the well-established, broad sentencing principles, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose. This aligns with the guiding principles that gender-specific mitigating factors should be considered during sentencing, mandatory sentences eliminated, and that the least interventionist non-custodial sentence should be imposed considering each woman's circumstance, e.g. caring responsibilities. It is argued that this presents an "escape-clause" for women who use drugs or are engaged in drug-related crime (particularly in the less serious offences) who, in most cases are mothers and caregivers and are likely driven into crime by the desire to provide for and fend for the family. Conversely, those without children/caregiving responsibilities are perhaps excluded from this benefit.

It is therefore argued that it is possible to use the existing legal provisions to nuance sentencing from a gendered lens and South African courts ought to do so in the case of women offenders, given the unique social determinants affecting women who use drugs and many other women detained on drug offences, the benefits that flow from a non-custodial sentence to the offender and the benign effect of such victimless offences on the community.

⁹⁹ Ferreira and others v S [2004] 4 All SA 373 (SCA)

¹⁰⁰ See for example the appellate Justice's comments on the lower court's decision in the Ferreira's case, (para 34-35) where Justice Howie, P observed that, "The learned Judge's view that the first appellant could simply have walked away from the relationship can be understood in one of two ways. Either he did not accept the witnesses' expertise, or he thought that they were unconvincing because the facts did not support them. I have difficulty in either event with the learned Judge's conclusion..."

¹⁰¹ Steyn, F., & Booyens, K (2018). A profile of incarcerated female offenders: implications for rehabilitation policy and practice. University of Pretoria, Pretoria. Available at repository.up.ac.za.

¹⁰² Ibid.

¹⁰³ [2007] ZACC 18.

¹⁰⁴ Ibid. Para 33-34.

¹⁰⁵ Ibid. Para 18.

International standards urge States to provide that courts can consider, during the prosecution and sentencing, claims of self-defence by women who are survivors of violence. Further, women's "pathways" into the South African criminal justice system reveal a generally common pattern of substance abuse, experiences of victimization and extremely physical, mental, and emotional abuse, poverty, mental illness, among other sociological factors¹⁰⁶. South African courts, in certain **narrow** circumstances, reflect the spirit of the *Tokyo Rules*¹⁰⁷ and the explicit provisions of the *Bangkok Rules*¹⁰⁸ that prescribe an approach that intentionally considers gender nuances, women's specific needs, circumstances and backgrounds and prioritises applying non-custodial sentences to women offenders, particularly caregivers wherever possible. It follows that providing sentencing guidelines that are rights-based, gender-sensitive and trauma-informed and supported by adequate assessments will lead to a more positive outcome in the protection of the rights of women in South Africa.

Women as victims of trafficking and defendants of drug and sex work-related offences

South Africa is a net recipient of foreign nationals, given its status as the pre-eminent economic hub of the SADC region. The country is also considered to be the primary destination for trafficked persons in the Southern African region and on the continent, with women and young girls being primary targets of recruitment into forced sex work. Among migrants crossing into South Africa are women seeking to find means to survive. Without proper legal documents to be in South Africa, these women end up victims of coercive practices such as exploitative sex work, human trafficking, and consumption of illicit substances which contributes to and results in their arrest and detention. When commenting on the unique challenges faced by foreign women nationals in detention, the Deputy Minister of Correctional Services *Nkosi Phathekile Holomisa*, noted that, '*correctional centres near border posts such as the one in Mbombela face unique challenges, where undocumented women often find themselves vulnerable, accosted into illegal acts such as human trafficking and end up being imprisoned*'¹¹⁰.

South Africa has adopted laudable and significantly progressive legislation¹¹¹ to address the pervasive problem of the trafficking of persons in South Africa. It is further of importance to mention the principle of non-punishment for victims of human trafficking, which is a core element of much national anti-trafficking legislation and regional instruments against trafficking¹¹². about the protection of victims of trafficking, reference may be made to the South African National Policy Framework on Trafficking in Persons¹¹³. The NPF should be read and interpreted in the context of Section 22 of the Prevention and Combating of Trafficking in Persons Act (PCTPA) Act concerning the criminal prosecution of victims of trafficking. The Act provides for criminal sanctions to protect vulnerable persons who included women and girls that may fall victim to traffickers. The Act, among other things, criminalises the act of trafficking another person through, "*abuse of the vulnerability*"¹¹⁴ Explanation of the definition of vulnerability below.

For purposes of the Act the following have been recognised as vulnerabilities that may result in a person finding themselves victims of trafficking¹¹⁵;

- *The person has entered or remained in the Republic illegally or without proper documentation*
- *pregnancy*
- *any disability of the person*
- *addiction to the use of any dependence-producing substance*
- *being a child*
- *social circumstances*
- *economic circumstances*

There is however conflict between procedures and reality, as published in the South African Country Narrative in the 2020 US TIP Tier Report¹¹⁶, which reports on corruption and official complicity among law enforcement and immigration officials in South Africa, representing significant obstacles to tackling trafficking offences.

The legislative framework acknowledges the existence of special circumstances warranting such an approach

¹⁰⁶ Ibid.

¹⁰⁷ Rule 8 of the Tokyo Rules.

¹⁰⁸ Rule 57 of the Bangkok Rules.

¹⁰⁹ See for example, Rules 2 and 3, of the Tokyo Rules and Rules 57, 58 and 59 of the Bangkok Rules.

¹¹⁰ Remarks made during the launch by The Department of Correctional Services, of a pilot programme on substance abuse, 12 February 2018, available at <http://www.dcs.gov.za/?s=female+offenders&submit=Search>

¹¹¹ In 2013 South Africa enacted the Prevention and Combating of Trafficking in Persons Act, Act 7 of 2013 which was supplemented by the Regulations Under Section 43(3) Of the Prevention and Combating of Trafficking In Persons Act, in 2015.

¹¹² The UN General Assembly explicitly affirmed this principle in 2010, urging Member States "to refrain from penalizing victims who have been trafficked for having entered the country illegally or for having been involved in unlawful activities that they were forced or compelled to carry out" (See United Nations updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/Res/65/228, annex, para. 18(k)).

¹¹³ Pg. 41 of the policy document: "Through the NPF, the government of South Africa commits to improve the identification of potential and actual victims of trafficking and ensure them full protection. More specifically, it intends to develop identification indicators and Standard Operating Procedures (SOPs) to establish a cooperative and coordinated framework involving all relevant anti-trafficking stakeholders to enhance identification, referral, and protection of assisted trafficked persons. In line with the Act, the NPF will also design measures to support swift access to compensation. Special attention will be given to foreign victims through the enactment of regulations to grant them a residence permit and access to protection; schemes for a sound repatriation to their home countries will also be designed."

¹¹⁴ Pg. 43: "Trafficked persons should always be treated as victims of a crime and holders of rights. They should not be criminalised, re-victimised or re-traumatised as a result of their contact with law enforcement and judicial authorities. Too often, in fact, victims are treated as criminals or irregular migrants and are detained, charged or prosecuted for violations of immigration law or for activities committed as a direct consequence of their being trafficked (e.g. prostitution, possession or use of fraudulent documents, etc.)."

¹¹⁵ Pg. 46: "A closely related area that needs to be prioritised concerns the need to ensure the correct implementation of provisions on the non-criminalization of victims of trafficking. The limited capacity of the criminal justice system to detect the crime and to identify its victims has often resulted in the past in the paradox of victims being prosecuted for offences committed as a consequence of their position as trafficked persons. The NPF sets as a priority to ensure compliance with the Act in this key area of the anti-trafficking response."

¹¹⁶ Section 4(1)(c) of the PCTPA.

¹¹⁷ Section 1 of the PCTPA.

when regard is given to section 22 of the PCTPA. Judicial identification of defendants as victims of trafficking is accepted and included as mitigating circumstances during sentencing¹¹⁷. When prosecuting a victim of trafficking, the Act obliges the prosecutor to give due consideration to whether the offence was committed as a direct result of the person's position as a victim of trafficking¹¹⁸. If the prosecutor establishes that an individual is a victim of trafficking and that the offence was committed as a direct result of that status, he can apply to the court for a postponement and refer such a person to the provincial department of social development to conduct an assessment¹¹⁹. If the Department of Social Development confirms that the concerned individual is a victim of trafficking, this forms a basis upon which a prosecutor may quash the criminal prosecution¹²⁰. National Instructions are in place which inter alia deal with the identification of victims of trafficking and processes to be followed:

SAPS National Instruction 4 of 2015 Prevention and Combating of Trafficking in Persons

Steps to be taken in respect of an adult who is a victim of trafficking

(1) If a member knows or has reasonable grounds to suspect that an adult is a victim of trafficking (whether that suspicion is based on a report or complaint that he or she had received, or on his or her observations during the performance of his or her duties and functions (while patrolling or attending to complaints), the member must —

(a) open a docket for the investigation of the offence of trafficking or a related offence (as set out in Annexure A) and register the docket on CAS;

(b) complete a form SAPS 611, make copies of the completed form and fax it to the provincial representative of the Department of Social Development (DSD) for an investigation to determine whether the person is a victim of trafficking and hand a copy thereof to the accredited organization;

(DSD will then issue a Form 4 Letter of Recognition to the Victim of Trafficking (VoT), which should be filed in the police docket)

Conducting an operation

The trafficking in persons screening form (Annexure B) must be completed (with the assistance of interpreters where necessary) to identify victims of trafficking.

Read together, section 22(4) further strengthens possibilities of protecting the rights of women who use drugs and those who survive on sex work, if such crimes are committed in the context of human trafficking. This is especially more so in the case of female foreigners who are normally coerced into sex work and the world of illicit drug use once they arrive in South Africa through trafficking or, because of desperation they unlawfully enter the country in search of economic opportunities. Section 22(4) curtail the prosecutorial discretion to institute a prosecution in the circumstances, as the written authorisation of the Director of Public Prosecutions of the particular jurisdiction, is mandatory before such prosecution may be instituted or proceeded with (excerpt).

"22 Criminal prosecutions of the victim of trafficking

(1) When deciding whether to prosecute a victim of trafficking, the prosecutor must give due consideration to whether the offence was committed as a direct result of the person's position as a victim of trafficking.

(2) If, during a criminal prosecution of a person, the prosecutor on reasonable grounds suspects that that person is a victim of trafficking and that the offence was committed as a direct result of the person's position as a victim of trafficking that prosecutor must

(a) apply to the court for a postponement; and

(b) in the prescribed manner, refer that person to the provincial department of social development, which must conduct an assessment in terms of section 18 (6) or 19 (8), as the case may be.

(3) A letter of recognition that an adult person is a victim of trafficking or a finding by the provincial department of social development after an assessment referred to in section 18 (6) that a child is a victim of trafficking serves as a ground for the withdrawal of the criminal prosecution or the discharge of the victim of trafficking if the prosecutor is satisfied that the offence was committed as a direct result of the person's position as a victim of trafficking.

(4) No criminal prosecution may be instituted against a person referred to in subsection (1) or be proceeded with against a person referred to in subsection (2) without the written authorisation of the Director of Public Prosecutions having jurisdiction."

The multi-level, multi-agency response to trafficking in persons cases process is illustrated as follows;

¹¹⁶ United States Department of State (2020). Trafficking in Persons Report. 20th edition. <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf>

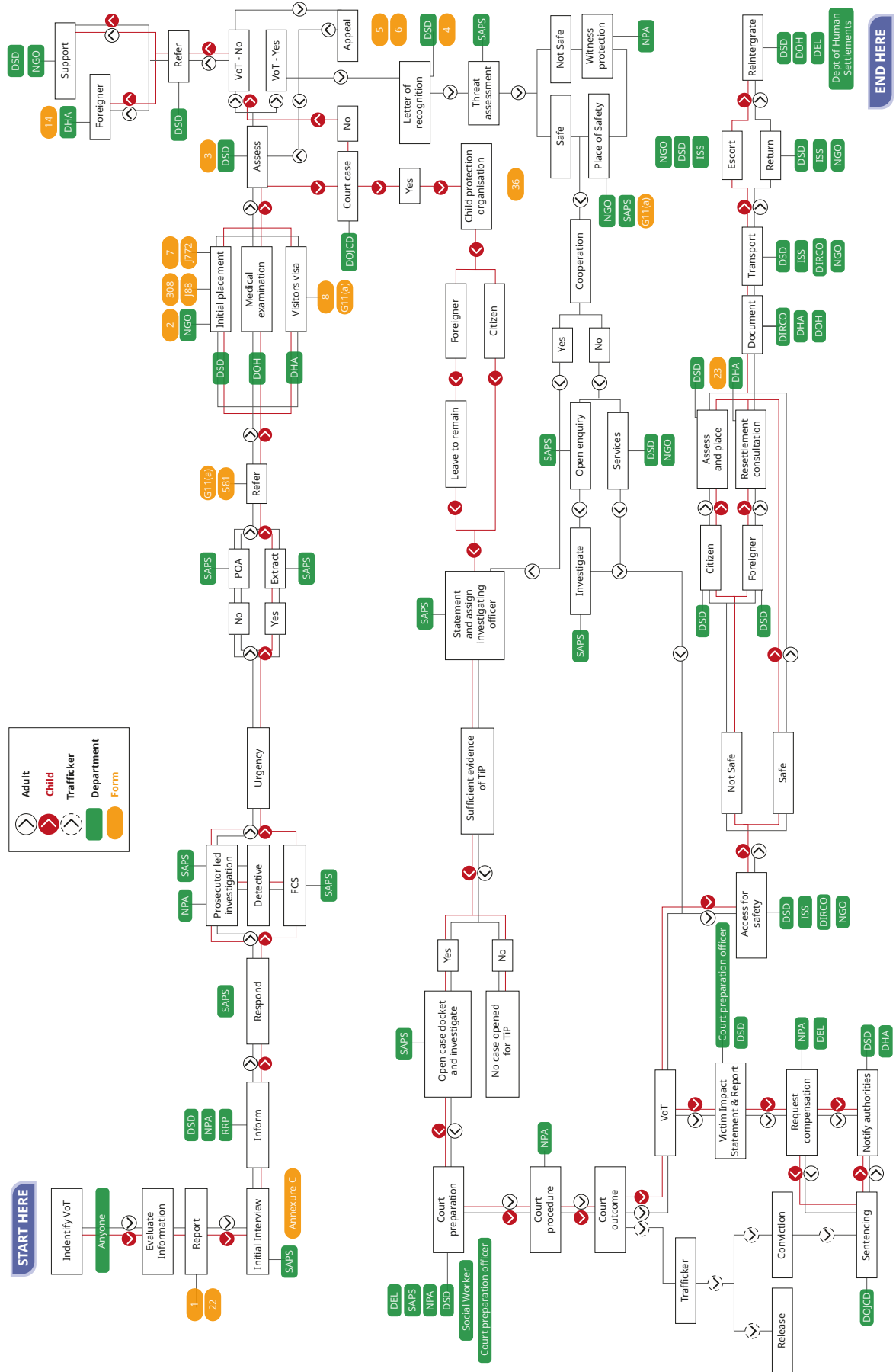
¹¹⁷ Mabuza and Chauke, SHG 9 / 13, 2016.

¹¹⁸ Section 22(1) of the PCTPA.

¹¹⁹ Section 22(2) of the PCTPA.

¹²⁰ Section 22(3) of the PCTPA.

identification of victims of trafficking and processes



Linguistic and cultural differences are however described as a challenge in ensuring foreign national victims' access to justice in South Africa, particularly with respect to testifying^{121; 122}. One participant also observed the additional difficulties of securing available accredited and vetted interpreters to assist in consulting with certain foreign nationals, and the potential for corruption when using officials from foreign state embassies.

Central to the *Tokyo Rules*, several participants observed insufficient focus in the South African criminal justice system on understanding and considering the victim to perpetrator pathways, in the instance of women conducting drug-related crime as the perpetrator, and the pathways from victimization (for example trafficking victim) toward perpetration. Many highlighted the need for greater awareness-raising across vulnerable communities of women and young girls (for example concerning the 'phony' social media advertising of employment in foreign countries; and the impact of gangsterism), training at the SAPS level regarding detection of victims from arrest, to pretrial to sentencing, and with further development of dedicated trauma-informed support for these women. There are further gaps in the system about receiving non-custodial sentencing, outlined in later sections. One participant remarked that there is a programme in place for victims of trafficking on return from foreign prisons. .

South African has progressive legislation in place to address the trafficking of persons and is in line with the guiding principle that law enforcement officers are required to take measures to identify, protect and support victims of trafficking at an early stage and avoid prosecuting them for offences committed as a consequence of their exploitation by traffickers. In the practical sense, there are compromising factors in the form of official corruption, language barriers and witness testimony.

Non-custodial sentencing in general

The South African legal system has a permissive framework for the imposition of several variants of non-custodial sentences and to that extent, it is, at the very least, on par with some of the more progressive penal systems in the world¹²³. All participants agreed that at present a **gender neutral** approach to non-custodial measures is applied by courts in South Africa. Sentencing is considered the primary prerogative of trial courts who enjoy wide discretion to determine the type and severity of a sentence on a case-by-case basis. All participants were of the view that the application of non-custodial

measures in South Africa, in general, adheres to the basic principles to promote the use of non-custodial measures and sanctions, as well as minimum safeguards for persons subject to alternatives to imprisonment. Many non-custodial measures are provided for by South Africa law but according to some participants continue to be underutilised by the judiciary. Many were of the view that whilst there is variance in the type of application of non-custodial sentences geographically in South Africa, there is very little difference in the application of the **type** of alternative sentence between genders.

Participants described a **range of non-custodial measures** applied in South Africa which include fines, caution and discharge; compensatory orders; postponed or suspended sentencing, correctional supervision, community service orders, house arrest with monitoring, electronic monitoring, community service, committal to an institution; and with a range of programmes (i.e. anger management, psychosocial counselling) and conditions (for example attendance of drug detoxification or drug treatment, generally abstinence focused plus testing), imprisonment with remand in the community, or imprisonment with parole. One participant also described that as an example the Commissioner may, without applying to a court, convert a prison term to correctional supervision when an offender has been sentenced to a fine but is unable to pay the fine.

The Criminal Procedure Act (CPA), read together with the Correctional Services Act (CSA), provide for several non-custodial sentences that a court may impose upon the conviction of an offender. Broadly these sentences fall under the ambit of the so-called community corrections, which have been defined as, "*all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department.*"¹²⁴ The primary form of community correction (called correctional supervision) is defined as, "*a community-based sentence served by the offender in the community under the control and supervision of correctional officials, subject to any conditions that may be set by the court*"¹²⁵ or the Commissioner of Corrections."¹²⁶ A court can only impose a sentence of correctional supervision after receiving a sentence report either by a correctional official or a probation officer. According to the Correctional Service Act¹²⁷, the objectives of community corrections are (excerpt):

¹²¹ UNODC (2020). Female victims of trafficking for sexual exploitation as defendants. Available at: [final_Female_victims_of_trafficking_for_sexual_exploitation_as_defendants.pdf](#) (unodc.org)

¹²² Mabuza and Chauke, SHG 9 / 13, p. 37.

¹²³ See generally sections 1, 50, 51, 52, 53 and 60 of the Correctional Services Act as read with sections 276, 276A, 296 and 297 the Criminal Procedure Act.

¹²⁴ Section 1 of the Correctional Services Act.

¹²⁵ As per section 276(1)(h) of the CPA.

¹²⁶ As per section 276(1)(i) of the CPA.

¹²⁷ Section 50 of the Correctional Services Act.

- *Allow sentenced offenders an opportunity to serve their sentences in a non-custodial manner.*
- *to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in future.*
- *to enable persons subject to community corrections to be rehabilitated in a manner that best keeps them as an integral part of society, and to*
- *enable persons subject to community corrections to be fully integrated into society when they have completed their sentences.*

The broad legal framework on community corrections articulated by the CSA and the CPA does reflect, to a greater extent, the letter and spirit of the *Tokyo Rules*. According to Rule 11.1 of the *Tokyo Rules*, States must specify the nature and period of the community correction sentence. The *Tokyo Rules* also prescribe for a correctional supervision programme that assists offenders in the integration process back into society in a way that minimizes the likelihood of relapse¹²⁸. The rules also require courts, together with the department of prisons, to tailor the conditions of the non-custodial measures to the personal circumstances of the offender to ensure that a most appropriate and beneficial sentence is served¹²⁹. The essence of Rule 11 of the *Tokyo Rules* is aptly reflected in legislation and the jurisprudence of the land. The domestic law and the Courts invariably order the most suitable of non-custodial sentences informed by the individual circumstances and based on a pre-sentence report by an expert on the suitability of a community correction sentence¹³⁰. As prescribed by rule 10.4 of the *Tokyo Rules*, the domestic law must provide psychological, social, and material assistance to the offender to assist with their reintegration into society. To this extent, the South African legislative framework reflects the overriding ethos of the *Tokyo Rules* and this can be gleaned from the elaborate approach in the CSA¹³¹, the Community Services regulations¹³² and case law¹³³. The application of correctional supervision, which was introduced via an amendment to the law¹³⁴ in 1991, has been rightly lauded as a most defining moment of the shift towards options for non-custodial sentencing in South Africa. In the case of *S v Williams and Others*¹³⁵, *Langa J* remarked:

The introduction of correctional supervision with its prime focus on rehabilitation, through 276 of the Act, was a milestone in the process of 'humanising' the criminal justice system. It brought along with it the possibility of several imaginative sentencing measures, including, but not limited to, house arrest, monitoring, community service and placement in employment. This assisted in the shift of emphasis from retribution to rehabilitation. This development was recognised and hailed by Kriegler AJA in S v R as being the introduction of a new phase in our criminal justice system allowing for the imposition of finely tuned sentences without resorting to imprisonment with all its known disadvantages for both the prisoner and the broader community. The development of this process must not be seen as a weakness, as the justice system has 'gone soft'. What it entails is the application of appropriate and effective sentences. An enlightened society will punish offenders but will do so without sacrificing decency and human dignity.

Formulation of community corrections provisions however tends to be gender-neutral and courts seem to generally approach sentencing in the same manner¹³⁶. Community corrections can be executed through a wide range of measures¹³⁷ and conditions. Section 52(1) of the Correctional Services Act, 1998, provides that (excerpt):

When community corrections are ordered, a court, the Correctional Supervision and Parole Board, the National Commissioner or other body which has the statutory authority to do so, may, subject to the limitations contemplated in subsection (2) and the qualifications of this Chapter, stipulate that the person concerned-

- is placed under house detention ;*
- does community service to facilitate the restoration of the relationship between the sentenced offenders and the community.*
- seeks employment.*
- where possible take up and remains in employment.*
- pays compensation or damages to victims.*
- takes part in treatment, development and support programmes.*

¹²⁸ Tokyo Rules, Rule 10.1

¹²⁹ Tokyo Rule, Rule 10.3.

¹³⁰ See for example, the case of *S. v Vetter*, (AR 264/11) [2012] ZAKZPHC

¹³¹ See sections 1, 50, 51, 52 and 53 of the CSA.

¹³² See for example, Section 27 of Correctional Services Regulations which provides as follows:

The Correctional Supervision Committee

The Supervision Committee established at every community corrections office consists of the following:

(a) the correctional supervision official; and

(b) a monitoring official who is responsible for the monitoring of the offender and at the discretion of the chairperson, a social worker or psychologist if necessary and, if practicable, a person from the community who is an expert in behavioural sciences.

¹³³ See for example, the case of *S. v Vetter*, (AR 264/11) [2012] ZAKZPHC.

¹³⁴ Correctional supervision is a sentencing option that was introduced in terms of s 41(a) of the Correctional Services and Supervision Matters Amendment Act 122 of 1991.

¹³⁵ 1995 (2) SACR 251 (CC), at para 67-8.

¹³⁶ From a review done of a sample of reported case law, there is no evidence that courts specifically take into account or consider gender as a factor in sentencing.

¹³⁷ See Section 52(1) of the CSA, 1998.

¹³⁸ *S v Dikgacwi and Others* (SS49/2012) [2013] ZAWCHC 67 (15 April 2013).

- g. *participates in mediation between victim and offender or in family group conferencing.*
- h. *contributes financially towards the cost of the community corrections to which he or she has been subjected.*
- i. *is restricted to one or more magisterial districts.*
- j. *lives at a fixed address.*
- k. *refrains from using alcohol or illegal drugs.*
- l. *refrains from committing a criminal offence.*
- m. *refrains from visiting a particular place.*
- n. *refrains from making contact with a particular person or persons.*
- o. *refrains from threatening a particular person or persons by word or action.*
- p. *is subject to monitoring.*

Crimes like possession of drugs (and sex work) are victimless and there is generally no direct harm to another person when the crime is committed, and similarly, there are no direct complainants who may necessarily be aggrieved by a non-custodial sentence. Therefore, a community correction sentencing option should be preferred by courts in its different forms as it easily satisfies the ultimate correctional objectives of punishment and rehabilitation without infringing upon the interests of the community of seeing justice done. The law adequately provides for such options where an offender is saved from serving time in prison and instead, benefit from a community correction sentence that is rehabilitative following Rule 12.1 and Rule 12.2 of the *Tokyo Rules*¹³⁹.

Applying adequate non-custodial sentencing for women was agreed by many participants to support a woman's continued role, sense of responsibility and engagement in the community. Diversion and restorative justice programmes are available for women both at the court level or before release on parole. One participant said;

"in the Probation Services Act 116 of 1991, diversion is defined as a diversion from the formal court procedure with or without conditions. At present, there is a prominent school of thought in South Africa proposing that persons should be kept out of the criminal justice system wherever it is possible to do so. Such diversion will be achieved partly plea bargaining by the DPP. Diversion plays an important role in especially in juvenile justice see , and there are at present dedicated sections of magistrates' courts dealing exclusively with juveniles in an attempt to achieve diversion if at all possible.

Juvenile offenders fall under the remit of the Child Justice Act, and many participants observed the robustness of the diversion programming, and its support by priests, family, social workers, and community drug forums. Several participants remarked on the opportunity to further strengthen this model and expand its remit to include adults of both genders. The Alternative Dispute Resolution (ADR) system whilst sufficiently developed for minors, was viewed by some participants as not as formalized for adults. These participants highlighted the need for a formalized adult ADR system with judicial oversight to attend programmes as part of the non-custodial sentence and ultimately avoid re-entry into the criminal justice system. To achieve this, legislative changes are required with general ADR provisions like those in the Child Justice Act.

The South African system reflects, in large parts, the spirit of the *Tokyo Rules* that encourage the adoption of a diversity of approaches that give judicial officers many sentencing options before settling for imprisonment. Its limitations manifest, as stated in earlier sections, in its failure to reflect gendered nuances either in the legislation or via judge-made law, as dictated by the *Bangkok Rules*. There is ***no identifiable difference between men and women*** about the actual implementation of non-custodial measures (supervision, duration, conditions, treatment process, discipline and breaches of conditions, *Tokyo Rules 10-14*). It is important to ensure that non-custodial sentences do not widen the net of the South African criminal justice control over women through administrative sanctions, and; sufficiently address their unique gendered needs in community re-insertion.

Identified gaps in coverage and institutional capacity to implement non-custodial sentences

What emerges from the previous sections is that whilst South Africa does not seem to have specific laws and policies within the criminal justice chain, that nuance issues specific to women, particularly those arrested for drug-related offences and potential victims of GBV, it still retains some legal and policy provisions that can be invoked to promote the use of non-custodial alternatives to imprisonment, and it may be inferred that women should ***logically benefit*** from such laws and policies. Whilst some laws and policies support the establishment of mechanisms to cater for women who use drugs, in practice, it has been noted that there is a ***dearth of specialist welfare support*** for affected women¹⁴¹. More on this in the later section on drug treatment and rehabilitation

¹³⁹ Section 52 of the CSA, 1998.

¹⁴⁰ Child Justice Act 75 of 2008

¹⁴¹ The AIDS and Rights Alliance for Southern Africa (ARASA) (2019). Don't treat us as outsiders, Drug Policy and the Lived Experiences of People Who Use Drugs in Southern Africa. ARARA.

Some participants observed several significant gender gaps based on discrimination in the application of non-custodial sentencing contra to the guiding principles in the *Tokyo Rules* and *Bangkok Rules*. Several distinct groups of women are affected and do not benefit from such alternative provisions. **Firstly**, women who receive a non-custodial measure are required to have a fixed address to facilitate monitoring. Women who are victims of trafficking and those on parole who do not have an address or a safe place to return to are unlikely to receive the benefit of non-custodial measures. Many require support from civil society, and a place in a halfway house (if available). For victims of GBV with a home address, the controlled aspect of alternative sentencing impacts on these women who must then live with perpetrators in the home. This remains a significant challenge in South Africa, safe houses are limited which puts women (and their children) at risk. This is contra the guiding principles which state that community service placements should be gender-responsive, by considering the distance from a woman's home, safety, need to take care of dependent children etc. **Secondly**, women incarcerated in foreign countries (for example South African nationals detained on drug trafficking charges) cannot serve a non-custodial sentence in South Africa; and hence are disadvantaged by the lack of prisoner transfer/extradition agreements. Them and their families, are exposed to significant trauma, and their families are unable to provide support and resources to them in foreign prisons. **Thirdly**, non-national women particularly those trafficked with no formal address do not appear to receive the benefit of non-custodial sentences in South Africa, and if sentenced serve time in prison before deportation. This is contra to guiding principles which state that foreign national women in contact with the law may not be discriminated against, that they have access to justice services and access to non-custodial measures and are assisted with resettlement or transfer. **Fourth**, little distinction applies between mental illness and learning disability in the judicial system, as well as dual diagnosis and substance use. Within the context of this remark, it is possible that women with co-morbidities are disadvantaged and are not detected when referred for medical assessment (for example psychiatric illness versus mental disability), and subsequently ill-supported in the system. This is contra to guiding principles which state that gender-specific mitigating factors should be considered during sentencing and mandatory sentences eliminated (for example history of victimization or mental health care needs).

The debilitating economic situation compounded by the severity of the escalating COVID-19 pandemic in South Africa has meant that the community corrections

programme continue to remain **under-resourced**. According to the Department of Correctional Services (DCS), there are currently 218 fully-fledged Community Corrections offices across the nine provinces of the country serving the respective communities and offenders within the community corrections system¹⁴². Whilst the DCS offices strive to cater for all offenders on probation or parole through the decentralised network of offices, resource constraints continue to hamper its ability to effectively manage the community corrections programme. Consequential challenges occur especially for those parolees and probationers that stay in remote locations far from the community corrections offices¹⁴³.

Consultations also revealed concern around the implementation of community sentences for both men and women. Considering the wide range of discretionary measures, some participants observed that whilst the number of people in receipt of these measures have increased exponentially over the years, the number of correctional officials who monitor them in their communities has dwindled substantially, indicating increased judicial and penal application of such measures, despite the reduced capacity to monitor and implement. Further, the vast geographic nature of South Africa has contributed to the sub-optimal application of correctional supervisions due to the lack of supervisors in more remote areas. Due to this, more often a suspended sentence without any additional conditions apart from not committing the same offence again within the specified period (max 5 years) is applied by the system. Offenders often are forced to travel long distances, using their financial resources to access the community corrections offices and inevitably end up missing report conditions and violating their parole conditions. One participant observed;

"The sad situation in South Africa is that the country lacks not only correctional officials to monitor persons sentenced to correctional supervision, but also government-funded institutions for purposes of drug rehab. Resources, resources, resources...."

The operationalization of community sentences are gender-neutral, and do not fully align with the Tokyo and Bangkok Rules. Gaps and exclusions which compromise optimal application are based on those with prior victimization of GBV not having a safe house, South African nationals detained in foreign countries with no extradition agreements in place and foreign nationals in South Africa not having an address, and thereby unable to receive the benefit of a non-custodial sentence, and those with mental health or psychiatric illness falling between the cracks. Further identified constraints include insufficient resourcing, lack of gender-responsive programming and geographic aspects.

¹⁴² Department of Correctional Services (2019). Annual Report 2018/2019. Available at <http://www.dcs.gov.za/wp-content/uploads/2019/12/DCS-Annual-Report-web-version.pdf>

¹⁴³ Ibid.

¹⁴⁴ See also the case of *S v Williams* where the court reasoned that sentencing involving rehabilitative treatment such as treatment of drug addiction was preferred to incarceration and would have much greater success if the offender remained in the community, where he could continue being employed and living with his family. Thus, the matter was referred to correctional supervision for conversion. In the case of *S v R*, the court decided that correctional supervision was an appropriate sentence for a man convicted of a sexual offence involving a 15-year-old boy, despite the man having a relevant previous conviction. This is because a sentence in terms of section 276 (1) (h) allowed him to obtain the necessary therapeutic support (emphasis added) he needed. The court found that the sentence was particularly suitable, because the offender was young (32 years old), had strong family ties and a stable work pattern. His criminality had its origins in personality defects that responded favourably to therapy, whereas imprisonment would have had a negative impact on these defects and would interrupt the therapy. Whilst the court dealt with a different offence and a male-adult, the recognition and preference of the principle of rehabilitative treatment within the confines of the home setting is relevant.

Application of alternative measures regarding drug offences, and drug treatment and rehabilitation

The South African National Drug Master Plan (NDMP) 2019-2024 encourages the development, adoption and implementation of alternative measures concerning conviction or punishment. This depends on the amount in possession and whether this qualifies as personal use or dealing. The NDMP 2019-2024 advocates for proportionate and effective policies and responses, as well as legal guarantees and safeguards criminal justice proceedings. This is in line with the international drug control conventions that expressly allow the provision of measures such as treatment and education as alternatives to conviction or punishment for personal drug consumption offences and all other relevant offences in “appropriate cases of a minor nature”. Excerpt below

“The CPA dictates that a person SHALL be detained for drug offences when the value exceeds a certain amount etc. Section 60 of the CPA - Bail application of accused in court: “....(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to—

(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with per the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.....”

Schedule 5 of the Criminal Procedure Act:

“....Any offence referred to in section 13 (f) of the Drugs and Drug Trafficking Act, 1992

(Act No. 140 of 1992), if it is alleged that—

(a) the value of the dependence-producing substance in question is more than R50 000,00; or

(b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or

(c) the offence was committed by any law enforcement officer.....”

It is argued that there is enough scope within the South African legal framework to ensure that women who are charged and convicted for drug-related (and sex-work related offences) are not incarcerated. Consultations revealed that in general very few women are incarcerated on serious drug-related criminal offences in South Africa, as such serious offences are largely perpetrated by males. Where women detained on drug offences are incarcerated, these have committed serious and/or violent crime. Participants observed that women caught in possession of small quantities of drugs or who have committed less serious offences are generally considered for non-custodial measures, particularly if they have caring responsibilities. Many participants described the destructive nature of drug use and dependence, particularly relating to mothers who use drugs. One participant illustrated this;

Non-custodial sentences are imposed on both males and females, based on the same criteria. One should always keep in mind that a mother who is addicted to narcotics, is just as dangerous to a child as an addicted father. Sad but true. Drug- dependency almost always overshadows all maternal instincts

Similar to that outlined in previous sections, there was consensus that alternatives to incarceration are applied wherever possible to women who are pregnant or with children (see also¹⁴⁵). For those convicted to prison, many participants described the significant social and health impact on these circumstantial children who grow up in the prison setting or who remain alone outside of prison.

While it is commendable that South Africa has legislation that provides for a comprehensive, holistic and all-inclusive approach to combating harmful substance use, it is worth noting that the laws are not especially nuanced to address specific needs of women who use drugs, or indeed those manipulated and exposed to GBV to commit drug-related crimes. For all the elaborate and expansive provisions to combat substance abuse, the Prevention of and Treatment for Substance Abuse Act is generally **gender-neutral** with only a single mention of women in the whole text¹⁴⁶. There appears to be **no special gendered** consideration given to women offenders convicted of dealing in drugs. The legislative framework and the common law fail to delineate clearly nuanced approaches that are sensitive to women offenders who fall foul of the law.

¹⁴⁵ See https://www.who.int/substance_abuse/activities/pregnancy_substance_use/en/

¹⁴⁶ Section 4 provides that all services rendered to service users and to persons affected by substance abuse must be provided in an environment that, (h) ensures that services are available and accessible to all service users, including women, children, older persons and persons with disabilities without any preference or discrimination (emphasis mine)

Courts have handed down harsh penalties where persons are convicted of dealing in dangerous dependence-producing drugs as provided for by section 5(b) of the Drugs and Drug Trafficking Act regardless of the gender-specific circumstances and background of the accused. In the case of *Sheryl Cwele and Frank Nabolisa v S*,¹⁴⁷ the two appellants brought an appeal against conviction and sentence having been convicted of drug dealing and given sentences of 12 years imprisonment each before the trial court. Upon consideration of the case on appeal, the Supreme Court increased their sentences from 12 years' imprisonment to the minimum prescribed sentence of 20 years imprisonment. However, the sentences of the two were overturned by the Constitutional Court and reduced back to 12 years, based on a technical argument that the State had not followed the peremptory statutory requirement of cross-appealing to increase a sentence handed down by a trial court¹⁴⁸.

It must be noted that in the case of cannabis use, the Courts have taken a more pro-active approach in reducing the impact of criminal sanctions by ruling that provisions criminalizing private possession, consumption, and cultivation of the cannabis plant for personal use are unconstitutional¹⁴⁹. Since decriminalisation of cannabis use in South Africa, some participants observed reduced rates of drug offences in the criminal justice system, which before this, had clogged up the system, to the detriment of more serious GBV crimes. Some described the case in point regarding children and cannabis. The High Court ruled (31/July/2020) that the use and/or possession of cannabis by children should not be criminalised¹⁵⁰. They may be sent to treatment facilities without a criminal record to their names. This is congruent with the rights of the child regime. Participants observed that **scope could be widened** to also include women in contact with the law on drug offences and with further developed diversion and restorative justice mechanisms in place for women in the community.

South Africa has since gazetted the Cannabis for Private Purposes Bill which will give effect to the *Prince case*. The proposed provisions currently under consideration by National Assembly include the expungement of criminal records of those previously convicted of possession of cannabis. This is important as both genders find it difficult to get employment because they have a criminal record irrespective of what crime they committed. It is likely that women with criminal records encounter such barriers to employment and may likely benefit from this law if their criminal records are related to the use of cannabis.

Alternatives to incarceration should include conditions such as diversion to drug treatment and rehabilitation, providing the offender with the choice to opt for treatment or prison¹⁵¹. To achieve this, available, accessible, and evidence-based treatment is vital and should be developed in complement with provisions that legally enhance access to alternatives to incarceration. There is support for this approach in the South African CPA which prescribes a consideration of rehabilitative sentences that focus on the treatment of a person with a drug use disorder. Section 296 of the Act empowers a court to commit an offender to a treatment centre *in lieu* of imprisonment in terms of the Prevention of and Treatment for Substance Abuse Act. The diversion prescribed by the Act resonates well with rule 13.1 of the *Tokyo Rules* that prescribe for the specialized treatment of various categories of offenders, to meet the needs of offenders more effectively. The Prevention of and Treatment for Substance Abuse Act provides a comprehensive and holistic plan to combat substance abuse. *Excerpt*.

The objects¹⁵² of the Act, are among other things to ;

- a. combat substance abuse in a coordinated manner.
- b. provide for the registration and establishment of all programmes and services, including community-based services and those provided in treatment centres and halfway houses.
- c. create conditions and procedures for the admission and release of persons to or from treatment centres.
- d. provide prevention, early intervention, treatment, reintegration and aftercare services to deter the onset of and mitigate the impact of substance abuse.
- e. establish a Central Drug Authority to monitor and oversee the implementation of the National Drug Master Plan¹⁵³.
- f. promote a collaborative approach amongst government departments and other stakeholders involved in combating substance abuse; and
- g. provide for the registration, establishment, deregistration and disestablishment of halfway houses and treatment centres.

¹⁴⁷ Sheryl Cwele and Frank Nabolisa v S [2012] ZASCA 15.

¹⁴⁸ Nabolisa v S (CCT 105/12) [2013] ZACC 17.

¹⁴⁹ The High Court held that sections 4(b) and 5(b) of the Drugs Act read with part 3 of the act's schedule 2, and sections 22A(9)(a)(i) and 22A(10) of the Medicines Act read with its schedule 7 (statutory provisions), are inconsistent with the right to privacy guaranteed by section 14 of the Constitution, a position affirmed by the Constitutional Court in the case of Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening).

¹⁵⁰ State v L decision – HC 2020.

¹⁵¹ UNODC-WHO (2018). Treatment and Care for People with Drug Use Disorders in Contact with Criminal Justice System- Alternatives to Conviction or Punishment. Available at [UNODC-WHO_Alternatives_to_conviction_or_punishment_ENG.pdf](#)

¹⁵² Section 2 Prevention of and Treatment for Substance Abuse Act.

¹⁵³ South Africa launched a new National Drug Master Plan (NDMP) 2019-2024 on 26 June 2020. It's noteworthy that the NDMP departs from the previous plan in some regard by placing more emphasis on a rights-based approach, victim-centred and community inclusive approach to substance abuse issues, while highlighting the non-preference to using criminal sanctions to substance use and drug related infractions

There is ample jurisprudence that shows that courts endeavour to give effect to provisions of the Prevention of and Treatment for Substance Act, primarily, and the CSA and the CPA, that balance the interests of the society to ensure justice¹⁵⁴ while remaining in conformity with rule 12¹⁵⁵ and 13¹⁵⁶ of the *Tokyo Rules*. However, the elaborate provisions above and other complementary provisions within the Prevention of and Treatment for Substance Abuse Act, and relevant policies¹⁵⁷ raise a key tension, if not a paradox, on the framing of the current domestic legal and policy framework in South Africa. As stated earlier, on the one hand, South Africa retains harsh criminal sanctions and penal provisions on drug-related offences. On the other hand, it has adopted laws and policies that seek to provide holistic socio-oriented solutions to the problem of substance abuse in a manner that is suggestive of a shift away from the penal approach¹⁵⁸. The recently adopted National Drug Master Plan 2019-2024 aptly captures the challenge of an incarceration-leaning model towards drug users by stating that:

*“The world drug problem and response continue to present challenges to **the health, safety, and well-being of people in South Africa. A drastic change in approach to drug policy recognises that the punitive approach has not been successful in tackling drug-related problems. Instead, emphasis should be placed on evidence-based public health and social justice principles that focus on individuals, families, communities, society as a whole, and must underscore social protection and health care instead of conviction and punishment.**”*¹⁵⁹ (emphasis added)

Some participants described drug treatment and rehabilitation as part of conditions contained in non-custodial measures for women when ordered by the court. There was no detail available on a woman's choice regarding the type of court-mandated drug treatment, for example, detoxification versus treatment with long-acting opioid agonists (in fact one participant described the **only choice** as prison versus drug withdrawals). Drug treatment itself appears to consist largely of methadone detoxification with the management of opioid withdrawal

symptomatology's, as opposed to gold standard opioid agonist treatment (substitution therapy using methadone or buprenorphine). Stimulant and other drug withdrawals are managed using detoxification. Many licensed treatment centres are abstinence focused and faith-based. There is one State drug treatment facility for women, the remainder is mixed. Some participants described anecdotal reports around women's fears for personal safety in mixed treatment centres, with concerns that some centres are not using evidence-based guidelines for treatment, are not gender-sensitive in their approach, and with continued drug use occurring in some centres. Very few cater to pregnant drug-dependent women. Detox treatment generally lasting six weeks with psychosocial interventions during treatment was observed to be stand-alone and appears not to be sufficiently supported by a psychosocial rehabilitation intervention post-discharge. One participant described how there has been the establishment of Aftercare programmes around the country as part of continuum care, which help many users post-treatment care whether in-patient or out-patient. Many participants observed that those requiring drug treatment long term will require medical aid/private insurance. Due to long waiting lists in operation for State-administered treatment facility, some described the rise in unlicensed private treatment centres using methods not evidence-based in response to the public need for treatment.

Many observed the role of the Department of Social Development and Substance Abuse with the existing network of very experienced civil society organizations to further support the development of evidence-based drug treatment and rehabilitation spanning prison, clinic and community (including prison release; detoxification completion) within a multi-agency approach. Indeed, several commented that the NDMP 2019-2024 recommends that partnering with civil society and community structures for the continued public health care services of offenders who were undergoing drug treatment is vital.

¹⁵⁴ See for example, the cases of *S v. Williams*, 1995 (2) SACR 251 (CC), *S v. Masike* 1992 (1) SACR 667 (A), *S v. Ramone* 2013 (2) SACR 596 (FB) & *N Jonga v. S v.* 2020 (1) SACR 550 (ECG). In the case of *S v. Vetter* (AR 264/11) [2012] ZAKZPHC the court gave the following sentence to a convicted drug offender:

- The Appellant is sentenced to correctional supervision for a period of eighteen (18) months in terms of section 276 A (3) (e) (ii) Act 51 of 1977 on the following conditions:
- The Appellant is sentenced to house arrest at his place of residence at no 33 Greyling Street, Pietermaritzburg between the hours 21h00 to 6h00.
- The Appellant is confined to the Magistrate district of Pietermaritzburg.
- The Appellant is ordered to perform community service for a period of sixteen (16) hours per month. The nature of service to be determined by the National Institution for Crime Prevention and Rehabilitation of Offenders (NICRO) in consultation with the Department of Correctional Services.
- The house arrest referred to in paragraph 2.1.1 shall be subject to the Appellant's medical practitioner's assessment, should it be necessary that the Appellant is in need of hospitalisation.
- The Appellant shall report to the supervising officer of the Department of Correctional Service in Pietermaritzburg once a month.
- Any officer of the Department of Correctional Service shall have access to the Appellant's place of residence at any time during the period of house arrest for purpose of ensuring that the Appellant complies with the terms of this order. His movements will be monitored and supervised. Regular evaluation will ensure that he is upgraded for intensive to a less intensive degree of supervision or vice versa.
- The Appellant shall conduct himself properly at all times and shall not be convicted of any offence involving narcotics, alcohol or drugs.
- The Appellant shall be involved in the following programmes as recorded in the pre-sentencing report: -
- Orientation Programme – this will inform the Accused of his responsibilities pertaining to the conditions set out by the Court.
- Life Skills Programme – to assist the Appellant improve his social functioning; and
- Drugs and Alcohol Abuse Programme – to inform the Appellant of the detrimental effects of alcohol with the possibilities of him abstaining from the use of alcohol or drug. He such have two (2) hurly sessions over or four (4) weeks period.

¹⁵⁵ For example, in the case of *S v. Vetter*, the court specifically made an order for an orientation programme to inform the offender of his responsibilities pertaining to the conditions set out by the Court which is consistent with Rule 12.3 of the Tokyo Rules which provides that, “At the beginning of the application of a non-custodial measure, the offender shall receive an explanation, orally and in writing, of the conditions governing the application of the measure, including the offender's obligations and rights.”

¹⁵⁶ Ibid.

¹⁵⁷ See for example, the National Drug Master Plan, 4th edition 2019 to 2024.

¹⁵⁸ See generally the Prevention of and Treatment for Substance Abuse Act and the National Drug Master Plan, 4th edition 2019 to 2024.

¹⁵⁹ The National Drug Master Plan, 4th edition 2019 to 2024, page 27.

While it is commendable that South Africa has legislation that provides for a comprehensive, holistic and all-inclusive approach to combating substance abuse, it is worth noting that the laws are not especially nuanced to address specific needs of women who use drugs, or indeed those manipulated and exposed to GBV to commit drug-related crimes. Neither State nor civil society has adequate capacity to provide adequate evidence-based, gender-sensitive, trauma-informed, women-only drug treatment programmes in the community, as required by the Bangkok Rules and in line with the International Standards for the Treatment of Drug use Disorders (UNODC/WHO, 2020). Treatment and aftercare services adopt a **gender-neutral approach** in the main, are restricted to detoxification and limited to only one individualized women-only treatment centre in the country.

Custodial sentences and the community reinsertion of women

Committing women to imprisonment is inimical to addressing socio-economic determinants leading women to use drugs or involved in drug-related crime. Consultations revealed the realities of the punishment paradigm and prison centric nature of the South African penal landscape, with the retributive approach, not a restorative approach in the community fueling the revolving door of incarceration. A participant illustrated this societal tension:

“Restorative justice attempts to restore the relationship between the offender and the community through the promotion of reconciliation, restitution and responsibility. The victim plays a bigger role. Whereas retributive justice looks backwards, reacting to something which has been done, restorative justice looks forward. Instead of merely depriving the accused of freedom in a prison sponsored by the community (of which the victim is a member), it gives the victim something through compensation or restoration of relationships. Either section 300 (compensation) or section 297(1)(b) (suspension on condition of compensation or rendering of service (section 297(1)(a)(i)(aa)–(cc)) can be used. Although restorative justice has been accorded statutory imprimatur in section 73 of the Child Justice Act, the Supreme Court of Appeal has cautioned against the use of restorative justice as a sentence for serious offences which evoke strong feelings of outrage and revulsion in society (see¹⁶⁰)”.

Public perceptions in South Africa continue that offenders must serve their time for justice to be achieved. In this sense, serving time is in the interest of the community, and not the individual offender. Some participants observed a lack of public and political awareness around the difference in the value of alternative sentencing and prison sentencing. Very little is done to sensitise the public and community, who appear more interested in retributive objectives (*‘justice is served’*). A participant remarked:

“Correctional supervision differs from other forms of punishment and is aimed at filling a void which has been experienced worldwide for a long time. There is a gap between imprisonment, a particularly severe form of punishment, on the one hand, and, on the other, the well-known forms of noncustodial punishments, which are often inadequate to fulfil the aims of punishment. At the same time, there is a growing disillusionment with the reformatory and deterrent value of imprisonment and a growing realisation that the enormous human and financial costs thereof require that prisons be reserved for those who belong there. Hence there were efforts all over the world to try to cut this Gordian knot. After the extended study, it was decided to base the South African solution on a system of probation – correctional supervision – which has enjoyed success in Georgia in the USA.” (participant referred to Van der Merwe and see¹⁶¹).

Whilst non-custodial measures can reduce the social and economic cost of imprisonment and help to reduce the prison population and rates of recidivism, one participant observed that there has not been a detailed cost benefit analysis undertaken in South Africa.

There are several initiatives in South Africa that unpack and expose public opinion and also inform the training of criminal justice practitioners concerning the different sentencing options allowed in terms of South African legislation, and the benefits of non-custodial measures. They include national surveys on victimization, crime rates, crime reporting, and the development of victim compensation schemes. One participant said;

¹⁶⁰ Director of Public Prosecutions, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA) par [20].

"I cannot comment on initiatives regarding public opinion, however, South Africans are so worn-out by the crime rate (especially drugs, gangsterism, murder and gender-based violence and femicide in the Western Cape), that some organisations are rallying for the reintroduction of the death penalty".

Human rights violations, sexual violence and poor standards of South African prisons however continue. There are problems with prison congestion, including in female institutions;

"The legal mandate of the JICS [Judicial Inspectorate for Correctional Services] is to guard over the human dignity of inmates, which is inextricably linked to the dignity of all in our country. Whereas overcrowding is a huge general problem in South African correctional centres, the situation of women and infants – especially in Pollsmoor – is unacceptable, sad, and indeed inhumane. (emphasis added)"¹⁶³

The dire situation inmates find themselves in was further articulated in the recently decided case of *Sonke Gender Justice NPC v President of the Republic of South Africa and Others*¹⁶⁴. In this case, the Court was invited to consider the constitutionality of sections 88A(1)(b) and section 91 of the CSA 111 of 1998 to the extent the provisions fail to provide an adequate level of independence to the Judicial Inspectorate for Correctional Services. The Court agreed with the submissions of applicants noting that the Judicial Inspectorate as it is currently formulated is neither financially, nor operationally independent. The legislative limitations inhibit the Judicial Inspectorate's ability to perform its functions without the assistance or permission of the very body it is supposed to have oversight of. The judgment is important as it should lead to a more independent judicial inspectorate that is not compromised by laws that potentially impact its ability to investigate human rights abuses within correctional centres.

There is widespread evidence that correctional centres have become epicentres of health risks including drug use, and whilst they do provide for vocational development, they do not adequately contribute to the rehabilitation of an offender post-release. The NDMP 2019-2024 notes that *"drug use is common among inmates (offenders)."*¹⁶⁵ Some

participants observed that the stigma of drug use and prison in communities remains strong, and is now coupled with perceptions that non-custodial measures for drug offences are a soft touch, particularly given the legislation around possession (based on amount). Several observed that there is potential for exploitation of non-custodial measures with mixed views on whether this is a deterrent for drug-related crimes, and the potential for exploitation by criminal networks and gangs, thereby heightening harm to vulnerable women and young girls.

Even in 2017, given the congested conditions in prisons, and ill-resourced medical care in South African prisons, calls continue for increased appropriate use of medical parole¹⁶⁶. Parole is an integral part of a sentence due primarily because it is a continuation of a sentence outside of the correctional facility¹⁶⁷. The Correctional Services Amendment Bill 2020¹⁶⁸ considered by National Assembly seeks to introduce amendments to the principal Act¹⁶⁹ that, *inter alia*, strengthens provisions relating to the placement of a sentenced offender under day parole, parole and correctional supervision; and sets out the minimum periods to be served before one can become eligible for consideration for release and placement in terms of the parole regime. This bill¹⁷⁰ does not specifically address the granting of parole to females with caretaking responsibilities, and again demonstrates South Africa's legal system's gender-neutral approach to sentencing. What may find application in the granting of parole to a female with caretaking responsibilities, is the amendment in terms of the Criminal and Related Matters Amendment Bill, 2020 *supra*. The amendment proposed in section 9 of the Bill, which will further regulate *inter alia* the right of a complainant in a domestic-related offence to participate in parole proceedings, will have a greater impact on the granting of parole to females with caretaking responsibilities.

Many participants described how correctional supervision and parole have been utilised more extensively in South Africa to decrease the general prison population in recent years. Heads of Centres possess the discretion to release offenders with sentences of less than two years on parole. National Council may also recommend the advancement of the approved date for placement of any prisoner under community corrections. This may also occur if the prison population is reaching such proportions that the safety,

¹⁶¹ Van der Merwe "Korrektiewe toesig en die gemeenskap" 1991 26 TM at 83-88 provides details of the background and development of this system in South Africa.

¹⁶² Muntingh, L (2016). Ten years after the Jali Commission Assessing the state of South Africa's prisons. SA Crime Quarterly, 58, 35-44.

¹⁶³ Extracted from the press release: Judicial Inspectorate for Correctional Services, Pollsmoor Correctional Centre still in violation of the Overcrowding Court Order of 2016, 4 May 2018, available at http://jics.dcs.gov.za/jics/wp-content/uploads/2019/04/Pollsmoor-Press-Release_May2018.pdf

¹⁶⁴ Sonke Gender Justice NPC v President of the Republic of South Africa and Others [2020] ZACC para 38-40.

¹⁶⁵ South Africa's National Drug Master Plan, 4th edition 2019 to 2024, page 34

¹⁶⁶ Maseko T (2017). 'An assessment of the realisation of inmates' right to adequate medical treatment since the adoption of the South African Constitution in 1996' De Jure 263-280 <http://dx.doi.org/10.17159/2225-7160/2017/v50n2>

¹⁶⁷ Mujuzi, Jamil D.. (2011). Unpacking the law and practice relating to parole in South Africa. PER: Potchefstroomse Elektroniese Regsblad, 14(5), 204-228. Available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812011000500005&lng=en&tlng=en

¹⁶⁸ Amendment of section 1 of Act 111 of 1998, as amended by section 1 of Act 32 of 2001, section 1 of Act 25 of 2008 and section 1 of Act 5 of 2011.

¹⁶⁹ The Correctional Services Act.

¹⁷⁰ The bill deals with when an accused sentenced to a period of life imprisonment, will be eligible to apply for parole. Under the previous act, such an accused would have been eligible after serving a period of 20 years' imprisonment. In terms of the current act, an accused will only become eligible after serving a period of 25 years. The constitutionality of the particular section in the new act was challenged. The Concourt pointed out that bringing the new parole regime into effect on any arbitrarily chosen date, as 1 October 2004 was, and then to tie its application to date of sentence, rather than date of commission of offence, created irrational, absurd and capricious disparities between those sentenced before and after the date the new regime comes into force.

human dignity and physical care of the prisoners are being affected materially. This is illustrated in the State efforts to decongest prisons as part of the COVID-19 response (see later section). Several participants described how the corrections department utilise release on parole or correctional supervision for women after they served a certain amount of time in prison or when directed by the court. The conditions that they are required to comply with are clearly defined and explained to them and these women are monitored within their communities where they reside. The level of compliance of women with the conditions was observed to be generally satisfactory. Parolees and probationers continue serving their sentences under strict supervision by correctional officials within their communities. A victim-offender mediation process is in operation, with the restoration between the offender and the victim of crime forming an important part of the parole process.

There are **several discrepancies** observed by participants. **Firstly**, many remarked that short term incarceration for minor offences is insufficient for correctional services to reform, rehabilitate and support offenders, regardless of gender. The rehabilitation aspect of short sentences is minimal, longer-term prisoners, in general, receive a greater advantage. There is also no vocational training or development supports provided to those in pretrial detention or those awaiting deportation. **Secondly**, many described gaps in the community system regarding non-custodial sentencing and also prison release reinsertion. Given the vast geographic nature of South Africa, in rural areas, particularly there is an insufficient provision of rehabilitation and reinsertion programming. **Thirdly**, whilst vocational and rehabilitation training for women in prison is more optimal than what is provided for in non-custodial sentences, the majority released from prison are insufficiently followed up on prison release. Prison release is a challenge for all, especially for women, in terms of stigma, with women released from prison especially stigmatised. Many women charged with drug offences are rejected by family and community during non-custodial sentencing, whilst in prison, and on release, and report significant isolation. Those with family support and family resources during incarceration fare better. Many described the difficulties in supporting inmates on release; *‘they are damaged goods’*. Some participants described gender-specific post-release barriers (stigma, familial rejection, low self-esteem, gender-based stigmatization, employment, family breakdown, housing, etc.), with one participant poignantly described women’s experience on release back into the community as a *“second sentence in itself”*. As previously outlined, there appears to be an insufficient

provision of halfway houses to ensure safe prison release for women, particularly those with GBV histories and who are rejected by family and community due to their sentence. **Fourth**, whilst those on parole or correctional supervision receive support, those released directly from prison at the end of their sentence are less favourably supported. Parole according to some participants is limited to acting as a policing function. **Fifth**, despite significant vocational and skills training, education and personal development in prisons themselves, the severe gap in realizing employment on reintegration into the community, with difficulties in securing employment due to criminal records was described by many participants as a significant hurdle for men and women. Participants described how successful reintegration requires knowledge and understanding of women’s pathways to prison (poverty, intimate partner violence, substance use disorders, victimization, exposure to trauma and GBV, mental health, caretaking responsibilities, etc.). A trauma-informed approach and one which incorporates community-based solutions regarding housing childcare, education, sustainable livelihoods and treatment/therapy were observed by several participants to be lacking and warranted consideration by the government.

Many observed that the community is better served by community-based interventions which address the underlying causes of women coming into contact with the law in the first instance. Civil society plays a crucial role in supporting women arrested or detained on drug offences, both in South Africa and also in support of South African nationals arrested in other countries. They provide a range of advocacy, programmes in prisons and communities, and drug treatment/reinsertion/halfway house supports. Participants observed a reliance on non-governmental organisations (NGOs) to backfill government resources in providing social and reinsertion supports during non-custodial sentencing, and for women on release from prison. There are also several NGOs at different levels of the criminal justice value chain which engage in advocacy and train stakeholders on alternative sentencing. Several stakeholders remarked on the opportunity for greater reference to alternative sentencing in the NPA social context awareness training. One participant also observed the role of the Social Crime Prevention at SAPs within its remit for community-based public education and awareness programmes. Targeted actions that support non-custodial sentencing in the community, and after prison on return to families and communities, cognizant of the socio-economic situation of the women arrested on drug offences could further leverage and support the role of civil society in the response.

There are inherent tensions between retribution and rehabilitation in South Africa, with a gender-neutral approach applied to prison release, whether on probation, parole or on exit. This means there are gaps in alignment to Bangkok Rule 63 concerning the consideration of women prisoners caretaking responsibilities and specific social integration needs on exit. Vocational training and skills development are better in prison than in the community, is better for those on parole than those who complete sentence, and is non-existent in pretrial detention or for those awaiting deportation. The myriad of vulnerabilities and stigma for women, particularly those who use drugs is ill-considered, and with the support of these women reliant on civil society.

COVID-19

At the time of writing, with a total number of infections and deaths currently standing at 1.2 million and 33163 respectively¹⁷¹, South Africa accounts for the highest figures of COVID-19 cases in Africa. Unsurprisingly, the pandemic has not spared South African correctional centres with outbreaks affecting both inmates and correctional services staff. At the time of writing, the published COVID-19 cases in correctional centres are as follows. See Table 4.

Table 4. COVID-19 cases in South Africa correctional centres¹⁷²

Total cases	Cases officials	Cases-Inmates	Deaths officials	Deaths inmates
9097	5815	3282	111	60

In May 2020, President Cyril Ramaphosa authorised the release of nearly 19,000 qualifying inmates, in terms of Section 82(1)(a) of the CSA. The 53 Correctional Supervision and Parole Boards in South Africa processed 19,000 offenders for the Special Parole Dispensation (SPD) during COVID-19. SPD applied to low risk sentenced inmates who had passed their minimum detention period or approached this in the coming five years. The criteria were developed and took into cognisance the crime categories and offenders who are at risk, with the comorbidities as advised by the WHO. They included the elderly and offenders with chronic diseases or other health conditions, pregnant women, women with dependent children, offenders approaching the end of their sentence and those who have been sentenced for minor crimes. Certain categories of offenders were not granted parole.

It remains unclear how many of those 19,000 have since been released to date as the operationalisation process is subject to a phased and sometimes lengthy process of parole vetting by the Parole Board. What is however noteworthy is that the qualifying criteria set for the release of the parolees should have seen, to a limited extent, most women qualifying for release¹⁷³. In reality, very few women were released in these prison decongestion measures, due to their sentencing for serious or violent crimes or not having completed ½ of their sentence, and due to their exemption from the release schemes. Prison lockdowns were observed to particularly impact women with all visits suspended (family and legal representatives). During this time judicial inspectorate visits were also suspended.

South Africa implemented a range of control and lockdown measures commencing at the end of March 2020. One of these was the government placement of restrictions on the sale of alcohol, underpinned by the understanding that alcohol contributes to GBV. Anecdotal evidence during these consultations suggests a reported rise in GBV and intimate partner violence during lockdown measures based on calls to toll-free lines; but with under-reporting of offences to SAPS due to the inability of victims to access police stations. SAPS structures also reported a decrease in reported crime. With regards to the judicial system, it was observed that pretrial rates increased, and actual sentencing rates decreased due to backlog and court closures. Several participants described delays in GBV cases, with a significant backlog at the time of writing this report. The digitalisation of court hearings during COVID-19 was reported in some cases. Several observed that the capacity to monitor and support all in receipt of non-custodial measures was hampered due to the COVID-19 situation.,.

¹⁷¹ Data accurate as of 11 January 2021, per Department of Health, daily tracker

¹⁷² There is no gender disaggregated information available Data accurate as of 11 January 2021, available at <http://www.dcs.gov.za/>

¹⁷³ The conditions for the parole release excluded inmates sentenced to life imprisonment or serving terms for specified other serious crimes, including sexual offences, murder and attempted murder, gender-based violence and child abuse.

The State attempted to ensure the rights of the homeless, those who use drugs, and their dignity were protected during the COVID-19 pandemic. Government in consultation with civil society implemented regulations for the establishment of temporary shelters for the homeless and people using drugs. The distribution of food and public health care services in these places remained a priority. In the major cities of the country, comprehensive health services for 2,300 homeless people in shelters were provided. Existing OST clients were placed onto weekly take-home doses. There were about 1 200 people who were initiated onto methadone treatment as well. With regard to drug use and drug-related crime, some stakeholders observed a reported rise in high-risk injecting drug use and home manufacture of drugs/ alcohol, increased uptake of shelters providing harm reduction programmes, and a causative reduced level of street drug activity. Others described a rise in drug-related violence between gangs, with resumed positioning for territorial control when lockdown measures eased.

4. Conclusions and Recommendations

The *Tokyo Rules* require States to adopt laws, guidelines and policies that encourage non-custodial approaches wherever possible and appropriate, when sentencing or deciding on pretrial measures for women¹⁷⁴. This is further reinforced by the *Bangkok Rules* that also direct States to consider gender-specific options for diversionary measures and pretrial and sentencing alternatives within Member States' legal systems¹⁷⁵.

It is apparent that South Africa, in the main, entrenches a legal and policy framework that favours a non-custodial regime across the various stages of the criminal justice delivery system. The Constitution has been shown to place a strong emphasis on a rights-based approach towards the liberty, dignity and security of an individual. Some subsidiary laws contain provisions that give effect to the applicable rights enshrined in the Constitution and relevant international human rights instruments. What seems to be somewhat problematic is the absence of a nuanced legal, policy and administrative framework that deliberately takes into account the, often victim-centric pathways of women arrested and detained on drug offences into the South African criminal justice system. The domestic laws in South Africa do not specifically provide for such nuanced approaches that take into consideration these peculiar, gendered pathways of women into the criminal justice system.

Women's pathways are disproportionately underpinned by their historical disadvantageous and marginalised status in a largely patriarchal society where women are subjected to social exclusion, abuse and extreme violence. The issue is complex spanning socio-economic status, GBV, drugs, health, and crime. It is suggested that there is a need for the State to improve its legislative, judicial, policy and other measures to ensure that there is particular attention and approach towards these women who find themselves in contact with the law, not limited to those in South Africa, but also with a focus on South African women exploited and detained in foreign countries on drug offences. Because of the resource constraints across line ministries within the justice sector, it appears that many services and supports that are prescribed by the relevant laws and policies in South Africa are not easily available to the women in conflict with the law. The challenges include:

- Rights abuses at the SAPS and border control/ immigration services
- Lack of human resources to provide timely pre-sentence reports and monitoring of offenders
- Lack of adequate specialised officials who can assess the best option for a drug user requiring treatment and/or rehabilitation, or psychiatric services
- Bureaucratic delays at courts and correctional facilities due to lack of sufficient staff
- Lack of gender-appropriate evidence-based drug use disorder treatment and care options including rehabilitative services (not limited to detoxification, but including a needs-based continuum of care including evidence-based psychosocial and pharmacological interventions, and trauma-informed supports) This comprehensive assessment, resultant response and care is critical – and should be addressed in correctional facilities and continued upon release to ensure re-integration of women through economic strengthening, psychosocial and other supports.
- Lack of adequate infrastructure for the community correction services, and specific supports for women

Overall, the lack of full budget support to relevant line ministries negatively impacts the smooth and effective operationalisation of the diversion programme for offenders who are given non-custodial sentences. These resource constraints also impact negatively on women released from prison and attempting to reintegrate and restart their lives.

¹⁷⁴ Rule 3 and 8 of the Tokyo rules

¹⁷⁵ Rules 57-62 of the Tokyo rules

¹⁷⁶ See United Nations Office on Drugs and Crime (UNODC) / World Health Organization (WHO) (2020). International standards for the treatment of drug use disorders. Available at https://www.unodc.org/documents/UNODC-WHO-International_Standards_Treatment_DrugUseDisorders_121217.pdf

In conclusion, the present blanket **gender-neutral** approach whilst operating relatively well, can be further gender sensitised by a greater focus on the underlying gendered dimensions experienced by women as victims, by caregivers and women who use drugs. This approach is supported by various international human rights instruments and normative standards that South Africa has ratified or agreed to. It will require public and law enforcement sensitization, resources, policy and practice reform, and a cohesive multi-agency response spanning all stakeholders across the social, health, criminal justice system, civil society, and community continuum. A series of recommendations are made to identify priorities for legislative and policy reform in South Africa, and for continued technical assistance needs considering applicable international standards.

Moving towards proportionate and non-discriminatory criminal justice policies and a health centred response to drug use and drug use disorders

It has been aptly stated in the National Drug plan that:

“The world drug problem and response continue to present challenges to the health, safety, and well-being of people in South Africa. A drastic change in approach to drug policy recognises that the punitive approach has not been successful in tackling drug-related problems. Instead, emphasis should be placed on evidence-based public health and social justice principles that focus on individuals, families, communities, society, and must underscore social protection and health care instead of conviction and punishment.”¹⁷⁷

The direction being proposed by the NDMP 2019-2024 should be lauded and the laws of the land ought to be revisited to reflect the framework stated above. It is suggested that the rights of women who use drugs and other socially vulnerable groups such as those trafficked or engaging in sex work are best protected by the adoption of approaches that exclude criminal and penal sanctions and instead promotes holistic solutions anchored on rights-based, psychosocial and medical approaches.

Women in South Africa who are affected by drug use and/or caught up in drug-related criminal activity experience multi-layered levels of stigmatisation, social exclusion, gross human rights abuses, problems in accessing health care, employment, access to justice and economic advancement. This is exacerbated by the structural vulnerabilities including gender, race, class, relative deprivation and education. The criminalisation of these

women only serves to aggravate all these gendered problems while research has shown that criminalisation does not serve as a deterrent. It leads to increased abuse and victimisation as they face extreme violence in their communities or at the hands of SAPS who arrest them. Ultimately it undermines other State-led interventions to fight the problem of substance abuse and other socio-economic challenges linked to drug use and sex work such as the spread of HIV/AIDS.

- A starting point would therefore be for the State to consider moving towards proportionate and non-discriminatory criminal justice policies to include the decriminalisation of certain drug-related offences (in line with the International Drug Control Conventions) and sex work.
- Developments could include a formal process of inquiries before being formally charged as to whether she is a person in need of drug treatment or rehabilitation, with diversion out of the criminal justice system before charging in the criminal court

Holistic and rights-based approaches to women who use drugs, and/or those exploited in drug-related crime

Linked to proportionate and non-discriminatory criminal justice policies and a health centred approach as stated above, the State should redirect resources towards escalation and scale-up of holistic programmes that target response and implementation of multi-layered solutions that focus on the causes of victimisation, GBV, sex work and drug use by women, and their children. Criminalisation drives women who use drugs and sex workers underground and pushes them away from health, legal and other rights-based protective mechanisms. The women resultantly become exposed to extreme violence and gross human rights violations and corrupt practices. Using non-custodial measures where possible will go a long way to dismantle these impediments and provide the much need rights-based, psycho-social and medical support required. The interventions must be anchored on rights-based, psychosocial and medical approaches that exclude the use of criminal sanctions.

¹⁷⁷ National Drug Master Plan, pg. 27.

¹⁷⁸ Vanwesenbeeck, I (2017). Sex Work Criminalization Is Barking Up the Wrong Tree. Archives of Sexual Behavior, 46, 1631–1640. Available from: <https://doi.org/10.1007/s10508-017-1008-3>

The State is encouraged to focus on a research-based approach that informs evidence-based interventions to understand the impact of GBV, exploitation, trauma, drug use, drug use disorder and drug-related criminal offences on the health and human rights of these vulnerable women. The NDMP 2019-2024 is a good starting point signposting the policy direction to be taken by the State. It should however be complemented by amendments to some of the laws including the CSA, the CPA and the Prevention of and Treatment for Substance Abuse Act as a pathway towards entrenching rights-based solution to drug offences by women. Further, the current proposed changes to the current Domestic Violence Act 1998 should be considered and may be of assistance to women holding or using drugs who are in abusive situations. This is especially the case with regards to the rise in gangsterism in South Africa and affects women, young and old.

The legislature and policymakers must revisit the laws, policies, standing orders and other guidelines to promote the non-custodial approaches when women get in contact with the law. There is a need for South Africa to prescribe specific rules and guidelines that guide law enforcement agents. By fully integrating aspects of the Tokyo Rules and Bangkok Rules into existing legislation, this could include reform of laws and policies to encourage flexible bail provisions; decriminalization of some elements of drug possession; removal of mandatory minimum sentencing regimes, and ultimately confirm that detention of offenders should be used as last resort. In line with the Tokyo Rules and Bangkok Rules, these domestic provisions would specify explicitly the non-custodial approach that should be adopted by the State at the time of the arrest and when an accused is awaiting finalisation of trial proceedings. These rules should emphasise the preference to not detain female offenders unless there are compelling circumstances justifying the detention of women. The rules would address the issues of arrest and detention of women by the police, providing for more “release clauses” that the police can rely on to avoid the unnecessary detention of women.

- **GBV is a key pathway to women's imprisonment.**
- There is an imperative for greater understanding and consideration of a woman's situation and sensitized criminal justice responses to the pathways from a victim of GBV or trafficking, to that of the perpetrator of drug or trafficking-related crimes.
- The rates of violence against women in South Africa is hyperendemic- and vulnerable groups are more at risk. Since GBV has become a priority for action in South Africa, all vulnerable and marginalised women must be included in the National Strategic Plan: Gender-Based Violence and Femicide.

- The State is urged to ensure that courts can take into account, during the prosecution and sentencing, claims of self-defence by women who are survivors of GBV. This is to be supported by human resources (prison officers, university clinics, paralegals, probation, social workers, legal representatives) to provide timely pre-sentence reports and monitoring of offenders.
- Developments could include reformed legislation and/or sentencing guidelines to ensure that histories of abuse are considered in relevant cases, with a formal process of inquiries before being formally charged as to whether the woman has a history of GBV and pathway toward drug use/drug-related criminal activity, similar to that currently used in victims of trafficking.
- Ensure adoption of gender-sensitive legislation and policies to guide policing via sensitisation and capacity building to ensure that SAPS possess sufficient measures to identify, protect and support victims of trafficking at an early stage and avoid prosecuting them for offences committed as a consequence of their exploitation by traffickers.
- The State is advised to examine their laws and policies with regards to foreign national women in contact with the law to ensure they are not discriminated against, that they have access to justice services and access to non-custodial measures and are assisted with resettlement or transfer. They are further strongly advised to dedicate attention to South African women detained on drug offences in foreign prisons and instigate ‘prison transfer agreements’.
- **Evidence-based drug and gender-sensitive disorder treatment centres**
- There is a role for the Department of Social Development and Substance Abuse to further support the development of evidence-based drug and gender-sensitive disorder treatment centres within a multi-agency approach.
- There is insufficient coverage of evidence-based gender-sensitive drug use disorder treatment options.
- Given the lack of gender-sensitive drug treatment available in South Africa, a network of gender-specific, trauma-informed, women-only treatment programmes should be established and thereafter prioritized in cases where the woman suffers from drug dependency.
- Compulsory drug treatment or rehabilitation in detention should never be enforced.
- People in contact with the criminal justice system for non-medical use of prescription medication are to be referred to drug disorder treatment programmes.

- Current provisions in the CPA do not distinguish between mental health and mental disability. Given the potential for dual diagnosis, referrals for psychiatric observations should be supported by further close interagency working between drug disorder treatment and psychiatric services is warranted.

Rights-based approach to the treatment of pretrial detainees and adoption of specific sentencing guidelines to promote non-custodial sentences

There should be guidelines and rules that the prosecutors and the judiciary should apply when dealing with women in conflict with the law, in line with the *Tokyo Rules* and *Bangkok Rules*. The prosecutors should also be directed to not ask for the remanding of women in custody as a matter of cause. Non-custodial remand should be preferred unless exceptional circumstances justify otherwise. The rules should specifically give guidance on how courts can bail accused persons without onerous conditions such as the payment of exorbitant bail amount that accused persons may not afford.

- The domestic provisions should specify explicitly the non-custodial approach that should be adopted once accused persons are placed on remand and awaiting finalisation of trial proceedings. These rules should emphasise the preference to not detain female offenders unless compelling circumstances are justifying the detention of women.
- Additional efforts are warranted to address rights-based abuses of women at arrest and pretrial stages.
- All sentence types should be documented and monitored.

Judge-made law is a double edge sword. On one hand, it enables courts to have as much flexibility as possible to hand down the most appropriate sentence based on a case-by-case basis. On the other hand, the neutral approach to sentencing can lead to blind approaches to gender nuances.

- Policy and legislative reform, sensitization, training and capacity building of all criminal justice system stakeholders should refer to the UNODC Toolkit on Gender-Responsive Non-Custodial Measures which provides an overview of international & regional standards and recommends that policymakers incorporate provisions of the Bangkok Rules and Tokyo Rules into domestic law & practice.

- Without attenuating the discretionary powers of courts, the legislature is invited to put sentencing guidelines that specifically direct trial courts to consider nuancing sentencing approaches in the context of the Tokyo Rules and Bangkok Rules. These guidelines may also specify the procedure to adduce evidence that may assist the court to consider all gendered issues. This could for example include questions on the impact of GBV, dependants, sources of livelihood, trafficking, and other social factors of the offenders. This can be supported by assessments and detailed social work and probation reporting systems.
- Further development of advocacy and sensitisation around the intersectionality of GBV, drugs, gangsterism and women across all elements of the criminal justice system, particularly SAPs at arrest and follow up stages on mitigating the aggravating factors of GBV and drug use in arrested or detained women is crucial.
- Non-custodial measures can reduce the social and economic cost of imprisonment and help to reduce the prison population and rates of recidivism. This can be supported by a cost-benefit analysis of alternative sentencing versus prison sentences for women.

Rights-based approach to the treatment of convicted offenders

Inevitably some offenders will find themselves incarcerated depending on the circumstances of their pathways to commissions of crime. Where such offenders end up incarcerated it is important that their rights other than the curtailment of their freedom be respected. Conditions of some correctional centres in South Africa do not rise to the level of accepted human rights normative standards. There are reports of human rights abuse, sexual abuse and drug use in both the SAPS and in South African prisons. Whilst it may be acceptable in certain circumstances for the right to liberty to be curtailed through incarceration, the inmates must retain all other rights which speak to the dignity of the person. There is also a need for a State review on international prison transfers and extradition agreements where trafficking of women and drug-related offences are concerned. Further transparency is warranted with regard to prisoner release schemes during COVID-19.

¹⁷⁹ UNODC (2020). Toolkit on Gender-Responsive Non-Custodial Measures. UNODC:Vienna. Available here [Toolkit on Gender-Responsive Non-Custodial Measures \(unodc.org\)](#)

- There is insufficient infrastructure for community correction services. Further development of an independent oversight mechanism in the Judicial Inspectorate, provision of harm reduction and drug treatment in prisons; gender-sensitive vocational training and skills development spanning prison and community, and continued drug rehabilitation and employment supports on release is warranted.
- Prison decongestion measures are warranted to fully consider the needs and suitability of women and their children, particularly during State health emergencies.
- Efforts are warranted to include sufficient coverage of vocational and skills development for all, including those in pre-trial, those on probation, on parole, those who are diverted and/or in receipt of a non-custodial sentence in the community, and those on sentence completion and re-entering the community.

Capacity building and Training of the CJS stakeholders

Given the well-documented breach of constitutional protections, international norms and the standing orders and regulations by the SAPS, there is a strong case for investment in reorienting and conscientisation of the enforcement agencies in rights-based standards to policing through a tailor-made training programme. This programme should be designed with women offenders in mind, and be per the International standards enshrined in the *Tokyo Rules* and the *Bangkok Rules* together with domestic legal instruments such as the Constitution.

- More awareness-raising is needed about the *Tokyo* and *Bangkok Rules* and supported by a review of all relevant legislation to ensure compliance with these Rules.
- The UNODC Toolkit on Gender-Responsive Non-Custodial Measures¹⁸⁰ should underpin all consideration as to how best to implement non-custodial measures, reduce imprisonment, and can enable the criminal legal system to recognize and address existing gender norms, roles and inequalities.
- Further about raising the spotlight on the unique gendered aspects of women in contact with the law, particularly those who use drugs or are exploited by drug gangs, dedicated training and capacitating of **all** players in the criminal justice system is warranted to support detection of trafficking victims, detailed pre-sentencing reporting and victim impact statements.

- There is a need for capacity building spanning the social work, judicial and law enforcement system to view the issues more broadly and support greater interagency working with social development, and health departments (for example in the NPA *social context awareness training*).
- Develop and implement a gender-sensitive approach to non-custodial sentences and probation in South Africa, for example by training probation officers to implement a gender-sensitive approach in their work by better reflecting the realities and background of women in pre-sentence reporting and in recommendations for non-custodial sentencing (see examples from Kenya¹⁸¹).
- Develop a system that utilizes and develops early career/entry-level professionals in support of over-capacitated legal professionals in several key areas to support the non-custodial system; data collection and surveillance, identification of process bottlenecks in the CJS, generating solutions in response to identified challenges; and generating policy commentaries and briefs.

Rehabilitation and reintegration

When considering a sentence, the purpose of a sentence must be considered by the judicial officer, namely, rehabilitation, prevention, deterrence and retribution . In this sense, rehabilitation itself, and particularly follow-up reinsertion programming for inmates represents the missing piece in the jigsaw and requires resourcing using a holistic multi-agency approach (criminal justice, social development, health, civil society) to support the safe application of non-custodial sentences for GBV (and trafficking) victims, rehabilitation, prevent recidivism, support employment -opportunities, and reinsert inmates back into the community. The Alternative Dispute Resolution (ADR) system whilst developed for minors, is not as formalized for adults. It is recommended to develop targeted actions that support non-custodial sentencing in the community, after prison, cognizant of the socio-economic situation of the women, and to further leverage and support the role of civil society in the response. and support the role of civil society in the response.

¹⁸⁰ UNODC (2020). Toolkit on Gender-Responsive Non-Custodial Measures. UNODC: Vienna. Available here [Toolkit on Gender-Responsive Non-Custodial Measures \(unodc.org\)](https://www.unodc.org/unodc/en/toolkit-on-gender-responsive-non-custodial-measures.html)

¹⁸¹ Penal Reform International (2017). A gender-sensitive approach to probation in Kenya. Available at: [Evaluation: gender-sensitive approach to probation in Kenya - Penal Reform International](https://www.penalreform.org/publications/evaluation-gender-sensitive-approach-to-probation-in-kenya/)

¹⁸² S v Swart 2004 (2) SACR 370 (SCA). In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that rehabilitation of the offender will consequently play a smaller role.

¹⁸³ Kumalo 1973 (3) SA 697 (A) Holmes JA. Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.

- Greater traditional communication is warranted to raise awareness and sensitise the public around non-custodial sentencing (TV, radio, community newsletter, social media), -gender-responsive approaches, and the benefits for the community and the individual.
- Programmes that will assist women to get their self-esteem, confidence and self-worth back are imperative, given that programmes currently offered are -gender-neutral and not addressing the needs of women.
- Civil society organisations are key within communities for purposes of better monitoring of alternative sentencing, rehabilitation and reintegration measures; particularly in rural and remote areas, supporting aftercare programming and stimulating community activism against gang and drug activity.
- Further development of a supportive platform will give ongoing support to women affected by drugs, by GBV and those exploited in drug-related criminal activity, and with a specific focus on those in conflict with the law, and those in prison.
- There is a significant need to establish a network of halfway houses to support women affected by GBV/trafficking, and establishment of programmes to address issues relating to GBV survivors to assist in educating them on living a healthy lifestyle and understanding their rights, and how to apply them in their lives. These are especially warranted in rural and impoverished communities.
- There is a need for the development of a formalized adult ADR system with judicial oversight to attend programmes and ultimately avoid the criminal justice system. This will involve legislative changes with general ADR provisions like those in the Child Justice Act.
- Community-oriented substance use programmes and child diversion programmes could be expanded to further support women who use drugs with non-custodial sentences; focusing on rehabilitation and promoting community-based programmes.
- Further support of local and national NGOs is warranted to support rehabilitation, develop the vocational and psycho-social interventions needed in non-custodial sentencing for women, and play a greater role in the provision of community and -prison-based drug treatment and rehabilitation, and community reintegration -post-sentence. Existing programmes that adopt a holistic community-based approach spanning life skills, self-care, domestic violence, anger management, positive parenting, outpatient substance abuse treatment and buddy

support chains during non-custodial sentences, on prison release and -post-drug treatment when in aftercare should be developed, resources, and scaled up.

- The Department of Social Development could also further develop aftercare skills and reinsertion programme to help women rehabilitate, re-integrate, continue their personal development and learning in a safe space, as well as support them in safe housing and living.

Monitoring and -evidence-based policy

There were startling gaps in the monitoring and surveillance of alternative sentencing, and women arrested and/or detained concerning drug use, or- drug-related criminal offences.

- Improvement of data collection and type of data collected is to be prioritised to support the CJS.
- Development of court level systems that record the type of non-custodial sentence imposed, to support existing judicial inspectorate level data on gender and drug offences.
- Investment in academic research to document the trajectories and impacts of non-custodial sentencing, and incarceration on infants and children in prison with their mothers.
- Investment in academic research to document the intersectionality between GBV, trauma, poverty, drug use, gangsterism, sex work and- drug-related crime perpetrated by women.
- Further attention is also warranted on the victim to perpetrator pathways within the context of drug and human trafficking networks to fully inform dedicated training for all who work in the criminal justice system.

Annex I Table of Participants

Non Governmental Organisations	
Male	Restorative Justice Centre South Africa
Female	Just Detention International: South Africa
Female	Just Detention International: South Africa
Female	Lawyers for Human Rights South Africa
Female	Lawyers for Human Rights South Africa
Female	South African Network of People who Use Drugs (SANPUD)
Female	South African Network of People who Use Drugs (SANPUD)
Female	South African Network of People who Use Drugs (SANPUD)
Female	BABSA BAAGI-BA (Anti Human Trafficking) South Africa
Female	South African National Council on Alcoholism and Drug Dependence (SANCA)
Female	South African National Council on Alcoholism and Drug Dependence (SANCA)
Male	South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)
Male	South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)
Female	Cape Flats Women's Movement
Female	Women's Legal Centre South Africa
Female	BEAR Foundation South Africa
Government	
Female	Judicial Inspectorate for Correctional Services
Male	Central Drug Authority - Dept of Correctional Services
Female	Judiciary
Female	Judiciary
Female	Judiciary
Female	Judiciary
Female	Department of Social Development
Female	Department of Social Development
Male	Department of Health and Social Development
Female	Legal Aid South Africa
Female	Legal Aid South Africa
Male	National Prosecuting Authority
Female	National Prosecuting Authority
Female	South African Police Service (SAPS)
Female	South African Police Service (SAPS)
Male	South African Police Service (SAPS)
Human Rights and Law Academics	
Male	Dullah Omar Institute for Human Rights -University. of Western Cape
Male	University of South Africa
Total 34	9 males 25 females

Annex II Case Law

S v Walters and Another (2002) (4) SA 613 (CC), 640 H- 641 A (para. 50).
S v Kgabo and Others (2005) (CC 11/1994) ZANWHC 63 (13 September 2005).
S v Ferreira and Others (2004), 4 All SA 373 (SCA) (1 April 2004).
S v Engelbrecht (2005) (2) SACR 41.
S v Potgieter (1994) (1) SACR 61.
Mxolisi and Another v S (2018) (A74/2017) ZAGPJHC 65 (29 March 2018).
S v Maglas (2001) 3 All SA 220 (A) (19 March 2001).
S v. Zinn (1969) (2) SA 537, 540.
Mhlongo v S (2016) (2) SACR 611 (SCA) (3 October 2016).
S v Vetter (2012) (AR 264/11) ZAKZPHC.
M v. S (2007) ZACC 18.
S v. Williams (1995) (2) SACR 251 (CC).
S v Masike (1992) (1) SACR 667 (A)
S v Ramone (2013) (2) SACR 596 (FB)
Jonga v S (CA&R295/2019) [2020] ZAECGHC 23; 2020 (1) SACR 550 (ECG) (3 March 2020)
Mabuza and Chauke, (2016). SHG 9 / 13

Annex III Data Collection Instruments

Introduction re In depth interview

Dear Colleague,

We are conducting a technical consultation on the legal and policy frameworks on alternatives to imprisonment with a specific focus on women arrested for drug offences and on the impact of gender-based violence before or during detention or imprisonment in South Africa.

Given your expertise, knowledge and experience in this area, we would like to invite you to participate in an - in-depth interview last no more than 60 minutes via Zoom/Ms Teams.

If you agree to participate, you will be contacted by international consultant Professor Dr Marie Claire Van Hout to schedule a suitable time/date.

Sincerely

Focus Group Invitation

Dear Colleague,

We are conducting a virtual consultation on the legal and policy frameworks on alternatives to imprisonment with a specific focus on women arrested for drug offences and on the impact of gender-based violence before or during detention or imprisonment in South Africa.

We would like to invite you to participate given your expertise, knowledge and experience in this area.

Discussions will be hosted via Zoom/Ms Teams and facilitated by international consultant Professor Dr Marie Claire Van Hout.

The date of the virtual consultation is XXX and the link to join will be provided.

Sincerely

Interview and Focus Group Guide

The topic of today's discussion is about alternatives to imprisonment with a specific focus on women arrested for drug offences and on the impact of gender-based violence before or during detention or imprisonment in South Africa.

Application

What are the current normal practices in South Africa concerning arrest, detention and imprisonment? How do these practices differ for men and women? What works and what does not? Why?

What non-custodial measures would be a suitable alternative to imprisonment for women in South Africa?

What are the institutional capacities for using alternatives to imprisonment and what are the current practices? To what extent are institutions aware and able to respond to gender-specific issues?

What initiatives exist in South Africa to expose public opinion and train criminal justice practitioners concerning the benefits of non-custodial measures, for example for minor or nonviolent crimes?

Pretrial detention should be used as a means of last resort. *To what extent are gender-specific criteria considered when making decisions on alternatives to pretrial detention? For example, bail conditions or conditions around house arrest should consider a woman's caregiving obligations?*

When are non-custodial measures applied for women in South Africa?

What are the measures considered (for example case dismissal, depenalization/decriminalization, gender-responsive diversion and treatment programmes, restorative justice and other related alternatives (especially for minor charges where a woman does not pose a serious threat), counselling, drug treatment & job training)?

Are these operationalised in line with relevant international standards and norms, including the Tokyo Rules and the Bangkok Rules? What are relevant local policies and legislation that includes the international standards & norms?

During the trial stage, what are the gender-specific mitigating factors considered during sentencing (e.g. caring responsibilities, the best interest of the child/children, history of victimization or mental health care needs)?

Are mandatory sentences used and what is their impact on women who are convicted?

Do the courts explore non-custodial sentences or the setting of the lowest fines, considering the background and circumstances of the woman in contact with the law?

To what extent are prison or probation officers, university clinics and paralegals used to support the court with providing background information for sentencing?

What initiatives exist in South Africa to expose and train judges to the benefits of non-custodial measures, e.g. for nonviolent / minor crimes?

In the -post-sentencing stage, if a woman has been sentenced, is it the case that any form of release from an institution to a non-custodial programme or measure is considered at the earliest possible stage e.g. early conditional release or, community work release?

What if any – integration measures are considered or in place for integration into the community and families?

How do you facilitate the integration of women involved in drug offences, back into families and communities?

GBV/Vulnerable group of women, including those who use drugs

How are histories of abuse considered in relevant cases, in terms of self-defence or prior GBV exposure of women (including sex workers, and women who use drugs) support the application of non-custodial measures in South Africa?

How are victims of trafficking identified by law enforcement officers at an early stage to avoid prosecuting them for offences committed in the context or because of their exploitation by traffickers?

To what extent are South African laws and policies clear about foreign national women in contact with the law to ensure they are not discriminated against, that they have access to justice services and access to non-custodial measures and are assisted with resettlement or transfer?

The incarceration of women for drug offences, does South African law and policy include any of the following: diversionary measures, alternatives to pretrial detention, non-custodial sentences, sentence reductions for low-level drug offences or gender-responsive amnesties and pardons for low-level drug offences?

Are gender-specific, trauma-informed treatment programmes available for women with drug use disorders?

To what extent are such treatment options used or prioritized by prosecutors or courts as alternatives to conviction or punishment?

What are the consequences for women with drug use disorders who refuse to undergo treatment as an alternative or do not comply with the established conditions?

What are the service options to support GBV victims, women who use drugs, women with children, those with mental health issues and adolescent girls during the application of non-custodial measures?

Are there any best practices in assessing female offenders/inmates by targeting their criminogenic needs, risk of exposure to GBV and supporting their rehabilitation?

Do non-custodial measures in South Africa focus on rehabilitation rather than retribution, considering women's pathways to

prison, their basic needs, their relationships, and community ties?

How do you protect the women released from prison as a non-custodial measure from stigmatisation by society for their committed crime or from GBV in South Africa?

COVID-19

To what extent have women prisoners benefited from release measures in the context of COVID-19?

To what extent has the enforcement of measures to prevent COVID-19 included arrest, detention or economic sanctions (i.e. fines), and what has been the impact on women?

What specific programs are most effective to address substance abuse or other related GBV risk behaviours upon women's reintegration into the community, facing the challenge of social distancing and other health security measures during the COVID -19 pandemic period?

Next Steps

How do we make the case for increased use of non-custodial measures in South Africa?

What are your recommendations for action that can be taken by the Government?

Annex IV Webinar Invitation

Pathways to Women's imprisonment: alternatives for women in conflict with the law

Agenda 08 March 2021

Moderator	Ms. Linda Naidoo	UNODC ROSAF
10h00 – 10h05	Opening Remarks Ms. Zhuldyz Akisheva	Regional Representative: UNODC ROSAF
10h05 – 10h40	Presentation of Research Study Dr. Marie-Claire Van Hout	Independent Consultant
10h40 – 11h15	Integrating Research and Practice: Presentation by Panelists Ms. Jakkie Wessels Mr. Pelmos Mashabela Ms. Wilna Lambley Ms. Caroline Peters	Regional Court Judge, Limpopo (5mins) Dept of Correctional Services (5mins) Legal Aid SA (5mins) Cape Flats Womens Movement (5mins)
11h15 – 11h30	Keynote Speaker Honorable Minister Ronald Lamola	Min. of Justice & Correctional Services
11h30 - 11h50	Questions & Answers Ms. Signe Rotberga	UNODC ROSAF
11h50 – 12h00	Closing Remarks Ms. Zhuldyz Akisheva	Regional Representative: UNODC ROSAF



UNODC
United Nations Office on Drugs and Crime



© United Nations Office on Drugs and Crime 2021

The content of this document does not necessarily reflect the views of the United Nations Office on Drugs and Crime (UNODC). The description and classification of countries and territories in this publication and the arrangement of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or its authorities, or concerning the delimitation of its frontiers or boundaries, or regarding its economic system or degree of development.

NOTES

