



DISCUSSION PAPER 161
PROJECT 100
DOMESTIC VIOLENCE: THE CRIMINAL LAW
RESPONSE

24 June 2023

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INTRODUCTION

The South African Law Reform Commission (the Commission) was established by the South African Law Reform Commission Act 19 of 1973. The members of the Commission appointed by the President to oversee the program of the Commission for the current term of office are —

Honourable Judge Jody Kollapen (Chairperson)
Mr Irvin Lawrence (Deputy Chairperson)
Professor Mfariseni Budeli-Nemakonde
Professor Wesahl Domingo
Professor Karthi Govender
Advocate Johan de Waal SC
Advocate Retha Meintjes SC (until 31 December 2022)
Advocate Tshepo Sibeko SC
Advocate JB Skosana (Full-time Commissioner)

The project leader appointed by the Commission to this project is Professor Wesahl Domingo. The investigation was supported by Commissioner Advocate Retha Meintjes (SC) up until her resignation as Commissioner on 31 December 2022. The Commission wishes to express its appreciation to Advocate Meintjes for her expert guidance and contribution to this investigation.

The Commission stands by its decision not to appoint an advisory committee as the matters are succinct and can be addressed through targeted stakeholder involvement.

The Secretary of the Commission is Mr Tshisamphiri Matibe. The researcher assigned to this investigation, who may be contacted for assistance, is Ms Dellene Clark.

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PREFACE

This discussion paper is preceded by an issue paper and an in-house proposal paper. It seeks to provide an opportunity to discuss the perceived need to review the criminal law response to violence perpetrated within domestic relationships and the lived reality of those seeking to engage the criminal justice system in this regard. Although a synopsis of the issue paper is provided, the content of the issue paper is considered incorporated by reference. The discussion paper provides a summation and analysis of pertinent comments received on the questions contained in the issue paper. Where appropriate this is done alongside developments in certain comparative jurisdictions. While divergent but related comment was received primarily identifying barriers to help-seeking and the preferred focus on prevention, the demarcation of the review remains focussed on the criminal law response to domestic violence and specifically the United Nation's Convention on the Elimination of All Discrimination Against Women (CEDAW) Committee's recommendation to specifically criminalise domestic violence and femicide.¹ The outcome of the discussion paper is contained in the preliminary proposals which are published for consideration and comment.

The discussion paper demarcates the parameters of the investigation and the proposed extent of the review needed. The comment of any person on the preliminary recommendations posed herein or in respect of any aspect of the discussion paper is sought. Relevant comment is integral to the outcome of this investigation and will be integrated into the draft report which is to follow.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents unless representations are marked "confidential". Respondents should be aware that the Commission may be required to release information contained in representations under the Promotion of Access to Information Act, 2000 (Act 2 of 2000).

Respondents are requested to submit written comment or representations on the Discussion Paper to the Commission by no later than **30 October 2023**. Any request for further information or administrative enquiries should be addressed to the Secretary of the Commission or the researcher assigned to this project.

¹ Recommendation of the Committee in the report on its inquiry concerning South Africa conducted under article 8 of the Optional Protocol to the Convention (CEDAW/C/ZAF/IR/1).

SUMMARY OF THE DISCUSSION PAPER

1. This investigation is framed against the background of significant changes to the legislative framework dealing with gender-based violence. The purpose of which is to among others, extend additional protection to vulnerable groups, improve the pathway of services to victims of gender-based violence (GBV); prevent secondary victimisation, address legislative gaps and remove implementation barriers. Law reform was identified as one of the vehicles through which clear and effective steps could be taken to address the seemingly endemic nature of gender-based violence and femicide in South Africa.² (See page 19)

2. The need for a specific crime of domestic violence is being investigated against the backdrop of the recommendation contained in the 2017 Report of the High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change (The High Level Panel),³ and the finding in 2021 by the United Nations Committee on the Elimination of Discrimination against Women that South Africa was guilty of a systematic violation of rights under the Convention on the Elimination of Discrimination against Women (CEDAW) for knowingly omitting to, among other omissions, specifically criminalise domestic violence and femicide⁴ and implement ex officio prosecutions.⁵ (See page 20)

3. Although the Domestic Violence Act, as a civil remedy, has recently been reviewed, the amendments focus primarily on promoting the uptake and efficacy of the civil remedy provided for in this Act. Amidst the accelerated promulgation of the original Domestic Violence Act; and the Domestic Violence Amendment Act; and rising calls to criminalise domestic violence as a stand-alone offence, the Commission identified the need for further research with a view to possible law reform.⁶ (See page 21)

4. The Commission has interpreted these recommendations in the collective context of pertinent CEDAW General recommendations. Based on this nuanced approach, it would seem that South Africa has substantially complied with the recommendations made by the CEDAW Committee. The injunction placed on South

² Presidential Summit against GBVF Declaration 2018.

³ Report of the High Level Panel Recommendation 4.8a 338.

⁴ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 116 (b)(ii).

⁵ CEDAW Committee Report Inquiry concerning South Africa 2021.

⁶ See paragraph 6 to 8 of the issue paper which details the history to the promulgation of the Domestic Violence Act.

Africa by the CEDAW Committee to prosecute ex officio “as appropriate” would in context seem to provide a discretion. The recommendations contained in paragraph 32 of CEDAW General recommendation No.35 emphasise the need for a case by case approach to determine the most appropriate remedy, including whether a criminal or an ex officio prosecution is required. Paragraph 32(b) of CEDAW General recommendation No.35, while presenting the option of alternative dispute resolution procedures to address GBV with extreme caution, presents this as an option to that of the criminal law. Against the outline of these international imperatives, the amendments to the Domestic Violence Act, the Criminal Procedure Act and the Criminal Law Amendment Act 105 of 1997 (pertinent to mandatory minimum sentences) have been effected. (See page 55)

5. The evidence would suggest that providing an adult victim of domestic violence with a choice as to whether she wishes to engage a civil or criminal remedy, together or separately, or not at all is in the best interest of the person themselves. A mandatory reporting mechanism in respect of children, a person with a disability or an older person has been brought about by the recent amendments to the Domestic Violence Act. The Commission’s preliminary recommendation is that the autonomy of adult victims who are not older persons or have a disability, to engage a civil or criminal response (where such acts constitute criminal offences) or both a civil and criminal response to acts of domestic violence should continue to be recognised. (See page 67)

6. To ensure that the remedies provided are truly survivor led and survivor focussed would require a broader approach than engaging the criminal justice system. It would arguably include different layers of societal intervention, including personalised risk assessment. (See page 59) The necessity of prevention or early intervention are supported by research that femicide is predictable and preventable as it is seldom the first act of violence, but instead the final act in a process of chronic domestic violence. (See page 62)

7. The Commission is of the view that changes to the substantive law will not address challenges being experienced in relation to procedure and implementation of the existing law by police officers and court officials. It is further of the view that criminalising all behaviour in the recently extended definition of ‘domestic violence’ or enacting additional substantive crimes through the criminalisation of a standalone offence of domestic violence which contains certain behaviour which currently does not meet the definitional criteria or elements of a criminal offence, thereby extending the reach of the criminal law would be a particularly inappropriate response to the

complexities and subtleties of certain domestic violence behaviour. (See page 67) Furthermore the release of the reconfigured national crime statistics show that the South African Police Service is capable of disaggregating and reporting on individual crime categories underlying domestic violence. This means that the South African Police Service can collect and present domestic violence data in a way that enables better understanding of the nature and extent of the reported problem, and which could inform prevention and intervention strategies.⁷ The concern by the CEDAW Committee regarding disaggregation of data has therefore been addressed. (See page 69)

8. A pertinent consideration in the current legislative climate relates to whether the time is right for further amendment to the laws regulating domestic violence. Three laws have recently been enacted with a view to bringing about a substantial change in the process and procedure of matters dealing with GBV, arguably the key flaw in responding to domestic violence. The purpose of these laws is to bring about a clearer pathway of services to among others address implementation issues. Pertinently this renewed focus on GBV includes issuing directives and instructions in the relevant departments to bring about focussed and expanded service delivery. Shifting the focus onto a criminal law response so soon after remedying flaws in the civil response may therefore be counter-productive.

9. The Commission notes with concern the submission highlighting the abuse of charges of domestic violence, particularly by lawyers in the realm of the family law, and the deleterious effect that lodging spurious claims has on minor children and inevitably the parties involved. The criminalisation of all acts of domestic violence in a standalone offence would arguably exacerbate this highly charged environment. The Commission believes that this matter is deserving of further attention. (See page 73)

10. Although strangulation emerged as one of the key risk factors for escalation of severity of domestic violence and increased risk of fatality, neither of the Commission's expert dialogues nor the submissions expressed uniform support for an additional substantive crime of strangulation or any other substantive crime. The predominant view was that, contrary to the position in New Zealand, an act of strangulation or suffocation is already criminalised and actionable as common assault; assault with the intent to inflict grievous bodily harm; or attempted murder depending on the circumstances. (See page 81) The Commission is therefore of the preliminary view that the law as it stands allows

⁷ Lisa Vetton & Sanja Bornman, the Commission for Gender Equality per Dr Dennis Matotoka, Legal Services concur with Point 4.

for differing levels of redress through a civil or criminal process for various acts of domestic violence such as stalking, emotional harm and strangulation. The need for adequate recognition of the risk and severity, particularly of strangulation and emotional harm, would point towards the need for broad societal awareness raising; training for law enforcement and officials within the criminal justice system, health and social services; focussed risk identification and a swift response. (See page 88)

11. The Commission further considered the CEDAW Committee's recommendation to criminalise 'domestic violence' as a stand-alone crime which it reiterated in its concluding observations on the fifth periodic report of South Africa. As the law currently criminalises all criminal elements contained in the definition of 'domestic violence' the recommendation of the CEDAW Committee to criminalise all acts of domestic violence is substantially met. There is insufficient evidence that re-arranging crimes in the context of domestic violence into a single offence would be in the best interests of victims of domestic violence. (See page 71) The Committee, among others, recommended the adoption of the three GBV-related bills; that the focus be placed on the investigation, prosecution and punishment of perpetrators; and the need for statistical data on the scope and extent of domestic violence.

12. The evidenced-based shift towards identifying and addressing drivers of domestic violence include interventions to address widespread alcohol and substance abuse, structural, societal and normative barriers. The Commission found it notable that the presence of firearms has been found to be a specific predictor of domestic abuse and specifically implicated in combined events of femicide and suicide.⁸ (See page 62 and 164)

13. The Commission agrees with the Commission for Gender Equality that non-compliance by the police should be addressed practically through disciplinary action and ongoing training, monitoring, and evaluation.⁹ It is of the view that engaging an automatic criminal law response, i.e. mandatory prosecution and criminalising functionaries, in order to address non-compliance, for not informing victims of available remedies or diverting them to apply for a protection order instead of or without registering a criminal complaint, would arguably result in the most negative outcome for victims of domestic violence. (See page 63)

⁸ Van der Heyde presentation SAPS & DHET Training Webinar (2022).

⁹ Commission for Gender Equality per Dr Dennis Matotoka, Legal Services. Supported by Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

14. In considering the context specific barriers that victims of domestic violence experience to accessing the criminal justice system and other remedies to addressing GBVF the Commission refers to the imperative found in CEDAW under articles 2(f) and 5(a) of CEDAW, that States parties must address the root causes of domestic violence and bring about normative change by dismantling stereotypes and cultural norms perpetuating violence against women. Furthermore that awareness raising needs to be broadly targeted, together with mandatory and recurrent capacity-building for the judiciary, law enforcement officers and forensic medical and health-care personnel to eliminate gender bias and stereotypes; ensure the strict application of criminal law provisions, the collection and preservation of evidence and the issuance and monitoring of protection orders in domestic violence cases and to assess the impact of such measures.¹⁰ The United Nations Economic and Social Council Commission on the Status of Women in its Sixty-fifth session reiterates the need for normative change.¹¹ (See page 115)

15. The Commission points out that barriers to dealing with GBVF matters efficiently and effectively include a lack of skills on how to deal with GBVF cases at police stations; and the turnaround time of DNA evidence and ballistic reports from the forensic laboratory.¹² Other barriers are structural, with the location of police stations playing an important role in reporting, case retention, referrals and convictions – in other words access to justice. Victims are not only hindered from reporting, but from sustaining court visits particularly where cases are postponed.¹³ Socio-economic factors seem to underpin not only the prevalence of domestic violence but redress thereof.¹⁴ For example the threat of a criminal conviction and imprisonment almost always means the simultaneous cessation of financial support to a family. When already facing poverty the very difficult choice is then between food and physical safety. (See page 55) The Commission therefore recognises the significant and concerted strides that have been made across all sectors to ensure that GBVF, including domestic violence, is dealt with effectively and efficiently. It recognises too that the multi-varied interplay of socio-economic, normative and relational complexities often make the law an ineffective tool to address these complexities. In recognising that progress is underway to address some of these barriers the Commission supports the Commission for Gender Equality's

¹⁰ CEDAW Committee Report Inquiry concerning South Africa 2021 par 92.

¹¹ UNESC Commission on the Status of Women Sixty-fifth session 6.

¹² Commission for Gender Equality Biannual SAPS Report (2022) 5.

¹³ Commission for Gender Equality Biannual SAPS Report (2022) 38.

¹⁴ Commission for Gender Equality Biannual SAPS Report (2022) 40.

recommendations and does not make additional recommendations in this regard. (See page 122)

16. Paradoxically at a time when our prisons are overcrowded, bearing witness to the ineffectiveness of the heightened use of the penal system to deter or prevent violence, the solution most often touted in response to acts of domestic violence is amplified sentences and lengthy incarceration. In non-fatal cases of domestic violence there are a range of reasons why this option does not address the root causes of domestic violence or provide the recourse sought by victims of domestic violence. The Commission is of the view that the emphasis placed by the UN Commission on the Status of Women in 2021 in its 65th session to invest in sustainable solutions should be heeded and that further enhancement of the sentencing regime is not appropriate. (See page 149 – 150)

17. The Commission agrees with the National Commissioner of the South African Police and a number of other respondents that the criminal law is generally an ill-fitting tool to remedy the harms of domestic violence. Where appropriate, adequate access to and protection by criminal justice stakeholders within the framework of the criminal law should be provided. This should be coupled with sentencing which is properly informed by the impact on the victim of domestic violence through detailed Victim Impact Statements, appropriate consideration of relevant aggravating factors; and the possibility of alternatives to sentencing which include interventions for the offender, and where suitable both the victim and offender. (See page 127)

18. While the legislative framework has been significantly changed to provide recourse through the criminal and civil law, a whole-of-society approach focussing on societal and normative change of deep-rooted harmful patriarchal views regarding women which perpetuates inter-generational domestic violence, is needed. The Commission believes that the Department of Health and the Department of Social Development are mandated to play a more meaningful role in not only addressing the inter-generational trauma of GBV in domestic relationships across the life-cycle of its citizens, but in early detection of warning signs. A collaboration between government and civil society in respect of awareness raising, training and provision of remedies that provide victims of domestic violence with realisable avenues of exit from abusive relationships are key to the effective implementation of laws around domestic violence. It is also key to dismantling the structural drivers that lead to GBV, which is core to achieving substantive equality. All functionaries, as defined in the amended Domestic Violence Act should be trained in applying universal screening of markers of domestic

violence. The systems approach which is being embarked on by the police should arguably include tangible changes as documented in the Khayelitsha report and in other areas as the context determines. (See page 112 & 139)

19. Following the discussion paper, the Commission will publish a report setting out the final recommendations and draft legislation, if necessary. The report will take the public response to the discussion paper into account, and will test public opinion on the solutions identified by the Commission. The report (with draft legislation, if necessary) will be submitted to the Minister of Justice and Correctional Services for his consideration.

20. For ease of reference the preliminary recommendations found in the text of the discussion paper are arranged below. They are presented for comment with a view to further deliberation.

Preliminary recommendations

1. The Commission's preliminary recommendation is that the autonomy of adult victims of domestic violence should not be disregarded and that the criminal law should not be automatically engaged in instances of domestic violence. (See page 68)
2. The Commission is of the preliminary view that the existing substantive crimes sufficiently cater for criminal behaviour found in the definition of 'domestic violence' in the Domestic Violence Act. Additional legislation would not seem to be required in this regard. The Commission is undecided on whether there is a need to categorise all substantive crimes contained in the definition of domestic violence under an umbrella offence of domestic violence. However, the Commission agrees that there should be a renewed focus on improving everyday practices and procedures of police officers and court officials, for example non-facilitation of laying of charges for existing crimes. The recent amendments and revision of existing and enactment of new instructions and guidelines and training will arguably provide the necessary impetus to give effect to the correct application of the law and clarify obligations placed on various functionaries in and along the chain of services for victims of domestic violence. (See page 70)

3. The Commission endorses the submission by the Commission for Gender Equality that time should be given for the recent changes to the Domestic Violence Act to be implemented, and that the impact thereof should be monitored and assessed before any further technical amendment to crime categories is made. The Commission's preliminary view does not support the enactment of a standalone offence of 'domestic violence' or the introduction of a category of offences in the Domestic Violence Act in duplication of the existing criminal law. (See page 74)
4. The Commission seeks comment on whether spurious civil or criminal claims of domestic violence following advice by legal practitioners needs attention. (See page 74)
5. The Commission is of the preliminary view that the law as it stands allows for differing levels of redress through a civil or criminal process for stalking, emotional harm and strangulation. The need for adequate recognition of the risk and severity, particularly of strangulation and emotional harm, would point towards the need for broad societal awareness raising; training for law enforcement and officials within the criminal justice system, health and social services; focussed risk identification and a swift response. (See page 88)
6. The Commission recognises the significant and concerted strides that have been made across all sectors to ensure that GBVF, including domestic violence, is dealt with effectively and efficiently. It recognises too that the multi-varied interplay of socio-economic, normative and relational complexities often make the law an ineffective tool to address these complexities.

While efforts may be underway to address some of these areas the Commission supports the Commission for Gender Equality's recommendations that:

- Urgent attention should be given to the forensic laboratory backlog, prioritising of these crimes and building blocks such as a dedicated courier to ensure safe delivery of DNA samples;
- There should be awareness raising of the dangers of withdrawing cases;
- The link between alcohol and gender-based violence needs attention with a view to mitigating harm facilitated by the abuse of substances;
- Mobile police stations and regional courts should be established to cater to rural and impoverished communities;

- Early intervention should be prioritised to stop children from perpetuating the cycle of violence;
 - Staff training should range from basic competencies like computer literacy to GBVF specific services;
 - Collaboration between the South African Police Service, the Department of Health; Department of Home Affairs; and Department of Social Development to deal with matters involving foreign nationals, shebeens and GBV crimes;
 - Harnessing of intersectoral partnerships to reduce and prevent intimate partner violence through awareness, changing norms and promoting non-violent conflict resolutions; and
 - There should be a focus on mental health as depression and suicide often accompany sexual abuse. It also affects victim readiness to testify. In order to do this the Department of Social Development should take ownership of support provision to ensure a proper referral system and pathway to services. (See page 127)
7. The Commission notes the submission by the Commission for Gender Equality, with reference to the Criminal and Related Matters Amendment Act No. 12 of 2021, that the recently amended sentencing law regime applicable to domestic violence provides for harsher sentences for crimes involving GBV, and crimes against people with whom perpetrators are in a domestic relationship. The Commission agrees that any further amendment in this regard, before the impact of the recent amendments on implementation are gauged may serve to create unnecessary uncertainty in respect of the laying of charges, competent verdicts, and sentencing. It therefore does not support further amendments at this time. (See page 164)
8. In terms of the sentencing process, the Commission is of the view that detailed and victim specific Victim Impact Reports should be compiled with a focus on the extent of the domestic violence and the physical and psychological impact on the victim and family. As there may not be previous criminal convictions, it would be apposite to reference previous applications for protection orders, even where withdrawn and breaches thereof. (See page 164)
9. The Commission notes that substance abuse has been identified as a contributor to domestic violence and that both the Criminal Procedure Act and the recently amended Domestic Violence Act provides for referral for treatment and rehabilitation. As substance abuse is in turn arguably a response to other root causes, the Commission sees value in the Department of Social Development developing or expanding on interventions aimed at social and normative change. The availability of programs aimed at cognitive behavioural

change, restorative justice or conjoint or couple treatment may be preventative and responsive to violence in families. The empowering provisions in both the Criminal Procedure Act and Domestic Violence Act are arguably wide enough to include interventions which are not linked to substance abuse. (See page 165)

10. It is suggested that the role of the Department of Social Development, Department of Human Settlements, Water and Sanitation, and Department of Public Works in addressing the homelessness and housing instability post using sheltering services experienced by women and by women and children in abusive relationships and those subjected to family violence should be further explored. (See page 165)
11. The Commission is of the view that there is merit in the suggestions made by Mses Vetton and Bornman in respect of analysing the circumstances surrounding femicide or murder of a family in which the victim, or a family member, was in possession of a protection order obtained through the Domestic Violence Act at the time of their death (or had applied for one). It is of the preliminary view that the recommendation that such an event should automatically trigger review by a panel comprising, at a minimum, the South African Police Service (SAPS) and independent experts in domestic violence should be supported. The suggestion of the following procedure for such a panel is presented for consideration:
 - All intimate femicides perpetrated by police officials must be immediately reported to either the provincial complaints coordinators of the SAPS Inspectorate, or the national office of the CSP.¹⁵
 - Any other intimate femicide which occurs must be checked against SAPS 508(a), 508(b) and file of protection orders maintained by the police station in the jurisdiction where the killing occurred. Should the victim have been in possession of a protection order, or in the process of obtaining such an order, then this case must automatically be forwarded to the CSP.
 - When a child is killed by a parent, their details must also be checked against this documentation to ascertain whether or not one of the parents was in possession of a protection order, or was in the process of applying for one. Where this is found, such cases must also be forwarded to the panel. (See page 165)

¹⁵

An abbreviation for the Civilian Secretariat for Police.

12. The Commission is further of the view that the SAPS could in light of section 18 of the Domestic Violence Act and the enactment of the online electronic repository in time consider issuing guidance along the lines of the Domestic Violence Disclosure Scheme. However, history of violence against intimate partners may form part of the safety monitoring and risk assessment of a victim of domestic violence who has applied for a domestic violence safety monitoring notice. The Commission does not support including the names of domestic violence respondents or offenders on the National Register of Sex Offenders. (See page 166)

CHAPTER 1: OVERVIEW OF THE INVESTIGATION

A Introduction and background

1. This investigation is framed against the background of significant changes to the legislative framework dealing with gender-based violence and femicide (GBVF). The purpose of which is to, among others, extend additional protection to vulnerable groups, improve the pathway of services to victims of gender-based violence (GBV); prevent secondary victimisation, address legislative gaps and remove implementation barriers. Law reform was identified as one of the vehicles through which clear and effective steps could be taken to address the seemingly endemic nature of GBVF in South Africa.¹⁶ Consequently, the need for law reform was identified as one of the key policy demands in the #TotalShutDown memorandum and the Declaration, which emanated from the Presidential Summit against Gender Based Violence and Femicide in 2018.

2. The Department of Justice and Constitutional Development (DoJ&CD) prioritised three pieces of legislation for review and proceeded with the introduction of these amendment Bills in Parliament in the latter part of 2020. The Bills were subsequently unanimously supported in the National Assembly by all political parties on 10 September 2021 and forwarded to the President. The President in turn assented to the Criminal and Related Matters Amendment Act 12 of 2021¹⁷ and the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 13 of 2021¹⁸ on 28 January 2022. These Acts were operationalised on 5 August 2022 and 31 July 2022 respectively. While the Domestic Violence Amendment Act 14 of 2021 (the Domestic Violence Amendment Act) was also assented to by the President on 28 January 2022, the amendments to the Domestic Violence Act 116 of 1998 (the Domestic Violence Act), with the exception of the establishment of the integrated electronic repository for domestic violence protection orders contained in section 6A, became operational on 14 April 2023.¹⁹ As further referred to below, the reason for the commencement interval was to allow for the development of the directives and regulations required by the Act.²⁰

¹⁶ Presidential Summit against GBVF Declaration 2018.

¹⁷ The Act commenced on 5 August 2022 As per Proclamation Notice R75 of 2022, Government Gazette, 4 August 2022 No 47198.

¹⁸ The Act commenced on 31 July 2022 as per Proclamation Notice R79 of 2022, Government Gazette, 29 July 2022 No. 47205.

¹⁹ The Act commenced on 14 April 2023 as per Proclamation Notice R117 of 2023, Government Gazette, 14 April 2023 No. 48419.

²⁰ The directives issued in terms of section 18A of the Domestic Violence Act and the

3. The Commission's Issue Paper on Domestic Violence: The Criminal Law Response (the issue paper) which precedes this paper,²¹ explains that the focus of this investigation is on an aspect which has not formed part of the current legislative review; namely the need for a specific domestic violence offence or offences. The need for a specific criminalisation of domestic violence is being investigated against the backdrop of the recommendation contained in the 2017 Report of the High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change (The High Level Panel);²² and the finding in 2021 by the United Nations Committee on the Elimination of Discrimination against Women that South Africa was guilty of a systematic violation of rights under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) for knowingly omitting to, among other omissions, specifically criminalise domestic violence and femicide²³ and implement ex officio prosecutions.²⁴ Although the Domestic Violence Act, as a civil remedy, has recently been reviewed the amendments focus primarily on promoting the uptake and efficacy of the civil remedy provided for in this Act. Prior to commencement of the Domestic Violence Amendment Act, the only offences provided for in the Domestic Violence Act were for non-compliance of a protection order, which constitutes the offence of contempt of court,²⁵ publication of information identifying parties to the application of a protection order,²⁶ contravention of a court directive in respect of information on the proceedings²⁷ and a wilful false statement regarding breach of a protection order by a respondent.²⁸

4. The amendments to the Domestic Violence Act introduce additional offences. This includes the offence committed by an adult person who fails to comply with the obligation to report domestic violence against a child, a person with a disability or an older person.²⁹ This offence would arguably not be applicable to perpetrators of domestic violence. Further offences are for non-attendance or non-cooperation by a witness;³⁰ and

Domestic Violence Act Regulations were both published in the Government Gazette on 14 April 2023. See Government Gazette No R 3282 of 14 April 2023 No 48419 and Government Gazette No R3289 of 14 April 2023 No 48428.

²¹ SALRC Issue Paper 42 (2021) par 4.

²² Report of the High Level Panel Recommendation 4.8a 338.

²³ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 116 (b)(ii).

²⁴ CEDAW Committee Report Inquiry concerning South Africa 2021.

²⁵ Section 7 and 17 of the Domestic Violence Act.

²⁶ Section 11(2)(a) and 17 of the Domestic Violence Act.

²⁷ Section 11(2)(b) and 17 of the Domestic Violence Act.

²⁸ Section 8(4)(a) and 17 of the Domestic Violence Act.

²⁹ Section 2B of the Domestic Violence Act as introduced by the Domestic Violence Amendment Act 14 of 2021.

³⁰ Section 5A of the Domestic Violence Act as introduced by the Domestic Violence Amendment Act 14 of 2021.

various offences related to non-compliance by an electronic communications service provider in contravention of a court order.³¹

5. Amidst the accelerated promulgation of the original Domestic Violence Act, the Domestic Violence Amendment Act and rising calls to criminalise domestic violence as a stand-alone offence, the Commission identified the need for further research with a view to possible law reform.³² The Commission approved the issue paper for publication on 8 December 2021 under the guidance of two Commissioners, i.e., Professor Wesahl Domingo and Advocate Retha Meintjes (SC). The issue paper, which included a request for comment on 7 succinct questions, was released for publication on 10 December 2021. The return date for comments was 28 February 2022. A limited extension for submissions was granted until 14 March 2022. A list of respondents who submitted written submissions is reflected in Annexure A of this discussion paper.

6. Due to COVID-19 lock-down restrictions no “in person” workshops were held. However, two representative virtual strategic dialogues were held on 2 and 8 February 2022. Participants included academics, researchers, grass-root non-governmental organisations (NGOs), survivors of domestic violence, representatives of the Gender Machinery, forensic pathologists, social workers, representatives from the National Prosecuting Authority (NPA) and the Judiciary. The names of the dialogue participants are listed in Annexure B of this discussion paper. At the request of the Southern African Catholic Bishops’ Conference Parliamentary Liaison Office, the issue paper was presented during a Webinar and streamed on Facebook Live on 16 February 2022.

7. The Commission abides by its decision not to seek the appointment of an advisory committee as the matters contained in the paper have been found to be succinct and of such a nature that they could be discussed with relevant stakeholders by way of expert meetings.

B Methodology and purpose of the discussion paper

8. The issue paper, which preceded this discussion paper, set out to initiate and explore proposals on law reform on the topic of the criminal law response to certain

³¹ Section 5B(11)(a), (b), (c) or (d), read with section 17 of the Domestic Violence Act as introduced by the Domestic Violence Amendment Act 14 of 2021.

³² See paragraph 6 to 8 of the issue paper which details the history to the promulgation of the Domestic Violence Act.

behaviour perpetrated within a domestic relationship. In so doing, it sought to identify the manner in which the law currently regulates and protects those in domestic relationships from criminal behaviour and whether there is a need for law reform. The content of the issue paper will not be replicated in this discussion paper and should be regarded as part of the overall discussion.

9. This discussion paper reflects the position taken and proposals made by respondents through their submissions on the issue paper, either in writing or during the online dialogues, seeks to take guidance from local and international comparative research and best practice, test public opinion on possible solutions and contains the Commission's preliminary findings and recommendations. The discussion paper contains preliminary findings, which are published alongside the paper for consideration and comment. On the strength of these responses, measured against evidence contained in local and comparative law, a report will be prepared containing the Commission's final recommendations. The report (with draft legislation, if necessary) will be submitted to the Minister of Justice and Correctional Services for consideration.

C Legislative and regulatory context

10. Against the backdrop of the Constitution of the Republic of South Africa, 1996 which provides the framework for an effective legislative response to GBVF,³³ the issue paper succinctly elaborates on the legislative and regulatory context. For ease of reference, the following policies and legislation pertinent to South Africa's broader response to GBVF and domestic violence as listed in and inclusive of the National Strategic Plan on GBVF are:

- The National Strategic Plan on Gender Based Violence and Femicide 2020 – 2030 (the NSP)³⁴;
- The National Crime Prevention Strategy (NCPS) 1996 which establishes crimes of violence against women and children as a national priority;
- The National Development Plan (Vision for 2030), 2011;³⁵
- The Integrated Social Crime Prevention Strategy, 2011;
- The White Paper on Safety and Security, 2016;

³³ NSP 2020-2030123.

³⁴ NSP 2020-2030123.

³⁵ National Development Plan Vision for 2030 (2011).

- The Criminal Law Amendment Act 105 of 1997 (pertinent to mandatory minimum sentences);
- The Criminal Procedure Second Amendment Act 85 of 1997 (pertinent to bail conditions);
- The Domestic Violence Act 116 of 1998 (pertinent to protection orders);
- The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (pertinent to all codified sexual offences other than adult prostitution, and provides for the National Policy Framework on the Management of Sexual Offences Matters);
- The Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 (pertinent to effective prosecution and conviction of offenders);
- Criminal and Related Matters Amendment Act 12 of 2021 (pertinent to virtual courts; intermediaries; reasonable accommodation; enhanced sentencing);
- Criminal Law (Sexual Offences and Related matters) Amendment Act Amendment Act 13 of 2021 (pertinent to additional sexual offences; enhanced National Register of Sex Offenders; creation of a category of vulnerable person; victim-centric parole; obligation to report sexual offences; and protection of whistle-blowers);³⁶ and
- The Domestic Violence Amendment Act 14 of 2021.

11. The United Nations Committee on the Elimination of Discrimination against Women has flagged the lack of an offence of domestic violence³⁷ and the following peripheral areas of concern for attention:

- persistent stereotypes that legitimise domestic violence and discourage women from reporting it;³⁸
- difficulty to collect data in the absence of a specific offence;³⁹
- lack of enforcement of the law by the police; and
- lack of capacity building and awareness-raising for the judiciary and police.⁴⁰

12. Pertinently South Africa was issued with a recommendation by the Committee to, amongst others,

³⁶ NSP 2020-2030 33.

³⁷ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 17.

³⁸ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 3.

³⁹ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 26.

⁴⁰ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 96 - 101.

- (a) Specifically criminalize and establish penalties commensurate with the gravity of all forms of domestic violence and femicide and introduce ex officio prosecution with the possibility of issuing a final warning rather than sentencing the perpetrator when a victim withdraws her complaint upon reconciliation.⁴¹

The wording of this recommendation is framed against the finding that South Africa was guilty of a systematic violation of rights for not criminalising domestic violence and femicide.⁴²

13. Government and civil society have remained committed to addressing GBVF. On 14 April 2023, a year and a few months after promulgation, the Domestic Violence Amendment Act, with the exception of section 6A (relevant to the establishment of the integrated electronic repository), was operationalised. The delay in commencement was to provide for the drafting of regulations by the Department of Justice and Constitutional Development, to accommodate the amendments to the Domestic Violence Act and to issue directives in terms of section 18A of the Act. Information on the status of the directives and instructions to be issued in terms of sections 18A and 18B of the Amendment Act by other departments, to ensure compliance of and execution of functions by identified government officials and functionaries, as defined, are believed to be in various stages of completion. The exact status could not be verified but the absence of any of these operational documents would arguably directly impact on training of officials to ensure seamless implementation of the Domestic Violence Act.

14. Notably, four years to the day after the first Presidential Summit was held, the GBVF Presidential Summit Two took place on 1 and 2 November 2022. The theme for the summit was accountability, acceleration and amplification, shifting the focus somewhat from legislative change to implementation and accountability. The Presidential Summit Resolutions record, among other matters, that a category of common law and statutory offences that constitute GBVF related offences must be developed in order to establish a national repository for GBVF cases.⁴³ The need for criminalisation of domestic violence as a stand-alone offence or for additional crimes was not considered or identified as a resolution at the summit. The call for the categorisation of GBVF offences in a national repository should be seen against the backdrop of the six

⁴¹ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 118 (a).

⁴² CEDAW Committee Report Inquiry concerning South Africa 2021 Par 116 (b)(ii).

⁴³ This is reflected under the six month acceleration strategy of the third pillar of the National Strategic Plan, which deals with protection, safety and justice. See the End GBVF Collective Summit Resolutions (2023).

key emergent areas flowing from the second Presidential Summit. Essentially, an assessment of the current status of response to GBVF is that while there has been a strengthened awareness of GBVF, progress has not been relative to the scale of the challenge, which remains critical. Furthermore, that the understanding of GBVF should be located within the context of the COVID-19 pandemic, social and economic hardship, and service delivery issues.⁴⁴ This context would seem to point to the need to address structural drivers and related barriers of GBVF and to allocate a dedicated budget in this regard, as opposed to further legislative change.

D Outline of the Discussion Paper

15. Chapter one of the discussion paper sets out the purpose and methodology of the investigation. As reflected in the issue paper the purpose is to determine whether a criminal offence of domestic violence or offences specific to it are needed to augment the civil and criminal remedies available to combat the scourge of domestic violence in South Africa.⁴⁵ This chapter further contains a brief exposition of the legislative and regulatory context in South Africa. Furthermore, it highlights the recommendation contained in the Report of the High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change⁴⁶ and the recommendations by the United Nations Committee on the Elimination of Discrimination against Women⁴⁷ to enact a specific offence of domestic violence and related matters.⁴⁸

16 Chapter two considers the need for a stand-alone crime of domestic violence and whether the existing substantive crimes are adequate to address crimes in the context of a domestic relationship. To this end, it provides a summation and discussion of comments received on four of the seven questions posed in the issue paper, namely whether a criminal law response should be automatic irrespective of the wishes of the victim, the adequacy of the substantive criminal law in respect of domestic violence, the necessity of a stand-alone offence of domestic violence and the need for additional substantive crimes including strangulation as a domestic violence offence. Each discussion point concludes with preliminary recommendations.

⁴⁴ End GBVF Collective Summit Resolutions (2023).

⁴⁵ SALRC Issue Paper 42 (2021) 12.

⁴⁶ Report of the High Level Panel Recommendation 4.8a 338.

⁴⁷ CEDAW Committee Report Inquiry concerning South Africa 2021.

⁴⁸ These matters are expanded on in the SALRC Issue Paper 42 (2021) 12 - 17.

17. Chapter three considers the often quoted disjuncture between what is expected from officials within the criminal justice system and what they are equipped to or the criminal justice system is able to do. This chapter considers a range of views expressed in submissions and during the Commission's strategic dialogues in response to the question of which measures should be put in place or changed to remove barriers to accessing the criminal justice system for victims of domestic violence. The imperatives to address normative and societal challenges placed on States parties by CEDAW are in turn juxtaposed against structural and implementation challenges and efforts underway to provide access to justice to victims of domestic violence. The chapter concludes with the recognition that significant and concerted strides are being made across all sectors to ensure that GBVF, including domestic violence, is dealt with effectively and efficiently. In further recognising that the multi-varied interplay of socio-economic, normative and relational complexities often make the law an ineffective tool to address these complexities, it expresses support of practical remedies identified by the Commission for Gender Equality.

18. Chapter four provides an overview of the submissions which identified additional sentencing or preventative measures requiring attention. In the evaluation it considers selected comparative examples of such measures and concludes with the preliminary recommendations focussed on mechanisms to assist with sentencing and not the sentencing regime as such, and preventative measures which might be considered.

CHAPTER 2: THE NEED FOR A CRIME OF DOMESTIC VIOLENCE OR CRIMES RELATING TO DOMESTIC VIOLENCE

A Introduction

1. Violence in families and between intimate partners often occurs in private and in spaces that should be safe and provide a respite from the pressures of their public lives. With no place to hide, violence in this space takes a devastating physical, emotional, spiritual and financial toll on victims.⁴⁹ Having appropriate enabling legislation in place may be seen as the bedrock of a whole-of-society, multi-sectoral effort to reduce and prevent domestic violence. It provides a mechanism to protect victims and to prevent future violence. Intervention arguably, however, needs to be early, swift and multi-dimensional for the desired results.⁵⁰ Legislation without implementation or accountability provides little respite or hope of normative change.

2. A range of conduct committed in the context of a domestic relationship match the elements necessary to charge and convict an offender criminally under the common law and/or statutory law for a single or a number of crimes. These same crimes, defined under the broader umbrella definition of ‘domestic violence’ as physical abuse, emotional, verbal and psychological abuse; economic abuse; intimidation; damage to property; or “any other controlling or abusive behaviour towards a complainant”⁵¹ may also provide sufficient grounds to activate a civil remedy through the issuing of a protection order under the Domestic Violence Act.

3. The Commission explained in its issue paper that the aim of the investigation was primarily to consider whether there is a need to create a stand-alone offence of domestic violence or offences pertinent to domestic violence, such as strangulation or choking within the context of domestic violence.⁵² By way of background, the Commission provided an overview of the current criminal law response and the rationale behind

⁴⁹ National Council of Juvenile and Family Court Judges Family Violence: A Model State Code 1994 v.

⁵⁰ National Council of Juvenile and Family Court Judges Family Violence: A Model State Code 1994 v - vi.

⁵¹ Paragraph (j) of the definition of ‘domestic violence’.

⁵² SALRC Issue Paper 42 (2021) 19.

providing a civil law response to domestic violence. It further provided a brief historical overview of the Commission's investigation, which culminated in the Domestic Violence Act and gave a top-level synopsis of the two Bills, which preceded the enactment of the Domestic Violence Amendment Act 14 of 2021 and the Criminal and Related Matters Amendment Act 13 of 2021.⁵³ In framing the rationale for this investigation, the Commission further explained that the criminal law response pertaining to a specific offence or augmented offences had not, given the civil nature of the Domestic Violence Act, received attention in the recent review thereof. The reason for this was that the primary focus of the review of the Domestic Violence Act was to address implementation challenges relating to the uptake of this civil remedy. The issue paper concluded with questions pertinent to framing the scope of this investigation.

4. Notwithstanding various calls to criminalise domestic violence as a stand-alone offence – as opposed to the current use of existing common law offences and specific statutory crimes relating to domestic violence – no example of such an overarching stand-alone offence containing otherwise non-criminalised behaviour such as economic or spiritual abuse could be found in comparative law.⁵⁴ The Commission noted in the issue paper that the emphasis seems to be on providing protection through additional or reframed crimes and providing a victim of domestic violence with adequate access to and protection of the law by criminal justice stakeholders.⁵⁵ The Commission, nevertheless, posed a range of questions to explore whether the existing substantive crimes adequately cover acts of domestic violence and whether the enactment of a single offence of domestic violence would not only be desirable but be viable.

5. This chapter will consider the submissions made to the issue paper and make preliminary recommendations in this regard.

⁵³ Proclamation Notice R.75 of 2022 Commencement of the Criminal and Related Matters Amendment Act, 2021 Government Gazette 4 August 2022 No.47198. See SALRC Issue Paper 42 (2021) 19 - 25.

⁵⁴ The High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change; the United Nations Committee on the Elimination of Discrimination against Women, during deliberations in Parliament on the Domestic Violence Amendment Bill and COSATU's submission to the Portfolio Committee on Justice and Correctional Services, as deliberated on during tabling and consideration of submissions on the Domestic Violence Amendment Bill 10 November 2020 Zoom virtual meeting; Parliament's "Summary and analysis of the DVAB" 10.

⁵⁵ See par 46.

B Consideration of submissions

1 Automatic engagement of a criminal response to domestic violence – should a survivor have a choice?

6. In response to the recommendation by the Convention on the Elimination of All Forms of Discrimination Against Women Committee ((CEDAW Committee) that prosecutors should institute criminal prosecutions irrespective of the willingness of the victim of domestic violence to do so, the issue paper posed the question whether a victim of domestic violence should have a choice in the matter. The issue paper, in posing this question, highlighted the need to recognise the autonomy of survivors of domestic violence and the risk of heightened violence following help-seeking from authorities. In order to place survivors of domestic violence at the forefront of the discussion and in order to frame the broader discussion, this discussion paper will commence with interrogating the response to this question.

7. Although certain respondents emphasised that acts of domestic violence should be firmly addressed and that certain acts of domestic violence should in turn be considered serious offences, they did not support the automatic activation of a criminal law response.⁵⁶ A number of respondents concluded that a survivor of domestic violence should still have the choice as to whether to engage a civil rather than a criminal law remedy or to engage both simultaneously.⁵⁷ The reasoning given was twofold. Firstly, that all victims of crime have a choice as to which remedy they wish to activate if at all, and whether remedies should be concurrent or not. Secondly, that it is imperative to recognise the agency of each person as they know their circumstances best and are therefore best placed to assess the potential benefits and risks of laying a charge or not.⁵⁸

⁵⁶ Dr Beba (X M) Papakyriakou (PhD) (Psychology); Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁵⁷ Lisa Vetton & Sanja Bornman; Women's Legal Centre; Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates; Professor Penelope Andrews, New York Law School; MOSAIC; National Commissioner, South African Police Service; Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council; Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager; Dr Beba (X M) Papakyriakou (PhD) (Psychology); Commission for Gender Equality per Dr Dennis Matotoka, Legal Services; Sonke Gender Justice; Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁵⁸ Lisa Vetton & Sanja Bornman; Women's Legal Centre; Unchain our children, Advocate

8. The Women's Legal Centre explains that much of the rationale underpinning the Domestic Violence Act is the reality that many victims of domestic violence do not want to pursue criminal charges against perpetrators. The reasons behind this position are well documented and include a reluctance to see abusers incarcerated as it means women are often left without the economic support of their partners, that a criminal record for a conviction for the act of domestic violence may negatively impact on their partners' ability to obtain employment and that many women simply "want[ing] the violence to stop" and do not want to put an end to the relationship.⁵⁹ Sonke Gender Justice supports the sentiment that a complete reliance on a criminal justice response to domestic violence does not adequately deal with the prevailing issues that enable such violence to manifest in the first place, but rather perpetuates it in varying ways.

9. The view is further held that the adoption of an automatic criminal intervention will act as a deterrent for reporting of domestic violence through statutory bodies. MOSAIC warns that a single remedy weighted towards a criminal response may also reduce help-seeking through other avenues.⁶⁰ In addition to the removal of a woman's agency, this can increase the risk of more severe forms of violence. It is accepted that a civil law remedy allows an applicant a choice in pursuing the application, whilst in criminal proceedings the choice becomes that of the prosecutor (the State).⁶¹ The view is that the approach should be survivor-led.⁶²

10. The view is also held that automatically engaging the criminal law may cause a boomerang effect of escalating violence and place the victim at risk of greater harm.⁶³ The value of this approach was also questioned in respect of whether it would aid stakeholders in their response to victims of domestic violence.⁶⁴ Although participants in the Commission's second strategic virtual dialogue noted that there is seldom an arrest for common assault and assault with the intent to inflict grievous bodily harm, and the matter is submitted to the NPA as a decision docket,⁶⁵ the question was raised whether the focus should rather be on an obligatory safety plan and social worker support. Dr Ramsoomar-Hariparsaad cautioned that the risk of increased harm exists irrespective of

⁵⁹ Amber Koekemoer, Circle Chambers Advocates; National Commissioner, South African Police Service; Commission for Gender Equality per Dr Dennis Matotoka, Legal Services. Women's Legal Centre; MOSAIC; Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager.

⁶⁰ MOSAIC; Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates

⁶¹ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁶² MOSAIC.

⁶³ MOSAIC.

⁶⁴ Strategic virtual dialogue 9 February 2022.

⁶⁵ Strategic virtual dialogue 9 February 2022.

whether a civil or criminal remedy was engaged. She explained that it is often after a protection order is issued that the risk for femicide or near femicide substantially increases.⁶⁶ The view is held that the victim should have a risk assessment tool discussed and implemented with her circumstances in mind, and that a risk identification and avoidance plan should be informed by any “red flags” that may emerge. Further that, the decision must be informed by a systematic process of having considered all factors, as opposed to simply engaging a civil or criminal law remedy.⁶⁷

11. Advocate Koekemoer emphasises that due regard must be had to the fact that these acts and crimes take place within a very intimate context, between partners who at one stage loved each other, or who still do.⁶⁸ Furthermore, that very often there are minor children born from the parties’ relationship, and very often these acts of domestic violence take place in the context of a relationship breaking down or as a result of substance abuse. The view is therefore held that to follow a prescriptive approach that simply criminalises certain acts without providing civil remedies could be devastating to the party’s family and even to the complainant.⁶⁹ It is also argued that in the context of family law matters, the granting of protection orders has been seen as providing spouses in acrimonious divorces with a “breathing space” and the risk of then criminalising the conduct, which may have been blown out of proportion, may have devastating, unintended and unforeseen consequences, which cannot simply be retracted once the criminal justice system becomes involved.⁷⁰ It is submitted that the Domestic Violence Act, through the provision of civil remedies, provides the answer to the above complications experienced by women, reflecting their lived realities.⁷¹

12. Consequently most respondents, inclusive of the Women’s Legal Centre, are not supportive of the position advocated by the Committee on the Elimination of Discrimination against Women in its 2021 report that domestic violence should be prosecuted irrespective of the wishes of the victim.⁷² Most opposition to this stance is based on the view that this would amount to overriding the autonomy and choice of adult women. Vetton and Bornman further caution against applying the UN recommendations

⁶⁶ Dr Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council.

⁶⁷ Dr Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council.

⁶⁸ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁶⁹ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁷⁰ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁷¹ Women’s Legal Centre; MOSAIC.

⁷² CEDAW Committee Report Inquiry concerning South Africa 2021.

for policy and reform without rooting the response in an evidence base within the South African context.⁷³

13. Professor Andrews suggests that in respect of a civil remedy, a survivor of domestic violence should be allowed to apply for different degrees of restraining orders.⁷⁴ She explains that the degrees of the orders can range from allowing normal contact due to the fact that the parties live together to no-contact orders.⁷⁵ It is further suggested that the victim, in setting the length of time that the restraining order is active, can allow the victim some agency in determining how and when they want to attempt to reconcile with their abuser.⁷⁶

14. Various submissions to the issue paper emphasised that in order for survivors of domestic violence to make a choice, it was necessary to highlight and underscore the existing legal obligation on relevant officials in the criminal justice system to advise complainants of their options, the nature of the remedy, and that civil and criminal remedies may be activated concurrently.⁷⁷ Advocate Koekemoer raises the importance of the role the police play in these matters.⁷⁸ The police are often the first point of call for victims of domestic violence. She submits that having to prove “undue hardship” in terms of section 4(5) of the Domestic Violence Act in order to make an after-hours application for a protection order to the Court creates a barrier in this regard. As assistance is usually sought from the police after-hours or on weekends, if they are unable to access the court for an after-hours application, the only remedy is to lay a criminal charge or not receive assistance. Bearing in mind the complexities faced by victims of domestic violence, the Women’s Legal Centre comments that both civil and criminal remedies should be made readily available and resourced by the police, prosecution and courts.⁷⁹ Although it was confirmed that a victim may already lay charges for three different offences, i.e. the initial crime, the breach of the protection order and the crime that caused the breach,⁸⁰ the

⁷³ Lisa Vetton & Sanja Bornman.

⁷⁴ Professor Penelope Andrews, New York Law School.

⁷⁵ Professor Penelope Andrews, New York Law School.

⁷⁶ Professor Penelope Andrews, New York Law School.

⁷⁷ Lisa Vetton & Sanja Bornman; Women’s Legal Centre; Commission for Gender Equality per Dr Dennis Matotoka, Legal Services.

⁷⁸ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁷⁹ MOSAIC.

⁸⁰ Strategic Dialogue (Virtual) 9 February 2022

view was held that if a matter is brought to the police, a criminal charge should be pursued only if requested to.⁸¹

15. The view was shared in a number of submissions that it is a common practice by the police to divert domestic violence cases to the courts, which means that if a protection order is not granted, there is no record of a crime being reported either.⁸² The proposed remedy is that it should be a crime if the police do not accept a complaint of domestic violence and for court officials not to assist a complainant. Furthermore, that the police should not be allowed to mediate these cases. It was further suggested that it should be a crime not to help a victim of domestic violence at a court.⁸³ The Commission for Gender Equality is, however, of the view that non-compliance by the police should be addressed practically through disciplinary action and ongoing training, monitoring and evaluation.⁸⁴

16. Advocate Koekemoer conveys that the consequence of having a criminal offence recorded, whether this is because the complainant chooses to follow this route or is unable to lodge an application for a protection order, means that counter charges may be laid by the perpetrator.⁸⁵ This in turn means that both parties may be arrested and detained until their first appearance in court. In her view, the recent changes to section 59 and 59A of the Criminal Procedure Act will mean that both parties will not be released on bail. This may act as a deterrent to seeking assistance from the police. She further raises the concern that the amendment to section 3(2) of the Domestic Violence Act will result in both the victim and perpetrator being arrested if the victim engaged in violence against the perpetrator in self-defence.⁸⁶ In her view, the absence of discretion on the part of the police can have unwanted and hazardous effects and will be open to misuse. More so, if due regard is had to the fact that medical treatment and attention, despite being prescribed for complainants, is not always made available, and remains discretionary.⁸⁷ Advocate Koekemoer submits that the true victim is subjected to further and secondary trauma by virtue of an arrest and detention. Furthermore, the arrest of both the complainant and the perpetrator can have devastating effects on the parties' family, especially if there are minor children involved. She explains that if an incident

⁸¹ Ms Gihwala, Research Officer, Gender, Health & Justice Research Unit, Division of Forensic Medicine, Department of Pathology Faculty of Health Sciences, University of Cape Town, Strategic Dialogue (Virtual) 2 February 2022.

⁸² Adv Linda Le Roux, TTC Case Manager, Port Elizabeth.

⁸³ Adv Linda Le Roux, TTC Case Manager, Port Elizabeth.

⁸⁴ Commission for Gender Equality per Dr Dennis Matotoka, Legal Services. Supported by Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁸⁵ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁸⁶ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁸⁷ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

occurs over a weekend, the minor children will be subjected to social workers and placement outside of their ordinary environments and home, until one or both their parents are released.⁸⁸

17. It is further believed that providing the court with a discretion to refer suspected domestic violence for criminal investigation during other matters, including applications for protection orders, would assist complainants as the fear of counter charges and the possibility of their own arrest would be negated in such circumstances. Further that, the choice to lay criminal charges in serious cases is taken out of the hands of the victim, and then pursued in the interests of justice by virtue of an order of court.⁸⁹

18. Some respondents, however, are of the view that a mandatory criminal approach is necessary because civil remedies allow perpetrators to get away with the abuse.⁹⁰ Legal Aid SA submits that although a protection order affords victims of domestic violence urgent and preventive relief from imminent further harm, civil remedies in the form of a protection order might not be adequate if there is an element of a criminal act as it might take too long. Legal Aid SA also cautions that a protection order that asserts rights and protections is less useful if the person against whom it is to be asserted is the breadwinner. Legal Aid SA is of the view that a civil and criminal remedy should be engaged concurrently with the criminal offence reported to the police to ensure their safety pending the outcome of the civil claim. Ilitha Labantu agrees that the primary remedy should be criminal, coupled with civil proceedings to ensure that any complainant who has suffered any financial loss because of domestic violence will be recompensed. It submits that the victim should have a choice to sue the perpetrator for loss of income due to injuries, time spent in recovery, psychological breakdown and being away from work or business or to apply for emergency monetary relief as provided for in the Domestic Violence Act. It, however, does not support the institution of only a civil remedy as this allows perpetrators with means to pay their way out of abuse.⁹¹

19. With reference to section 300 of the Criminal Procedure Act, Legal Aid SA submits that the criminal route may be more efficient in that an order at the end of the case can be made to either compensate the victim or punish the offender without delays.

⁸⁸ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates. It stands to be noted that save for the abovementioned, she welcomes the amendments to Section 60 of the Criminal Procedure Act, in respect of bail.

⁸⁹ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁹⁰ Lungile Debra Mashaba, Childline Mpumalanga; Ilitha Labantu.

⁹¹ Ilitha Labantu.

The recommendation is that a police officer should open a charge where there is evidence of commission of an offence before referring the victim to apply for a protection order. Furthermore, that only the senior public prosecutor should be allowed to decide, after carefully considering reasons including the possibility of the perpetrator committing the offence and whether the victim is forced or pressurised by someone or forced by circumstances to withdraw the charges, whether or not the alleged perpetrator should be prosecuted. While it questions the benefit of applying for compensation for repeated acts of violence, more so where the offender may not have the financial means to do so, it notes that the fear of the court imposing such remedies may be preventive of further acts of domestic violence.

20. The National Commissioner of the South African Police Service (SAPS) cautions that although a dual approach is supported, due to “the emotions involved in a domestic relationship that surpasses any rational thought or action”, neither of the remedies may provide the recourse sought. The civil remedy may not deter further violence and the nature of and backlog of cases in court may not lead to effective resolution in court.

2 Adequacy of the substantive criminal law in respect of domestic violence

21. A number of respondents to the issue paper are of the opinion that the existing criminal law (both statutory and common law offences) provides a wide enough range of offences to cover domestic violence and that the existing substantive crimes are adequate.⁹² The Women’s Legal Centre, Sonke Gender Justice and Dr Molefe, however, endorse the sentiment expressed in the Committee on the Elimination of Discrimination against Women Report that “[T]he failure to criminalise all forms of domestic violence falls short of a clear message against this offence....”.⁹³

22. Ilitha Labantu points out that “domestic violence” as currently defined in the Domestic Violence Act does not ensure that the substantive law is able to cover and address the unique characteristics of domestic violence such as the emotional, financial

⁹² Lisa Vetton & Sanja Bornman; National Commissioner, South African Police Service, Adv Linda Le Roux, TTC Case Manager, Port Elizabeth; Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager; Lungile Debra Mashaba, Childline Mpumalanga; Commission for Gender Equality per Dr Dennis Matotoka, Legal Services; Legal Aid SA; Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates; Magistrate Maya Prag, Strategic Dialogue (virtual) 2 February 2022.

⁹³ Sonke Gender Justice; MOSAIC; Dr Molefe concur.

and social effects on the victims, families and communities.⁹⁴ Although support was expressed for emotional and financial abuse to be criminalised due to the psycho-social trauma and economic impact thereof, which was likened to the trauma caused by physical abuse, it was acknowledged that acts of domestic violence like emotional abuse do not lend themselves to successful prosecutions.⁹⁵

23. The Women’s Legal Centre observes that the definition of “domestic violence” in the Domestic Violence Act includes actions which constitute crimes and wider conduct on the part of a perpetrator, which do not currently constitute a criminal offence in terms of statute or the common law, for example, economic, emotional, verbal and psychological abuse.⁹⁶ It reasons that this latter conduct does not meet the elements of a crime. Ms Bornman agrees and supports the view that not all forms of domestic violence should be criminalised and states that the criminal law may not provide an appropriate response to emotional intimidation and psychological abuse.⁹⁷ In her view, the substantive law as it currently stands is adequate. The view is further held that the definition of “domestic violence” in the Domestic Violence Act, prior to and after recent amendments provides a broad definition of acts that constitute “domestic violence”.⁹⁸ It was submitted that the definition is not confined to the criminal law and in so doing, reaches beyond acts prohibited under the criminal law with the aim of providing enhanced protection under the civil law by way of domestic violence protection orders and safety monitoring notices. This in the opinion of Mses Vetton and Bornman recognises that the complex and often subtle nature of domestic violence cannot and should not automatically be dealt with using the blunt instrument that is the criminal law.⁹⁹

24. A summary of the reasons provided by Mses Vetton and Bornman for not legislating further include that:

1. Domestic violence is receiving heightened government attention in the context of gender-based and sexual violence (which often manifest in domestic relationships). It is already the subject of substantive civil and criminal law, some of which has only recently been amended.

⁹⁴ Ilitha Labantu.

⁹⁵ Strategic Dialogue (virtual) 2 February 2022.

⁹⁶ This view is endorsed by Regional Court Judge President of Limpopo, Ms Wessels Strategic Dialogue (virtual) 2 February 2022.

⁹⁷ Strategic Dialogue (virtual) 9 February 2022.

⁹⁸ Lisa Vetton & Sanja Bornman.

⁹⁹ Lisa Vetton & Sanja Bornman.

2. The SAPS already possess extensive and specific legal duties and obligations in relation to domestic violence set out in substantive law, regulations, standing orders and national instructions.
 3. The NPA already possesses a range of legal duties and obligations in relation to the prosecution of domestic violence, including the crimes that underlie it, and the violation of protection orders under the Domestic Violence Act.
 4. The release of current national crime statistics show that the SAPS is capable of disaggregating and reporting on individual crime categories underlying domestic violence. This means that the SAPS can collect and present domestic violence data in a way that enables better understanding of the nature and extent of the reported problem, and which could inform prevention and intervention strategies.¹⁰⁰
25. Consequently, the view is held that changes to the substantive law will not address challenges being experienced in relation to procedure and implementation of the existing law by police officers and court officials. It is argued rather that the focus should be on improving everyday practices and procedures of police officers and court officials,¹⁰¹ for example, the non-facilitation of laying of charges for these crimes¹⁰² and that this should not be done through additional legislation.
26. A different perspective is that although the substantive crimes may be sufficient, that they should be categorised under an umbrella offence of “domestic violence” or by differentiating crimes committed in the ambit of an inter-personal relationship from crimes committed against non-intimate partners.¹⁰³ In other words, that the focus should not be on all conduct that constitutes “domestic violence” in the Domestic Violence Act, but on the crimes that form part of this definition. The motivation is that distinguishing between domestic violence and other forms of violence

may provide victims of violence with a sense of greater protection, empower advocates who provide support and assistance to victims of domestic violence, enable and empower police officers to police this area of the law more aggressively, and allow lawyers and judges to more efficiently and effectively deal

¹⁰⁰ Lisa Vetton & Sanja Bornman. the Commission for Gender Equality per Dr Dennis Matotoka, Legal Services concur with Point 4.

¹⁰¹ Lisa Vetton & Sanja Bornman; confirmed by both in the Strategic Dialogue (virtual) 9 February 2022.

¹⁰² Lungile Debra Mashaba, Childline Mpumalanga; Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager; Lungile Debra Mashaba, Childline Mpumalanga.

¹⁰³ Professor Penelope Andrews, New York Law School.

with the issue of domestic violence in the courts. Most importantly, it puts the imprimatur of government on the widespread problem and signals an indication of the highest authority to stem this problem.¹⁰⁴

27. Prof Andrews explains that there are four motivating reasons for making such a distinction:

- First, abused women, and particularly black abused women, experience the police as largely indifferent and unsympathetic.
- Second, most abused women seek support from relatives and friends because South Africa does not have a strong and well-resourced availability of refuges and shelters for abused women.
- Third, because of the stigma associated with domestic violence, victims of domestic violence fear ostracism from their families and there is often pressure to remain in an abusive relationship.
- Fourth, because domestic violence is so widespread and is largely viewed as incidental to intimate, especially marital relationships, there exists a sense amongst abused women that it is futile to bother to report its occurrence.¹⁰⁵

3 The necessity of a stand-alone offence of domestic violence

28. The above submissions have focussed on whether the conduct, which is criminalised in the existing definition of “domestic violence” in the Domestic Violence Act, which seeks primarily to provide a civil remedy, is adequate. Varied submissions were received in response to the question whether there is a need for a single offence of domestic violence and how this should be framed. The Parliamentary Liaison Office of the Southern Catholic Bishops’ Conference (SACBC), while not making a formal submission in respect of specific questions posed in the issue paper, notes that “[D]omestic violence compromises the dignity, safety, physical integrity and mental health of the victim. Moreover, that witnessing family violence as a child is a predictive factor of future abusive behaviour.”¹⁰⁶ It goes on to note that while the home should be a sanctuary for all within it, for many it is not. However, it recognises that “the question

¹⁰⁴ Professor Penelope Andrews, New York Law School.

¹⁰⁵ Professor Penelope Andrews, New York Law School.

¹⁰⁶ A recent study by Gender Links found that that the proportion of men who admitted to committing some form of violence against women in their lifetime was high: 78% in Gauteng; 48% in Limpopo; 41% in Kwa-Zulu Natal; and 35% in the Western Cape. Gender Links in ‘Abuse Rooted in Patriarchy’, Business Day 9th August 2019.

of whether or not perpetrators of domestic violence should receive sanctions in terms of the criminal justice system is a conundrum, which requires careful discernment”.¹⁰⁷

29. A number of respondents emphasised their support in favour of,¹⁰⁸ and against¹⁰⁹ the creation of a single offence of domestic violence. One view is that violence in the context of intimate relationships is so harmful to people, children, families and society as a whole, that the law should reflect that value by elevating domestic violence to its own criminal offence.¹¹⁰ Dr Papakyriakou reasons that having a stand-alone offence marked and considered “domestic violence” might make it clearer that this range of offences is not trivial or “private” or something to be dealt with within a relationship. In her view, there are counsellors for relationship matters but not at the expense of diminishing a crime.¹¹¹ She submits that domestic violence has a substantive impact on the victim and that consequently framing it as something worthy only of civil remedy minimises its severity.¹¹² The Women’s Legal Centre, however, reflects that the recent amendments to sections 59 and 59A of the Criminal Procedure Act 51 of 1977, which the issue paper explains as providing that “neither police nor prosecutor bail may be granted to an accused who is in custody for an offence against a person in a domestic relationship as defined in the Domestic Violence Act, nor for a breach of a protection order issued in terms of this Act”,¹¹³ recognises the role and importance of the nature of the relationship between an accused and victim. It tentatively suggests that these amendments indicate a move towards the criminalisation of domestic violence in this particular context and sets a precedent for the creation of a specific offence of domestic violence.¹¹⁴ A clear endorsement of such an offence was, however, lacking.

30. While the Social Justice Coalition supports the criminalisation of domestic violence, it cautions that this should be done in a way that does not overly burden an

¹⁰⁷ The Parliamentary Liaison Office of the Southern Catholic Bishops’ Conference (SACBC)
¹⁰⁸ Social Justice Coalition; Professor Penelope Andrews, New York Law School; Women’s Legal Centre; MOSAIC; Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council; Dr Beba (X M) Papakyriakou (PhD) (Psychology); Ilitha Labantu.

¹⁰⁹ Lisa Vetton & Sanja Bornman; Adv Linda Le Roux, TTC Case Manager, Port Elizabeth; National Commissioner, South African Police Service; Belinda Sellers, Childline Mpumalanga Social Work and Helpline Manager; Lungile Debra Mashaba, Childline Mpumalanga; Commission for Gender Equality per Dr Dennis Matotoka, Legal Services; Legal Aid SA; Sonke Gender Justice.

¹¹⁰ Professor Penelope Andrews, New York Law School; Ilitha Labantu; Sonke Gender Justice.

¹¹¹ Dr Beba (X M) Papakyriakou (PhD) (Psychology); Sonke Gender Justice.

¹¹² Dr Beba (X M) Papakyriakou (PhD) (Psychology).

¹¹³ SALRC Issue Paper 42 (2021) 23.

¹¹⁴ Sonke Gender Justice; MOSAIC; Dr Molefe concur.

already burdened system for the sake of being progressive in addressing issues that affect people in domestic relationships, especially women, children, LGBTQI+ persons and those differently abled. It submits that a balance should be struck between adequately preventing domestic violence, on the one hand, and the push towards meaningful criminal justice reform, on the other.

31. The Social Justice Coalition further submits that a key question is whether attempts to stop domestic violence should be elevated above attempts to stop violence between those who are not in an intimate relationship. It is of the view that creating a single offence of domestic violence would incorporate offences such as assault, battery, emotional distress, and others, into an umbrella domestic violence statute, thereby demonstrating a firm and strong formal commitment to explicitly stem violence in domestic relationships.

32. Furthermore, during the second strategic dialogue, the concern was raised, from a technical perspective, as to how the elements of a stand-alone crime would differ from existing crimes.¹¹⁵ The Regional Court Judge President of Limpopo, Ms Wessels, cautioned that femicide is not a specific crime. It is dealt with as murder.¹¹⁶ In her view, if additional elements are added to the crime of murder, it would make it more difficult for prosecutors and for sentencing.¹¹⁷ Her preference is to look for specific gaps and acts that need to be criminalised as opposed to criminalising all acts of domestic violence. The question being whether this evidence could be presented as evidence during sentencing.¹¹⁸ All participants in this strategic dialogue agreed that it may be difficult to have one crime to address all acts of domestic violence and that gaps and loopholes should rather be identified and addressed.¹¹⁹ In support of this suggestion, the argument is made that instead of a single offence of “domestic violence”, the same framing as in current offences could continue to be used, e.g. assault or assault with intent to cause grievous bodily harm, but that the gendered nature of the crime must be captured. In other words, assault with the intent to cause grievous bodily harm in the context of a domestic relationship or murder in the context of a domestic relationship.¹²⁰

¹¹⁵ Ms Pithey, Women’s Legal Centre, Strategic Dialogue (virtual) 9 February 2022.

¹¹⁶ Strategic Dialogue 2 February 2022.

¹¹⁷ Strategic Dialogue 2 February 2022.

¹¹⁸ Strategic Dialogue 2 February 2022.

¹¹⁹ As suggested by Regional Court Judge President of Limpopo, Ms Wessels Strategic Dialogue (virtual) 2 February 2022.

¹²⁰ Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council.

33. It is further suggested that all crimes committed within the context of domestic violence could be linked to a suffix indicating that the crime was committed in this context and as such should be dealt with more severely.¹²¹ They should be charged and prosecuted in this manner and when an application for bail is made, that release should be considered only after previous offences, arrests and protection orders for domestic violence matters are disclosed.¹²²

34. Dr Ramsoomar-Hariparsaad¹²³ agrees that the gendered nature of crimes needs to be considered not only in definitions, but in convictions and sentencing as well. Sonke Gender Justice supports this view and aligns itself with the view that it is important that domestic violence is characterised as a criminal offence so that a range of possible penalties can be developed into our law, taking into consideration that domestic violence exists on a continuum.¹²⁴

35. Mses Vetton and Bornman, in their joint submission, point out that the absence of a crime of “domestic violence” does not mean that violence within the context of a domestic relationship is not criminalised. They are of the view that alterations to the names of violent acts “can result in little more than the empty symbolism of cosmetic change – or the conflation of form with function.”¹²⁵

36. Legal Aid SA further submits that the existing crime for contravening a domestic violence or protection from harassment protection order is sufficient. It also agrees that if the criminal law is engaged to address acts such as rape or assault, it should be framed in such a way that the relational context between the offender and the victim is evident. Furthermore, that the charge should be framed in such a way that it is evident that the victim and offender shared a residence at the time of the offence, even if they no longer do.

¹²¹ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

¹²² Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

¹²³ Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council.

¹²⁴ Furthermore, that criminalising the crimes such as assassination, assault, battery, child abuse, defamation, harassment, homicide, intimidation, kidnapping, murder, invasion of privacy, stalking, torture, bigamy, cybersex, trafficking, incest, indecent exposure, obscenity, pedophilia, prostitution, rape, sex trafficking, sexual assault and sexual slavery within the domestic context will provide ‘real’ protection if these crimes are committed in the context of domestic violence; Ilitha Labantu concurs.

¹²⁵ Joint submission by Lisa Vetton & Sanja Bornman.

37. During the second strategic virtual dialogue it was suggested that adding a rider to the conviction, that the murder was committed in the context of a domestic relationship would assist with raising awareness and provide better protection. Further that, if this is reflected on the SAP 69 (form documenting previous convictions), it would not only reflect as a previous conviction for statistical purposes but would serve as an aggravating circumstance where applicable in leading similar fact evidence.¹²⁶ Regional Court Judge President, Wessels, however, expressed the view that the amendments to the Minimum Sentences Act, which provide for a murder or rape within the context of GBVF will already activate the operation of the Minimum Sentences Act. It will, however, not be a finding at sentencing but at conviction, as the SAP 69 captures murder under circumstances of Part II of Schedule 1 of the Minimum Sentencing Act and would therefore not be written on the charge sheet. Specific legislation would be needed to capture it on the SAP 69. In her view, it would be preferable for prosecutors to submit such evidence to the court.¹²⁷ In this regard, the SAPS further submits that if the motivation for a separate offence is driven by the need to secure more severe punishment upon the conviction of an offence relating to domestic violence the amendments brought about by the Criminal and Related Matters Amendment Act 12 of 2021 will address this, as minimum sentences in respect of certain specific offences if the offences are committed within a domestic relationship, have been included.

38. The Women's Legal Centre and MOSAIC suggests that in terms of framing of the offence there could be a main category of "domestic violence", with sub-categories, indicating the detail of the offence with its attendant elements, such as assault.¹²⁸ Furthermore, that "new" offences, such as economic abuse would need to be defined in accordance with specific elements, which satisfy general criminal law principles to constitute the said new offences.¹²⁹ The Social Justice Coalition, however, suggests a two-prong approach. Firstly, that the Domestic Violence Act should incorporate definitions of acts of violence that are consistent with the criminal law and secondly, that the act of strangulation should be clearly criminalised within existing substantive crimes and not be charged as assault or for any other crime.

39. Ilitha Labantu submits that in alignment with the Domestic Violence Act, a single offence should include "any form of abuse which includes physical, sexual, emotional,

¹²⁶ Strategic Dialogue (Virtual) 9 February 2022.

¹²⁷ Strategic Dialogue (Virtual) 2 February 2022.

¹²⁸ Ilitha Labantu concurs.

¹²⁹ Women's Legal Centre.

psychological or economic harassment, damage to property, stalking, entry into a person's property without their consent and any other abusive or controlling behaviour where such conduct causes harm or may cause harm to the persons health, safety or well-being". However, the Women's Legal Centre suggests that clarity should be sought on whether the aim is to include such conduct in a stand-alone offence of "domestic violence". It is argued that the rationale for a single offence of "domestic violence" should also be based on the value or risk that it may hold for victims of domestic violence.¹³⁰ In other words, whether it would provide further protection to victims of domestic violence, ensure further accountability of perpetrators, strengthen the criminal justice system response and those responsible for implementing the law, improve implementation of the law, improve or change the attitudes or response of criminal justice personnel who often do not take domestic violence seriously and whether such an offence would result in any harm to a victim of domestic violence.¹³¹

40. The National Commissioner of the SAPS, however, cautions that if domestic violence is framed as a separate offence, any sexual offence, such as rape within a domestic relationship will constitute domestic violence, and not rape as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007). This would mean that the particulars of a person convicted of domestic violence will not be included in the National Register for Sex Offenders, as a conviction for an offence of domestic violence would not constitute a sexual offence.

41. It is also argued that it is important to interrogate the discrepancy between institution of criminal charges in matters relating to domestic violence and matters proceeding to court, before a new crime is developed, as this will reflect whether there are problems with the existing crimes or some other intervening fact impacting on conviction and redress for victims of domestic violence.¹³² Ms Pithey of the Women's Legal Centre submits that in her view, the biggest barrier is the police who do not accept criminal charges or allow for a parallel process. Therefore, criminalisation of aspects of domestic violence may not make any difference if existing crimes are already not used.¹³³ While she is receptive to considering the need for an additional offence, it may not, in her view, make a practical difference.

¹³⁰ Women's Legal Centre.

¹³¹ Women's Legal Centre.

¹³² Lisa Vetton & Sanja Bornman.

¹³³ Strategic Dialogue (virtual) 9 February 2022.

42. MOSAIC in turn reasons that a stand-alone offence is necessitated as a result of the pervasive culture of poor adherence to administrative reporting requirements and implementation of legislated provisions across the criminal justice system. It reasons that the introduction of a single offence of “domestic violence” is necessary as one mechanism to address systemic failures to providing access to justice and services for victims of domestic violence.¹³⁴

43. However, the value of adding additional crimes onto an existing comprehensive legislative approach is questioned on the ground that women have remained vulnerable and prejudiced irrespective of existing legislative intervention.¹³⁵ The Commission for Gender Equality argues that amendments to the law, in addition to the recent amendments will not address the uptake, use and implementation challenges of the law.¹³⁶ Further that, a single offence may in fact create further practical complications that will exacerbate existing practical implementation challenges.¹³⁷ Mses Vetton and Bornman also submit that the primary motivation for not supporting a single offence of domestic violence is the view that such an offence would constitute a duplication of existing law.¹³⁸ They further highlight concerns in respect of such an offence:

- The nature of the actions ranges from verbal abuse to femicide, making the framing of such an offence difficult.
- The value of such an offence is questioned. Having an additional offence will not address the lack of legal knowledge and skills, or attitude of police officers who are unable or unwilling to assist victims of domestic violence to identify and lay criminal charges.¹³⁹
- The manner in which a new crime would affect the recent amendments made to the sentencing framework and law applicable to bail where a person is charged with a crime against someone with whom they are in a domestic relationship with.

44. The Commission for Gender Equality submits that the broad expansion of the definition of “domestic violence”, to include a range of additional behaviours, would make the framing of a single offence in a constitutionally compliant manner a challenge.¹⁴⁰ The

¹³⁴ MOSAIC.

¹³⁵ Belinda Sellers, Childline Mpumalanga Social Work and Helpline Manager; Lungile Debra Mashaba, Childline Mpumalanga.

¹³⁶ Commission for Gender Equality per Dr Dennis Matotoka, Legal Services.

¹³⁷ Commission for Gender Equality per Dr Dennis Matotoka, Legal Services.

¹³⁸ Lisa Vetton & Sanja Bornman.

¹³⁹ Lungile Debra Mashaba, Childline Mpumalanga concur with this sentiment.

¹⁴⁰ Domestic Violence Amendment Act No. 14 of 2021.

Commission for Gender Equality submits that time should be given for the recent changes to the Domestic Violence Act to be implemented, and that the impact thereof should be monitored and assessed before any further technical amendment to crime categories or sentences is made.

45. The Women's Legal Centre argues that a stand-alone offence of domestic violence would, however, respond to the numerous arguments and calls for more accurate data on the nature and extent of domestic violence in South Africa. The National Commissioner of the SAPS, however, submits that all reported crimes are recorded, including cases that are domestic violence related, and that crime statistics reflecting this data is released on a quarterly basis. The Commission for Gender Equality submits that the release of the recent crime statistics for the first quarter of the period 2021/22 have made it clear that the SAPS is capable of mining and reporting on a wide variety of crime, specifically as it relates to domestic violence. The creation of new offences to address acts of domestic violence for statistical purposes is therefore neither supported by the SAPS, nor the Commission for Gender Equality. The National Commissioner submits that information relating to the number of protection orders issued will be made available once section 6A of the Domestic violence Act, as inserted by the Domestic Violence Amendment Act, comes into operation.¹⁴¹ Similarly, Mses Vetton and Bornman submit that the collection of administrative data on the prevalence of domestic violence is not dependent on the creation of a single offence of domestic violence.¹⁴² The view is held that compliance with the existing legal obligation to complete Occurrence Books, the Incident Forms SAPS 508(a) (the Domestic Violence Incident Forms)¹⁴³ and the SAPS 508(b) (the Domestic Violence Act Registers),¹⁴⁴ provides all the necessary information from which to draw local, provincial and national statistics on domestic violence, including any crime underlying reports of domestic violence. However, Ms Bornman submits that although the SAPS is obliged to complete section 508(a) and 508(b)B registers and the data should be accessible it would, in her view, seem from the bi-annual Civilian Secretariat Reports to Parliament that these records are not being maintained properly.¹⁴⁵ Proper record keeping and reporting would lead to the collection of domestic violence data which can be used to inform prevention and intervention strategies.

¹⁴¹ The National Commissioner of the South African Police Service.

¹⁴² Confirmed by Ms Bornman at the Strategic Dialogue (virtual) 9 February 2022.

¹⁴³ Police responses to DVA incidents are required to be recorded SAPS forms 508(a).

¹⁴⁴ DVA incidents are required to be recorded in the Domestic Violence Register 508(b).

¹⁴⁵ Strategic Dialogue (virtual) 9 February 2022.

46. The Commission for Gender Equality is of the view that this clearly underscores the importance of the correct and timeous completion of these registers by police officers – and the need for serious disciplinary action against officers who neglect their legal duty in this regard. In its view, this information should by law be available at station level, implemented at local level, collated at provincial and national level for reporting, and further analysis and the planning of effective programmes and interventions by a range of government departments.¹⁴⁶ Dr Naidoo supports the reflection of murders related to domestic violence in the crime statistics.¹⁴⁷

47. Mses Vetton and Bornman recommend that the Department of Justice and Constitutional Development should issue guidelines on the appropriate and consistent reporting of administrative data pertaining to domestic violence.¹⁴⁸ The argument is also made that the challenge with accurate data may be ascribed to victims of domestic violence not being provided with an opportunity to institute criminal charges and, or the relevant forms and registers not being properly completed or maintained at station level.

48. It is submitted that the existing law is being ignored in practice and that adding to it by creating a new offence will not remedy the primary problem. However, although Mses Vetton and Bornman agree with and extend the statement in the issue paper that the primary challenges in policing domestic violence relate to the “uptake, use, and implementation”¹⁴⁹ of the existing law to existing crime categories,¹⁵⁰ the Women’s Legal Centre and MOSAIC submit that to counter this system of beliefs, an offence of domestic violence may serve to alter attitudes and shift services by police to support the laying of criminal charges against perpetrators of domestic violence, and force more effective policing of these violations. It further submits that the recognition in law of domestic violence as a stand-alone offence may elevate the conduct of domestic violence perpetrators to that of criminals and thereby require proper and adequate policing, rather than the current attitude all too prevalent in the police that domestic violence is a private matter that can and must be dealt with by means of the civil remedies as provided for in the Domestic Violence Act. It is submitted that in addition to the systemic strengthening potential of the introduction of the offence, it may serve as a deterrent to the perpetration of domestic violence and the refusal of service by statutory first responders.¹⁵¹ MOSAIC

¹⁴⁶ Commission for Gender Equality per Dr Dennis Matotoka, Legal Services.

¹⁴⁷ Strategic Dialogue (Virtual) 9 February 2022.

¹⁴⁸ Lisa Vetton & Sanja Bornman.

¹⁴⁹ Par 3 at pg 20 of IP 42.

¹⁵⁰ Lisa Vetton & Sanja Bornman.

¹⁵¹ MOSAIC.

argues that this is not fully achieved under a largely civil process. This would, however, mean that the offence would have to include conduct, which currently constitutes a criminal offence, as well as an extended definition to include conduct which does not currently constitute a criminal offence.¹⁵² Participants in both strategic dialogues remained largely undecided on whether the substantive law was adequate or needed expansion.

49. The SAPS cautions that criminalising conduct committed within a domestic relationship, which is not otherwise criminalised, for example, economic abuse, may result in unintended consequences. It submits that where a respondent unreasonably deprives his household of necessities, it is doubtful that the conviction and sentence (albeit a fine or imprisonment) will be in the interest of the household. It is of the firm view that the conviction of the breadwinner may actually cause more financial hardship to the household. Cause for Justice also argues that the enactment of a single offence may include mandatory arrest and prosecution for domestic violence, thereby removing some of the discretion from the police and prosecution. It is acknowledged that this may work to the disadvantage of the victim of domestic violence. Sonke Gender Justice similarly submits that enacting a single offence of domestic violence may limit the recourse to justice that victims will have. It therefore reasons that it may not be feasible to create a single criminal offence, so as not to limit access to the law.

50. Adv Koekemoer expresses her concern in respect of the potential for the further abuse of the remedies provided for in the Domestic Violence Act.¹⁵³ She states that it is already abused by unscrupulous legal practitioners to gain the upper hand in divorce proceedings. She is of the view that creating a single stand-alone offence would lend itself to further abuse of process within the realm of family law and particularly where minor children are involved.¹⁵⁴ She uses the recent amendment of section 5 of the Domestic Violence Act as an example. She foresees the (ab)use of this section by parents to activate investigations by social workers, with a view to obtain primary residency of a minor child who is in the other parents care.¹⁵⁵ In her view, this may be added to the forum shopping already engaged in by aggrieved parents. She cautions that a single offence of the broad definition of “domestic violence” contained in the Domestic Violence Act, which already lends itself to subjective interpretation and

¹⁵² Women’s Legal Centre.

¹⁵³ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

¹⁵⁴ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

¹⁵⁵ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

application as influenced by the facts and circumstances may lead to severe repercussions for the complainant and the family members of the complainant, specifically if related to the perpetrator.¹⁵⁶ A criminal prosecution will have profound effects on the family as a whole given the personal nature of the relationship. In her view, the definition of domestic violence, in its current form, is too wide to criminalise it collectively. However the fact that the definition is so wide is what makes the civil law remedy appropriate in most circumstances.¹⁵⁷ She cautions that the personal nature of the relationship, and the profound effects criminal prosecution on the family as a whole, will have, cannot be forgotten.¹⁵⁸

4 The need for additional substantive crimes including strangulation as a domestic violence offence

51. In response to the question whether additional substantive crimes, for instance strangulation/suffocation are needed, some support was expressed by respondents for the creation of a new crime category to address strangulation or suffocation.¹⁵⁹ However, there was no uniform support for enacting additional substantive crimes and varied views on the need for further legislative reform. Some of these views are ventilated below.

52. Mses Vetton and Bornman are of the view that strangulation does not feature prominently in South African research examining the cause of death in intimate femicide. They submit that the leading cause of death in these cases are stab wounds, followed by blunt force injuries and gunshot wounds, in other words assault with the intent to cause grievous bodily harm. Conversely, Dr Ramsoomar-Hariparsaad states that strangulation has emerged as a key risk factor for escalation of gender-based violence into femicide (GBVF).¹⁶⁰ Additionally, the Southern African Catholic Bishop's Conference Parliamentary Liaison Office, basing its comment on the doctoral thesis of Shahnaaz Suffla, quotes the finding that strangulation is the fourth leading cause of homicide in the City of Johannesburg and that females are most often the victims of fatal strangulation.¹⁶¹

¹⁵⁶ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

¹⁵⁷ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

¹⁵⁸ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

¹⁵⁹ Women's Legal Center; Sonke Gender Justice; Social Justice Coalition; Professor Penelope Andrews, New York Law School; Southern African Catholic Bishop's Conference Parliamentary Liaison Office; MOSAIC; Dr Beba (X M) Papakyriakou (PhD) (Psychology).

¹⁶⁰ Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council.

¹⁶¹ Referenced as https://uir.unisa.ac.za/bitstream/handle/10500/20065/thesis_suffla_s.pdf?sequence=1&is

While acknowledging that strangulation may be a rare occurrence in the context of mortality, it reflects that it presents a relatively common mechanism of intentional fatal injury and consequently constitutes a significant proportion of violent deaths. The Social Justice Coalition submits that in a webinar as recent as May 2021, research done by Domestic Shelters showed that victims of only one episode of strangulation are 750% more likely of becoming a victim of homicide at the hands of the same partner than a woman who is assaulted but not strangled.¹⁶² Furthermore, that the emerging research on strangulation from the international community must be strongly considered in order to find an appropriate way to frame the act within substantive crimes. Legal Aid SA suggests that a study of the occurrence of strangulation and the criminal response is needed.

53. Although Sonke Gender Justice does not support a single offence of domestic violence it recognises that leaving domestic violence unchecked by the criminal justice system serves to “disguise, distort and dilute the reality of men’s violence against women” in the private sphere, leaving it to thrive and continue undetected. It is of the view that not engaging the criminal law further creates an ecosystem in which patriarchy and the male narrative around the use of violence stands juxtaposed to an adequate response to domestic violence perpetrators. It supports the option of additional substantive crimes that are characteristic of domestic violence such as strangulation or suffocation which it states has been acknowledged as a risk factor in cases of femicide.¹⁶³ It suggests that the Domestic Violence Act should be amended to include both civil and criminal remedies. Similarly, the Social Justice Coalition supports the incorporation of definitions for acts of violence that are consistent with the criminal law in the Domestic Violence Act. Ilitha Labantu in turn supports the recognition of domestic violence as a crime with sub-categories of crimes addressing all criminal acts, which are prosecutable. Further that, these categories should be coupled with a range of penalties for the offenders.¹⁶⁴ MOSAIC, however, seems to support a number of such categories under an umbrella offence of domestic violence. It suggests that strangulation could be incorporated under the crime category of assault or assault with the intent to do grievous bodily harm in the context of domestic violence.¹⁶⁵ Professor Andrews in turn submits that the Domestic Violence Act should either include the crime of strangulation, or that a

Allowed=y.

¹⁶² Gael Strack “What Every Advocate Needs to Know About Strangulation” <https://www.youtube.com/watch?v=QmBdUo1SEB8>.

¹⁶³ Supported by Social Justice Coalition.

¹⁶⁴ Ilitha Labantu

¹⁶⁵ Dr Beba (X M) Papakyriakou (PhD) (Psychology) concurs.

separate crime of strangulation should be enacted with a particular focus on domestic violence.

54. It is, however, submitted by a few respondents that as an act of strangulation or suffocation is already criminalised and actionable as common assault; assault with the intent to inflict grievous bodily harm; or attempted murder depending on the circumstances, the creation of a new crime category for strangulation or suffocation is therefore not supported.¹⁶⁶ Legal Aid SA comments that strangulation would, in most cases, be a more serious charge, such as assault with the intent to inflict grievous bodily harm, attempted murder or murder. Dr Molefe submits that as a result of being unaware of the dangers, victims downplay the seriousness of strangulation as do the police due to lack of understanding.¹⁶⁷ She is of the view that any strangulation should be assault with the intention of inflicting grievous body harm and that if there is a history of choking that the perpetrator should be arrested.¹⁶⁸ Ms Vetton further advises that if the focus is on strangulation, that the focus should shift to the health sector, as it would be more meaningful to provide good training to the health sector on domestic violence. Links should also be established between the health sector and the social work system.¹⁶⁹

55. Advocate Koekemoer submits that strangulation covers a broad range of outcomes.¹⁷⁰ In her opinion, it would be difficult if not impossible to frame a substantive crime of strangulation and in the absence of physical evidence impossible to charge, frame or prosecute such a crime. She identifies the varying degrees of severity based on the source (hand or object) of the strangulation, the degree of pressure applied, the perception and experience of danger and harm and medical evidence substantiating the same as not only integral in prosecuting this conduct but in determining what the person should be charged with. Professor Andrews, however, submits that an increasing awareness around the dangers of strangulation include the recognition that strangulation may result in brain damage, injury to the spine in the region of the neck, cause other lasting health and physical problems; and often precedes murder.¹⁷¹ Professor Andrews explains that almost all the states in the USA have recognised the threat of strangulation in domestic violence by separating the crime of strangulation from assault, as a

¹⁶⁶ Vetton and Bornman; Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates; Adv Linda Le Roux, TTC Case Manager, Port Elizabeth. Lungile Debra Mashaba, Childline Mpumalanga; Legal Aid SA.

¹⁶⁷ Strategic Dialogue (virtual) 2 February 2022.

¹⁶⁸ Strategic Dialogue (virtual) 2 February 2022.

¹⁶⁹ Strategic Dialogue (virtual) 9 February 2022.

¹⁷⁰ Advocate Amber Koekemoer, Circle Chambers Advocates.

¹⁷¹ Professor Penelope Andrews, New York Law School; MOSAIC; Social Justice Coalition.

standalone crime.¹⁷² Instead of categorising all acts under one offence, American law makes a further distinction between two types of strangulation, namely manual and ligature. Manual strangulation involves the use of hands and forearms or kneeling on the neck. Ligature is used with an object (belt, rope, cloth) that is tightened by force. Both types of strangulation are, however, regarded as a felony that include imprisonment and heavy fines.¹⁷³

56. Legal Aid SA indicates that it has dealt with numerous murders of intimate partners. It states that a variety of acts are used such as severe assault or being burnt with oil, petrol or boiling water. Furthermore, that although no physical harm is caused, that emotional and mental abuse can also be debilitating. In this regard, it questions whether these actions would also then need to be identified and criminalised. It, however, does not believe that this will be necessary, instead recommending that “it remains essential that the charge sheet should contain all the elements of the offence, e.g. information as to how either the complainant or the deceased was allegedly assaulted”, and further make reference to the nature of the relationship that existed between the victim and the perpetrator and where the offence was committed.¹⁷⁴ The value of criminalising strangulation is also questioned as the conduct involved forms part of materially defined offences such as assault or murder.¹⁷⁵ This means that it is not the conduct (e.g. strangulation) that is prohibited, but rather the conduct that causes such result (the death or serious injury of the victim). It is argued that by separately criminalising strangulation, the offence will be a formally defined act, and will subsequently be excluded from the ambit of the relevant materially defined offences (namely murder and assault with the intention to cause grievous bodily harm).¹⁷⁶ A number of related questions are raised, which include whether the offence of strangulation is intended to only be applied when committed in a domestic relationship, meaning that the same conduct would form part of a materially defined offence of assault or murder if committed by a stranger; whether separate offences for other forms of

¹⁷² Professor Penelope Andrews, New York Law School; Social Justice Coalition.

¹⁷³ By way of explanation “In US law, a felony is typically defined as a crime punishable by a term of imprisonment of not less than one year or by the death penalty. Misdemeanors, in contrast, are often defined as offenses punishable only by fines or by short terms of imprisonment in local jails.” <https://www.merriam-webster.com/dictionary/felony> 20 June 2022.

¹⁷⁴ Legal Aid SA.

¹⁷⁵ Adv Linda Le Roux, TTC Case Manager, Port Elizabeth.

¹⁷⁶ Adv Linda Le Roux, TTC Case Manager, Port Elizabeth.

conduct which may cause death or serious injury would also need to be legislated for, such as when a knife, axe, panga or firearm is used.¹⁷⁷

57. It is submitted that broadly defined crimes would result in litigation on the statutory interpretation of certain words to determine whether the behaviour committed would fall into that category, and as such would be unhelpful.¹⁷⁸ To the contrary, it is argued that it would facilitate enforcement if more exact statutes, with adequate definitions and clear elements were put in place. The view is held that specific statutory language would allow police officers a greater understanding of what behaviours are worthy of arrest. Furthermore, it would allow prosecutors and judges a simplified way of obtaining a conviction because they are better equipped to line up facts with elements.¹⁷⁹

58. In this regard, the SAPS voices its own concern relating to legal certainty.¹⁸⁰ It submits that it is unclear whether the proposal of criminalising strangulation as a stand-alone offence would result in a conviction of strangulation of a victim instead of murder or injury to a victim, where a victim dies as a result of the strangulation. The view is further held that although strangulation needs to be considered under attempted murder and/or attempt to do grievous bodily harm, that the evidence of its effects beyond just the physical effects, e.g. psychological and psychiatric should be used in sentencing considerations and carry a heftier sentence.¹⁸¹

59. However, the Social Justice Coalition is of the view that not accounting for acts of domestic violence as a crime, and including these acts as assault, and other offences is part of the problem.¹⁸² When viewed against the under-reporting of domestic violence cases, primarily due to lack of confidence in the SAPS, and the referral by the police service directly to the respective magistrates' courts without registering a criminal charge, this results in domestic violence running rampant, while being ignored as an issue that is harming people.¹⁸³

¹⁷⁷ Adv Linda Le Roux, TTC Case Manager, Port Elizabeth.

¹⁷⁸ Professor Penelope Andrews, New York Law School.

¹⁷⁹ Professor Penelope Andrews, New York Law School.


¹⁸⁰ National Commissioner, South African Police Service.

¹⁸¹ Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council.

¹⁸² The Khayelitsha Commission of Inquiry Companion 178; Ilitha Labantu.

¹⁸³ Social Justice Coalition.

60. Without discounting that strangulation is a problem, Ms Vetton also states that strangulation is not the main problem.¹⁸⁴ Furthermore, where reports have been made to the police, Mses Vetton and Bornman argue that if the existing Domestic Violence Act registers are properly completed and maintained this will allow for the identification and disaggregation of existing crimes, including that of strangulation, to assess escalating patterns and trends. Dr Dennis Matotoka¹⁸⁵ concurs and illustrates this point with an excerpt from recent crime statistics as follows:



Province	Murder	Rape	Sexual Assault	Attempted murder	Assault with the intent to inflict grievous bodily harm	Common assault	Common robbery	Robbery with aggravating circumstances	Arson	Malicious damage to property	All theft not mentioned elsewhere	Burglary at residential premises
Eastern Cape	27	77	13	19	583	729	8	5	13	371	70	26
Free State	22	31	4	19	297	942	6	5	9	304	79	17
Gauteng	22	110	16	24	1348	3566	36	4	15	1035	207	33
Kwazulu/Natal	30	68	9	23	606	1213	18	4	13	354	80	25
Limpopo	13	28	3	4	210	443	6	2	9	166	28	1
Mpumalanga	10	23	2	7	233	420	5	0	6	130	16	6
North West	2	28	1	9	268	406	7	0	11	172	47	15
Northern Cape	4	9	3	2	103	161	2	0	2	55	14	3
Western Cape	34	113	30	23	957	2766	23	9	34	995	444	130
Female Total	89	453	78	92	3289	8725	93	19	76	2307	634	162
Male Total	75	34	3	38	1316	1921	18	10	36	1275	351	94
RSA	164	487	81	130	4605	10646	111	29	112	3582	985	256

Taken from recent crime statistics for the First Quarter of 2021/22 year, available online at www.saps.gov.za

61. The Commission for Gender Equality is therefore of the view that the SAPS is capable of recording and disaggregating existing offences linked to domestic violence and could take this exercise further to include existing crimes such as *crimen injuria* and the statutory offence of intimidation.

¹⁸⁴ Strategic Dialogue (virtual) 9 February 2022.

¹⁸⁵ Commission for Gender Equality per Dr Dennis Matotoka, Legal Services.

C Evaluation and preliminary recommendations

1 Automatic engagement of a criminal response to domestic violence – should a survivor have a choice?

62. Public requests for mandatory reporting, arrest and prosecution for domestic violence, particularly after a news report of a tragic outcome abound. Interrogating what effect this would have, however, reveals that while removing the agency of women to engage with the criminal justice system may work for some women, it may give rise to serious unintended outcomes for others.¹⁸⁶ One of the effects of mandatory prosecution, for example, is that survivors are deprived of the choice of whether engaging the criminal justice system is the correct route to follow and if so when it would be best to do so.¹⁸⁷ Complicated and compelling reasons informed by the context and dynamics of the particular relationship inform the choices victims of domestic violence make.¹⁸⁸ The balance has thus far in South Africa weighed in favour of recognising the agency of the victim over the outrage of society.

63. The CEDAW Committee, in analysing the current landscape of response to domestic violence in South Africa, notes that where there is no evidence in addition to the victim's statement and the complainant withdraws her statement, the law does not allow a prosecutor to proceed with an ex officio prosecution.¹⁸⁹ In this regard, it identifies the heavy reliance by prosecutors on victim's testimonies as evidence as a weakness in the criminal justice response. It, however, acknowledges that the withdrawal of a case may place the life of a victim at risk, and that a "no withdrawal policy" may do so too.¹⁹⁰ While the CEDAW Committee further acknowledges the possibility of retaliation, it is of the view that the lack of an automatic criminal justice response enables some perpetrators and third parties to escape with impunity.¹⁹¹

64. Arguably, for the sake of context, this recommendation by the CEDAW Committee should be read together with General recommendation No. 35 (2017), paragraph 32 (a). The aforementioned recommendation provides as follows:

¹⁸⁶ Coker Mandatory Policies Can Be a Threat to Women (2014).

¹⁸⁷ Goodmark Healthy Alternatives to Prosecution Can Help Victims (2014).

¹⁸⁸ Goodmark Healthy Alternatives to Prosecution Can Help Victims (2014).

¹⁸⁹ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 54; 99.

¹⁹⁰ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 54.

¹⁹¹ CEDAW Committee Report Inquiry concerning South Africa 2021 Par 99.

(a) Ensure effective access for victims to courts and tribunals and that the authorities adequately respond to all cases of gender-based violence against women, including by applying criminal law **and, as appropriate**, ex officio prosecution to bring alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties.¹⁹²

65. The injunction placed on a State party to prosecute ex officio “as appropriate” seems to provide a discretion. The recommendations contained in paragraph 32 emphasise the need for a case by case approach to determine the most appropriate remedy, including whether a criminal or an ex officio prosecution is required. Paragraph 32(b) of CEDAW General recommendation No.35, while presenting the option of alternative dispute resolution procedures to address GBV with extreme caution, presents this as an option to that of the criminal law.

66. CEDAW General recommendation No. 19 further recommends under paragraph 24I that measures to overcome family violence should include:

(i) criminal penalties where necessary and civil remedies in cases of domestic violence;¹⁹³ and

67. CEDAW general recommendation No. 35, among others, recommends that:

. . . States parties implement the following legislative measures:

(a) Ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity, are criminalized and introduce, without delay, or strengthen, legal sanctions commensurate with the gravity of the offence, as well as civil remedies;¹⁹⁴

68. In respect of the remedies under the criminal law, CEDAW General recommendation No.33 recommends that States parties

(j) Take steps to guarantee that women are not subjected to undue delays in applications for protection orders and that all cases of gender-based discrimination subject to criminal law, including cases involving violence, are heard in a timely and impartial manner.¹⁹⁵

¹⁹² Own emphasis. CEDAW General recommendation No.35: On gender-based violence against women, updating general recommendation No.19 par 2017 32.

¹⁹³ CEDAW General recommendation No. 19: Violence against women 1992.

¹⁹⁴ CEDAW General recommendation No.35: On gender-based violence against women, updating general recommendation No.19 2017 par 29.

¹⁹⁵ CEDAW General recommendation No.33 on women’s access to justice 2015 par 19.

69. Although this recommendation is housed under the heading of paragraph D Criminal law, it clearly makes provision for civil remedies. The absence of reference to choice of remedy in respect of GBV and domestic violence is noticeable, this general recommendation's reference to protection orders in matters of domestic violence may be interpreted as recognising the autonomy of women in such situations to determine which remedy, whether civil or criminal, would best suit their circumstances.

70. Nonetheless, the CEDAW Committee's concluding observations in 2021 on the fifth periodic report of South Africa, among others, decries the absence of a specific criminal offence of domestic violence and the lack of disaggregated data on the incidence of domestic violence.¹⁹⁶ It pertinently recommends that South Africa:

- (a) Implement the recommendations of the Committee in the report on its Inquiry concerning South Africa conducted under article 8 of the Optional Protocol to the Convention (CEDAW/C/ZAF/IR/1), within a clear time frame, in accordance with the Committee's general recommendation No.35 of (2017);
- (b) Adopt legislation to specifically criminalize domestic violence and femicide and ensure that both crimes are subject to public prosecution;
- (c) Expeditiously adopt the domestic violence amendment bill; the criminal and related matters bill and the Criminal Law (Sexual Offences and Related Matters) Amendment Act amendment bill;
- (d) Ensure that all cases of domestic violence and femicide are investigated and prosecuted, that perpetrators are adequately punished and can be brought to justice ex officio, and that victims have effective access to remedies, including issuance of protection orders, and full reparation;
- (e) Systematically provide statistical data on the scope and extent of domestic and other forms of gender-based violence against women, disaggregated by age, ethnicity, disability, socioeconomic status and the relationship between the victim and perpetrator.¹⁹⁷

71. Against the outline of these international imperatives, amendments to the Domestic Violence Act, the Criminal Procedure Act and the Criminal Law Amendment Act 105 of 1997 (pertinent to mandatory minimum sentences) have been effected. It would seem that the State party has substantially complied with the recommendations made by the CEDAW Committee. The Commission supports a nuanced approach based on the collective interpretation of the CEDAW General recommendations. It shares the concern expressed in a number of submissions and during the virtual expert stakeholder

¹⁹⁶ CEDAW Committee Concluding observations on the fifth periodic report of South Africa 2021 par 13.

¹⁹⁷ CEDAW Committee Concluding observations on the fifth periodic report of South Africa 2021 par 14.

dialogues that a mandatory or automatic criminal justice response to acts of domestic violence, and particularly all acts of domestic violence, as broadly defined in the Domestic Violence Act, will not only ignore the views and circumstances of victims of domestic violence, but not be to the benefit of all survivors of domestic violence or where applicable their children or related persons. In fact, evidence would show that it may act as a barrier to help-seeking by victims and place victims of domestic violence at increased risk of serious harm or death. The aim of the Domestic Violence Act as reflected in the preamble to the Act is to, among other measures, address the ineffectiveness of remedies available to victims of domestic violence, such as engaging the criminal justice system, by providing for protection orders. This civil remedy seeks to recognise the autonomy of victims of domestic violence through the acknowledgement that many victims, while seeking for the behaviour to end, neither seek to end their relationship with the abuser, nor seek to pursue criminal charges against the abuser. In *DVT v BMT*¹⁹⁸ the Supreme Court of Appeal held that the primary objective of the Domestic Violence Act is to provide victims of domestic violence with an effective, uncomplicated and swift legal remedy.¹⁹⁹ It is trite that this simplified procedure provides the court with a wide discretion, both in respect of the manner of the hearing and the form of relief.

72. The KPMG Report on diagnostic review of the state response to violence against women and children clarifies that it is important to be reminded that “Domestic violence differs from IPV, in that, although both may take place within the home, domestic violence is not limited to violence within an intimate relationship.”²⁰⁰ The reasons for not engaging the criminal response are primarily complex from a relational and societal perspective, but include the economic consequences that flow from entering the criminal justice system, such as imprisonment, loss of employment and in turn loss of economic support. Socio-economic factors seem to underpin not only the prevalence of domestic violence but redress thereof.²⁰¹ For example, the threat of a criminal conviction and imprisonment almost always means the simultaneous cessation of financial support to a family. When already facing poverty, the very difficult choice is then between food and physical safety. Other reasons include children, religion, immigration status and love.²⁰² In real terms, the deterrence of arrest and prosecution may be short-lived resulting in a rebound effect of escalated violence by the abusive partner; the woman may lose her housing and other

¹⁹⁸ *DVT v BMT* (287/2021) [2022] ZASCA 109 (15 July 2022).

¹⁹⁹ *DVT v BMT* (287/2021) [2022] ZASCA 109 (15 July 2022) par 1.

²⁰⁰ KPMG Report (2016) 17.

²⁰¹ Commission for Gender Equality Biannual SAPS Report (2022) 40.

²⁰² Goodmark Healthy Alternatives to Prosecution Can Help Victims (2014).

support placing her and her children at the mercy of the state.²⁰³ Children may be removed even where they were not physically harmed or where she attempted to protect them.²⁰⁴

73. Domestic violence may even, given the prevalence thereof in inter-personal violence, relate to the complexities of mutual alcohol and substance abuse. Recent studies conducted in the United States Justice System have revealed an alarming rate of domestic violence and co-occurring substance use disorders (70 – 90%).²⁰⁵ It is therefore significant that one of the resolutions under the six month target of Pillar Two (Prevention and Rebuilding Social Cohesion) of the Presidential Summit Two was to “[A]ddress alcohol and wider substance abuse as drivers of GBVF through fast-tracking existing and new evidence-based alcohol policy and legislation that would better regulate alcohol trade, distribution, marketing, pricing, monitoring, and meaningful community participation to create a safer social environment for women and children.”²⁰⁶ This target is further expanded on under the two year target of the same Pillar, i.e. “Develop a fully integrated, costed, and monitored system across all sectors addressing alcohol, other drug use, and GBVF on the continuum from prevention to treatment, aftercare, and maintenance, free from conflict of interest.”²⁰⁷ The solution to the intersection of GBVF and substance abuse is significantly not placed under the Presidential Summit Two resolutions listed under Pillar Three (protection, safety and justice) which deals with legislative intervention.

74. Coker suggests that equating “justice” with “punishment” reinforces a false narrative that abusive partners are unable to change and that all victims want to separate from their abusers.²⁰⁸ Johnson in agreeing that methods alternative to mandatory policies should be made available, however, adds that acts of domestic violence should still be regarded as criminal acts regardless of the relationship between the parties or whether the crimes are prosecuted.²⁰⁹ In her view, the voice of the victim should “remain at the forefront of any criminal case.”²¹⁰

²⁰³ Coker Mandatory Policies Can Be a Threat to Women (2014).

²⁰⁴ Coker Mandatory Policies Can Be a Threat to Women (2014).

²⁰⁵ Lewis ‘Neurotrauma of Domestic Violence and Substance Use Disorders’ (2022) Webinar.

²⁰⁶ End GBVF Collective Summit Resolutions (2023) 6.

²⁰⁷ End GBVF Collective Summit Resolutions (2023) 8.

²⁰⁸ Coker Mandatory Policies Can Be a Threat to Women (2014).

²⁰⁹ Johnson ‘Treat Domestic Violence Like the Crime It is’ (2014).

²¹⁰ Johnson ‘Treat Domestic Violence Like the Crime It is’ (2014).

75. While admitting that neither mandatory prosecution nor leaving the choice to the victim will end men's violence toward women, the view is held that there should be as many prosecutions as possible in cases of domestic violence.²¹¹ However, if prosecutors are not given the opportunity to consider the merits of each case the tenuous relationship between victims and prosecutors may disintegrate into secondary victimisation, especially in situations where the victim does not want to testify. The only way of obtaining this testimony would be to declare the victim a hostile witness. Asking a victim to testify may place her in greater danger than she already is.²¹²

76. The Commission shares the view of Sonke Gender Justice that a complete reliance on a criminal justice response, inclusive of mandatory prosecution in respect of domestic violence does not adequately deal with the prevailing issues that enable such violence to manifest in the first place, but rather may perpetuate it in varying ways. The automatic actioning of a criminal law approach may, given the history of the enactment of the Domestic Violence Act, be a retrogressive step.

77. To ensure that the remedies provided are truly survivor led and survivor focussed would require a broader approach than engaging the criminal justice system. It would arguably include different layers of societal intervention. Section 2A read together with Section 18B of the recently operationalised amendments to the Domestic Violence Act place an obligation on all functionaries²¹³ to conduct a risk assessment with a view to referring a victim of domestic violence for further services, which may include developing a safety plan and or engaging with the criminal justice system. This would mean that the risk assessment would be discussed and implemented at her instruction and with her circumstances in mind, and that a risk identification and avoidance plan would be informed by any immediate concerns of danger that may emerge. The Department of Justice and Constitutional Development has recently updated its online "Risk Assessment Tool for Victims of Domestic Violence", which provides an open list of risk indicators with the view to assisting victims of intimate partner violence with a tool to assess the danger they are in. While the one page document "seeks to empower these victims to make informed decisions on whether or not to exit a domestic/intimate relationship" to avert a potentially fatal outcome, it is not accompanied by a strategy to exit or contact details of shelters. While it may place victims of domestic violence in

²¹¹ Stoops 'Mandatory Prosecutions Wouldn't Change Violent Behaviour' (2014)

²¹² Johnson 'Treat Domestic Violence Like the Crime It is' (2014).

²¹³ The definition of functionary, which may be further expanded on, is currently defined in the Domestic Violence Act as a "medical practitioner, health care personnel, a social worker, an official in the employ of a public health establishment, an educator or a care giver.

danger if the exact location of shelters is divulged, it is suggested that contact numbers be included. Given the emerging research on the danger of strangulation, it is also suggested that this should be flagged as a risk indicator.²¹⁴ Further concerns around strangulation and choking will be dealt with later in this chapter.

78. While an external analytical evaluation, delinked from emotional ties, may point towards a criminal law remedy, it should be recognised that many victims of domestic violence may not comprehend the risks of remaining in a situation where inter-personal violence occurs. Artz et al document that domestic violence follows a progressive repetitive cycle, with reduced intervals between the harm and the increased danger thereof, including the increased risk of death.²¹⁵ In recognition of the escalating risk of fatal harm, the Health Professions Council of South Africa published a domestic violence protocol for emergency service providers. This protocol “includes assessing future risk to domestic violence, providing physical and psychosocial care, documentation of evidence of abuse and informing patients of their rights and the services available to them.”²¹⁶ Artz et al conclude that the use of guidelines for working with victims of domestic violence enable the proper identification, management and referral of victims of domestic violence.²¹⁷ Artz et al further submit that the proper use of proactive interventions like guidelines on domestic violence, together with an appropriately managed response may interrupt the cycle and escalation of violence, and in turn positively impact on the homicide rate.²¹⁸

79. It is sobering that although thousands of women die at the instance of their intimate partners each year, only a few make the press headlines. For those that are reported on, the public outrage is short-lived. With evidence showing that serious physical harm or murder is seldom the first step in the trajectory of domestic violence, opportunities for early intervention should be sought. It would appear that the Department of Health does not specifically record statistics on the presentation of domestic violence

²¹⁴ DoJ&CD “Risk Assessment Tool for Victims of Domestic Violence” (undated).

²¹⁵ Artz et al ‘Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa’.

²¹⁶ Artz et al ‘Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa’.

²¹⁷ Artz et al ‘Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa’.

²¹⁸ Artz et al ‘Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa’ 3.

cases in emergency care settings.²¹⁹ However, the obligation placed on functionaries, including health officials, in terms of section 2A of the Domestic Violence Amendment Act, 2021 to complete a report and submit the same to a social worker or the police where they suspect on reasonable grounds that a child, a person with a disability or an older person has been subjected to domestic violence lends itself to record keeping. Additionally while there is no obligation in health care settings to report domestic violence against adults who are not elderly or have a disability, the opportunity to interrupt the trajectory of violence presents itself through the utilisation of future risk assessment protocols and recording of cases reported. Area specific prevention initiatives could be designed to respond to the prevalence and nature of domestic violence in a particular area. The need for inter-sectoral collaboration and intervention has been actioned by practitioners. Artz et al document that a strategic framework for use in state-run health care facilities to guide screening and holistic care for victims of domestic violence has been developed as far back as 2003,²²⁰ and further developed in 2009.²²¹ The framework provides for medical and psychosocial care, and evidence collection for initiating a criminal justice response where indicated.²²² It is important to note that given that domestic violence is associated with poor mental and physical health, and may present alongside mental health conditions a risk assessment may have a wider value than incidences that lead to physical harm. Screening and risk assessment for domestic violence as part of assessments under the Mental Health Care Act, 17 of 2002 and the Choice on Termination of Pregnancy Act, 92 of 1996, among others, may provide victims of domestic violence with the necessary information to assess the risk they are exposed to and the remedies available.²²³

80. Warning signs during risk assessments include the presence of poverty, substance abuse, spatial inequality, firearm ownership and previous threat with a

²¹⁹ Artz et al 'Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa' 2.

²²⁰ Martin & Jacobs 'Screening for domestic violence' (2003). Artz et al 'Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa' 11.

²²¹ Joyner & Mash 'How to provide comprehensive, appropriate care for survivors of intimate partner violence' (2010) 87 – 100. Artz et al 'Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa' 12.

²²² Artz et al 'Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa' 11.

²²³ Artz et al 'Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa' 9-10.

weapon, trauma, protection order violations, intimate partner violence, violence-supporting norms, estrangement or recent break-up.²²⁴ Van der Heyde and Abrahams et al suggest, that murder is the final act in a process of chronic domestic violence and “seldom the first act of violence” by an intimate partner.²²⁵ For this reason, femicide is predictable and preventable in the context of inter-personal violence.

81. In 2022, the South African Medical Research Council (SAMRC) published the results of the third National Femicide Study, examining the murder of women in 2017. It further compared the results with those of the previous two studies conducted in 1999 and 2009. This study sought to understand whether any evidence exists to show that national efforts to combat GBV in South Africa are impacting on the problem of femicide.²²⁶ Although an estimated 1029 women were killed by an intimate partner in 2017, a significant finding was that intimate partner femicide has been decreasing since 1999. The results show that the recorded number of murders of intimate partners halved between 1999 and 2017.²²⁷ Abrahams et al conclude that the evidence shows that strategies aimed at reducing GBV are positively impacting on GBVF.

82. It is, however, concerning that notwithstanding the reduction in such murders, the quality of case investigation by the SAPS seems to have diminished. Over the three studies, it was found that only one third of the SAPS dockets contained information on past history of partner violence among the intimate-partner femicide cases,²²⁸ indicating a possible missed opportunity to assist the victim with an assessment of and understanding of the fatal danger she was in, and to intercept the trajectory of increasing violence, prior to the murder. Consequently, Abrahams et al recommend that case investigation be given focussed attention.²²⁹ Van der Heyde agrees with Abrahams and submits that although a number of the drivers underlying femicide are social issues and the police “cannot be everywhere at once”, the SAPS has a specific mandate.²³⁰ She identifies key warning signs for police to take note of to avoid femicide. They are previous intimate partner violence, previous threat with a weapon, protection order violation and firearm ownership.²³¹ The presence of firearms has been found to be a specific predictor

²²⁴ Van der Heyde presentation SAPS & DHET Training Webinar (2022).

²²⁵ Van der Heyde presentation SAPS & DHET Training Webinar (2022); Abrahams et al ‘Decrease in Femicide in South Africa’ (2022) Figure 4.

²²⁶ Abrahams et al ‘Decrease in Femicide in South Africa’ (2022) 1.

²²⁷ Abrahams et al ‘Decrease in Femicide in South Africa’ (2022) 2.

²²⁸ Abrahams et al ‘Decrease in Femicide in South Africa’ (2022) Figure 4.

²²⁹ Abrahams et al ‘Decrease in Femicide in South Africa’ (2022) Figure 4.

²³⁰ Van der Heyde presentation SAPS & DHET Training Webinar (2022).

²³¹ Van der Heyde presentation SAPS & DHET Training Webinar (2022).

of domestic abuse and specifically implicated in combined events of femicide and suicide.²³² This view accords with the research done by the SAMRC that while there was a decrease in the suspected rape murders over the three studies, firearm related femicide remained unchanged.²³³ This outcome is linked to the recommendation that strengthening firearm control is critical.²³⁴

83. The Commission agrees with the Commission for Gender Equality that non-compliance by the police should be addressed practically through disciplinary action and ongoing training, monitoring and evaluation.²³⁵ It is of the view that engaging an automatic criminal law response, i.e. mandatory prosecution and criminalising functionaries, in order to address non-compliance, for not informing victims of available remedies or diverting them to apply for a protection order instead of or without registering a criminal complaint, would arguably result in the most negative outcome for victims of domestic violence. The updated regulations issued in conjunction with the operationalising of the amendments to the Domestic Violence Act on 16 April 2023 are pertinent to this discussion. Regulation 3 of the Schedule of the Domestic Violence Regulations provides clear guidance on interpreting the obligation placed on members of the South African Police in section 2(c) of the Domestic Violence Act.²³⁶ The aforementioned subsection contains an obligation to explain the content of the notice on remedies available to complainants of domestic violence. It states that the explanation must not only explain the right to simultaneously apply for a protection order and a domestic violence safety monitoring notice, but that this can be done with or without lodging a criminal complaint.

84. The SAMRC has partnered with the Department of Justice and Constitutional Development to develop a Femicide Prevention Strategy which will be incorporated in the NSP on GBV&F. The five core objectives of the National Femicide Prevention Strategy are:

1. Strengthen legislation and develop femicide-specific policy and guidelines to prevent and respond to femicide

²³² Van der Heyde presentation SAPS & DHET Training Webinar (2022).

²³³ Abrahams et al 'Decrease in Femicide in South Africa' (2022) Figure 4 Figure 4.

²³⁴ Abrahams et al 'Decrease in Femicide in South Africa' (2022) Figure 4.

²³⁵ Commission for Gender Equality per Dr Dennis Matotoka, Legal Services. Supported by Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

²³⁶ Domestic Violence Regulations, 2022 issued in conjunction with the commencement of the Domestic Violence Act, 1998 by the Department of Justice and Constitutional Development, No R.3289 in Government Gazette, 14 April 2023 No.48428.

2. Provide leadership and accountability for femicide prevention through sustainable, multi-sectoral collaboration and action to prevent and respond to femicide.
3. Prioritise femicide surveillance and build knowledge of what works to prevent femicide.
4. Implement a targeted, context-specific femicide prevention programme.
5. Strengthen institutional capacity to prevent femicide.²³⁷

85. The Department of Justice and Constitutional Development has also spearheaded the development of Femicide Watch. The Femicide Watch is a national repository for GBVF-related cases, and a portal where all these cases are analysed for the purpose of ensuring that the country improves its response in this regard.²³⁸ One of the purposes of this repository is to channel resources for intervention where they are most needed.

86. Within this context, it is notable that the resolution taken by the Presidential Summit Two that “Thuthuzela Care Centre (TCC) service model must be expanded to include other survivors of GBV and costed; the NPA must lead the revision and the intersectoral coordination of the implementation of this revised model and ensure an improved resource sharing by the relevant stakeholders” has been actioned.²³⁹ The extension of services by all Thuthuzela Care Centres to victims of GBV, which includes domestic violence, is authorised by the Presidential Proclamation in which Adv Currie-Gamwo was appointed as a Special Director of Public Prosecutions of the Sexual Offences and Community Affairs Unit and in which her powers, duties and functions are listed, clearly including GBV.²⁴⁰

87. Furthermore, a number of initiatives were recognised and identified for amplification under the Summit Resolutions of Pillar three of the Presidential Summit Two, namely:

- (i) Monitoring implementation of the Domestic Violence Amendment Act by the SAPS, and other relevant stakeholders;

²³⁷ Abrahams et al ‘Decrease in Femicide in South Africa’ (2022) Figure 4.

²³⁸ PMG Follow up meeting on SADC Protocol on Gender & Development. The establishment of the Femicide Watch is captured under a resolution of Pillar 3: Justice, Safety and Protection.

²³⁹ Pillar3: Justice, Safety, and Protection, End GBVF Collective Summit Resolutions (2023) 9.

²⁴⁰ Proclamation by the President of the Republic of South Africa, National Prosecuting Authority Act, 1998 Appointment of and determination of powers, duties and functions of a special director of public prosecutions Government Gazette 19 February 2021 No 44190 7.

- (ii) Ensuring the involvement of the Department of Social Development in the TCC service model and the monitoring and evaluation thereof;
- (iii) Strengthening individual provincial statistical reports relating to GBVF and according them the same level of importance as the national statistics; and
- (iv) Amplifying the role of the Civilian Secretariat for the SAPS and ensuring civil society engagement in addressing issues relating to the SAPS and the executing of their duties.²⁴¹

88. The Commission is further of the view that prior to and following amendment, the Domestic Violence Act is framed to recognise the autonomy of those seeking a remedy outside of the criminal justice system. The Commission is of the view that the format of the protection order already allows for customised orders in respect of contact. However, the duration of a domestic violence protection order is not time-bound. The possibility of varying or setting aside a protection order is provided for in section 10 of the Domestic Violence Act. Either party may apply for a variation or setting aside of the order, which if granted would de-activate the suspended warrant of arrest that accompanies the protection order. The Domestic Violence Amendment Act has further amended section 10 to provide that the court must be satisfied that the application is done freely and voluntarily, that circumstances have changed materially since granting the order; good cause has been shown for the variation or setting aside and that proper service has been effected on the respondent. In this regard, the Act provides an intricate balance between ensuring protection and providing for reconciliation.

89. The Commission further believes that the recent substitution of the term “undue hardship” in section 4(5) of the Domestic Violence Act with the term “harm” by the Domestic Violence Amendment Act will bring about a clearer understanding of and access to after-hours services. Together with the clear instructions provided for in the amended regulations to the Domestic Violence Act, after-hours procedures should be more accessible.

90. A further consideration is that the benefit of acquiring an order for the payment of damages in terms of section 300 of the Criminal Procedure Act following the conviction of the abuser may have deleterious consequences for not only the abuser but the victim as well. This will particularly be the case where the abuser loses his employment and will have no particular benefit where he is not a person of means. Where the person does

²⁴¹ Pillar3: Justice, Safety, and Protection, End GBVF Collective Summit Resolutions (2023) 13.

have the means it will, however, ensure that he is not able to pay his way out of the damage that he has caused to the victim.

91. The Commission is of the view that the concern that the changes to section 59 and 59A of the Criminal Procedure Act, which removes the option of police or prosecutor bail may deter help-seeking, and in the event of self-defence, result in both the victim and the abuser being arrested and denied bail may be allayed by an interpretive reading of section 3(2) of the Domestic Violence Act as amended. A mandatory arrest in terms of section 3(2) of the Domestic Violence Act is in respect of an offence containing an element of violence against “a complainant” and based on the belief of the peace officer on reasonable grounds – which indicates that a determination needs to be made as to who the respondent and complainant is. In this context, reciprocal allegations and arrest of both parties are not provided for.

92. The recommendation by the Committee on the Elimination of Discrimination against Women in its 2021 report, that ex officio prosecution should be introduced where a complainant withdraws a charge of an offence related to domestic violence,²⁴² should be read with the recommendations contained in the 2010 United Nations Handbook for Legislation on Violence against Women.²⁴³ The Handbook, among others, recommends that legislation should “make protection orders available to complainants (survivors) without any requirement that the complainant (survivor) institute other legal proceedings, such as criminal or divorce proceedings, against the defendant (offender)”.²⁴⁴ On this point, the commentary to the Handbook states that “[T]he issuance of protection orders in some countries is dependent upon the complainant/ survivor taking further legal action, such as bringing criminal charges and/or filing for divorce. This requirement may deter survivors from seeking protection orders and could result in complainants/survivors being penalized if they fail to comply with this requirement.”²⁴⁵

93. It is also notable that the amendments to the Domestic Violence Act recognise that for the purpose of ensuring the safety of a victim of domestic violence, a combined civil and criminal process may be suitable. A domestic violence safety monitoring notice is provided for in section 4A of the Domestic Violence Act, and section 60(12)(b) of the Criminal Procedure Act, as amended and provides that if a court is satisfied that a person

²⁴² See paragraph 118 (a).

²⁴³ CEDAW Committee Report Inquiry concerning South Africa 2021.

²⁴⁴ 2010 United Nations Handbook for Legislation on Violence Against Women 45.

²⁴⁵ 2010 United Nations Handbook for Legislation on Violence Against Women 45.

who is in custody for an alleged act of domestic violence may be released on bail, it must, after holding an enquiry, issue a final protection order in terms of the Domestic Violence Act. The Commission is of the view that these recent amendments to both the Domestic Violence Act and the Criminal Procedure Act are aimed at ensuring the safety of a victim of domestic violence irrespective of whether she chooses to engage a civil or criminal remedy to address the domestic violence she was subjected to.

94. Although the reality is, that due to the relational dynamic involved, the law (civil or criminal) may be an inadequate deterrence to future violence where a protection order is issued or where resolution in court is delayed due to the court backlog or delays, the Commission shares the view of the National Commissioner of the SAPS that a dual approach (civil and criminal) should be available to victims of domestic violence. The Commission further shares the views of most respondents that in context, the recommendation of the CEDAW Committee provides for a discretion and superseding the autonomy of the survivor of domestic violence should not be supported.

Preliminary recommendation

1. The Commission's preliminary recommendation is that the autonomy of adult victims to engage a civil or criminal (where such acts constitute criminal offences) response or both a civil and criminal response to acts of domestic violence should continue to be recognised.

2 Adequacy of the substantive criminal law in respect of domestic violence

95. The definition of "domestic violence" in the Domestic Violence Act has been extensively amended to provide for a broad range of behaviour. The defined behaviour reaches beyond acts criminalised in the law, both nationally and internationally. The Commission shares the view that the extended definition, which is aimed at enhancing protection under the civil law by way of protection orders and safety monitoring notices, provides for recourse without engaging the criminal law. The latter being a particularly inappropriate response to the complexities and subtleties of certain domestic violence behaviour. Consequently, the view that changes to the substantive law will not address challenges being experienced in relation to procedure and implementation of the existing law by police officers and court officials is found to have merit.

96. The prevailing concern around the adequacy of the criminal response relates predominantly to the incorrect, or lack of implementation of the existing law in response to domestic violence incidents. A further concern relates to non-timeous help seeking behaviour caused by a lack of awareness among victims of domestic violence regarding the ultimate possible risk of being killed.²⁴⁶ The Commission shares the view expressed in a number of submissions that neither of these concerns would be addressed by enacting additional substantive crimes through the criminalisation of a standalone offence of domestic violence, which contains certain behaviour which currently does not meet the definitional criteria or elements of a criminal offence. The view that the focus should be on improving everyday practices and procedures of police officers and court officials,²⁴⁷ for example, the non-facilitation of laying of charges for existing crimes²⁴⁸ and that this should not be done through additional legislation is supported.

97. During a webinar conducted jointly in 2022 by the SAPS and the Department of Higher Education and Training on “Addressing Gender-Based Violence and Femicide in South Africa”, Major General Gossman and Brigadier Mncadi explained that a number of measures are in place to enable all victims’ access to services at police stations.²⁴⁹ With regards to specifics, the SAPS has a total of 1156 police stations, which all have established GBV desks, of which 1017 police stations have victim friendly rooms, which meet the minimum required standard, and of which 139 police stations are utilising alternative rooms.²⁵⁰ Following the establishing of GBV desks in all stations by 31 March 2022, a review process was underway to assess the functioning and structure of the desks. An audit was planned for the end of August 2022 followed by capacity building and compliance inspections thereafter.²⁵¹

98. With regard to monitoring and evaluation, the SAPS has appointed a committee to define GBVF in order to link specific crimes to the definition to enable SAPS to report statistical data in respect of GBVF related enquiries.²⁵² Ongoing monitoring is done through site visits at selected police stations in response to the prevalence of GBVF and

²⁴⁶ Strategic Dialogue (virtual) 2 February 2022.

²⁴⁷ Lisa Vetton & Sanja Bornman; confirmed by both in the Strategic Dialogue (virtual) 9 February 2022.

²⁴⁸ Lungile Debra Mashaba, Childline Mpumalanga; Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager; Lungile Debra Mashaba, Childline Mpumalanga.

²⁴⁹ Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

²⁵⁰ Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

²⁵¹ Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

²⁵² Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

lack of reporting. Inspections of registers are done to measure compliance with the National Instruction on Domestic Violence. Where serious cases of non-compliance have been identified, the Commander is obligated in terms of paragraph 17 of the Domestic Violence Instruction 7 of 1999 to take action steps against such member. Minor incidents are rectified immediately and members are encouraged during station lectures and on and off duty parades, to ensure compliance.²⁵³

99. The Commission is of the view that the reasons provided by Mses Vetton and Bornman that the existing substantive law is adequate has merit. In summary, following the recent amendments to the law, it is evident that domestic and gender-based violence is receiving heightened government attention; that the SAPS already possess extensive and specific legal duties and obligations in relation to domestic violence set out in substantive law, regulations, standing orders and national instructions; that the NPA already possesses a range of legal duties and obligations in relation to the prosecution of domestic violence, including the crimes that underlie it, and the violation of protection orders under the Domestic Violence Act and that the release of the national crime statistics show that the SAPS is capable of disaggregating and reporting on individual crime categories underlying domestic violence. This means that the SAPS can collect and present domestic violence data in a way that enables better understanding of the nature and extent of the reported problem, which could inform prevention and intervention strategies.²⁵⁴ The range of existing substantive crimes therefore allow for the capturing of data on the prevalence of domestic violence. While the option of the categorisation of existing crimes in the context of domestic violence under an umbrella offence of “domestic violence” or differentiating crimes committed in the ambit of an interpersonal relationship from crimes committed against non-intimate partners initially may seem to provide an option for recording purposes, the Commission is concerned that doing so may give rise to unintended consequences. One such consequence may be that while the intention would be to highlight the seriousness of these crimes, they may in fact be viewed as lesser crimes than those committed outside of an intimate context.

Preliminary recommendation

2. The Commission is of the preliminary view that the existing substantive crimes sufficiently cater for criminal behaviour found in the definition of “domestic violence” in

²⁵³ Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

²⁵⁴ Lisa Vetton & Sanja Bornman. the Commission for Gender Equality per Dr Dennis Matotoka, Legal Services concur with Point 4.

the Domestic Violence Act. Additional legislation would not seem to be required in this regard. The Commission is undecided on whether there is a need to categorise all substantive crimes contained in the definition of domestic violence under an umbrella offence of domestic violence. However, the Commission agrees that there should be a renewed focus on improving everyday practices and procedures of police officers and court officials, for example, non-facilitation of laying of charges for existing crimes. The recent amendments and revision of existing and enactment of new instructions and guidelines and training will arguably provide the necessary impetus to give effect to the correct application of the law and clarify obligations placed on various functionaries in and along the chain of services for victims of domestic violence.

3 The necessity of a stand-alone offence of domestic violence

100. While the 2010 UN Handbook for Legislation on Violence against Women provides that the prosecution of violence against women lies with the prosecution authority and not the woman or the complainant, it does not provide for a broad offence of domestic violence as defined in the Domestic Violence Act, which extends to acts which do not amount to physical violence.²⁵⁵ The Handbook differentiates between mandatory arrest and prosecution and pro-arrest and pro-prosecution approaches in matters related to violence against women. The latter recognising the need to acknowledge the agency of women, particularly those in domestic relationships.²⁵⁶

101. Most countries have laws that criminalise the different behaviours that constitute domestic violence, as separate crimes. An all-encompassing offence (of criminal and otherwise civil matters) could not be found. It is trite that making domestic violence a stand-alone offence may serve to confirm that society does not tolerate domestic violence.²⁵⁷ It may further serve to address a failure by law enforcement officials to treat domestic violence as seriously as stranger violence under the existing law.²⁵⁸ However, as stated above, it may have the opposite effect, in that it may be too unwieldy to prosecute or domestic violence could be considered a lesser crime to crimes committed

²⁵⁵ 2010 UN Handbook for Legislation on Violence against Women 35 – 37.

²⁵⁶ 2010 UN Handbook for Legislation on Violence against Women 37 – 38.

²⁵⁷ University of Minnesota 'Stop Violence Against Women Domestic Violence – Law and Policy'1.

²⁵⁸ University of Minnesota 'Stop Violence Against Women Domestic Violence – Law and Policy'1.

by strangers.²⁵⁹ It may also have a number of other undesired consequences, “such as the termination of the relationship, the break-up of the family and the loss of the primary breadwinner.”²⁶⁰

102. The Commission is mindful too that, as pointed out by the Social Justice Coalition, a balance needs to be struck between adequately preventing domestic violence on the one hand, and the push towards meaningful criminal justice reform on the other. The recent amendments to the Domestic Violence Act, Criminal Procedure Act and the Minimum Sentencing Act have legislatively addressed a number of gaps in service delivery and protection of victims of domestic violence. The implementation of the combined approach of these laws will determine the impact of these legislative changes.

103. A pertinent consideration in the current legislative climate relates to whether the time is right for further amendment to the laws regulating domestic violence. Three laws have recently been enacted with a view to bringing about a substantial change in the process and procedure of matters dealing with GBV, arguably the key flaw in responding to domestic violence. The purpose of these laws is to bring about a clearer pathway of services to, among others, address implementation issues. Pertinently, this renewed focus on GBV includes issuing directives and instructions in the relevant departments to bring about focussed and expanded service delivery. Shifting the focus onto a criminal law response so soon after remedying flaws in the civil response may be counter-productive. As the law currently criminalises all criminal elements contained in the definition of ‘domestic violence’ the recommendation of the CEDAW Committee to criminalise all acts of domestic violence is substantially met. There is insufficient evidence that re-arranging crimes in the context of domestic violence into a single offence would be in the best interests of victims of domestic violence.

104. The Commission shares the sentiment expressed in a number of submissions and during the expert strategic dialogues that having one standalone offence of domestic violence covering such a wide range of behaviour may have the deleterious effect that fewer offenders would be convicted for serious offences relating to domestic violence. This would in turn make it more difficult to prosecute offenders for an offence against an

²⁵⁹ University of Minnesota ‘Stop Violence Against Women Domestic Violence – Law and Policy’2.

²⁶⁰ Artz et al ‘Legal duties, professional obligations or notional guidelines? Screening, treatment and referral of domestic violence cases in primary health care settings in South Africa’10.

intimate partner than for a stranger. The Commission further sees merit in first determining whether there is any criminal behaviour in the context of a domestic relationship, which is not currently adequately addressed in terms of the criminal law response. As pointed out by Mses Vetton and Bornman the absence of a crime of “domestic violence” does not mean that violence within the context of a domestic relationship is not criminalised.

105. The Commission is further not convinced that adding a rider or suffix to existing offences in order to frame the offences as offences committed in the context of domestic violence will impact sentencing any differently or whether evidence to this effect would have the same effect when presented in terms of aggravation of sentence. This view extends to replicating generally applicable crimes such as murder or rape in the Domestic Violence Act to reflect that these crimes have been committed in the context of a domestic relationship. The value of convicting an offender for assault with the intent to cause grievous bodily harm in the context of domestic violence will arguably have the same outcome where evidence to this effect is led by the prosecution and presented in aggravation of the sentence. The Commission is further of the view that inserting crimes with suffixes in the Domestic Violence Act may cause a parallel system of offences, which in turn may result in these crimes being downgraded in terms of importance if withdrawal of criminal charges continues to remain a feature of the criminal justice system. There would also seem to be no value in terms of data collection as the police statistics already provide disaggregated data in respect of GBV. The collection of administrative data on the prevalence of domestic violence is not dependent on the creation of a single offence of domestic violence. As pointed out by the Commission for Gender Equality the revision of the police National Instructions and concomitant training should emphasise the correct and timeous completion of Occurrence Books, and Domestic Violence Registers 508(a)²⁶¹ and (b),²⁶² the failure of which at police station level,²⁶³ should be coupled with serious disciplinary action against officers who neglect their legal duty in this regard.

106. The underlying rationale in South Africa in support of criminalising all aspects in the definition of “domestic violence” in a standalone offence seems to be to address systemic failures in service delivery and to remedy barriers to access to justice for victims of domestic violence. As the recently enacted amendments to the Domestic Violence Act seek to facilitate accountability of service providers while recognising the autonomy of

²⁶¹ DVA incidents are required to be recorded in the Domestic Violence Register 508(b).

²⁶² Police responses to DVA incidents are required to be recorded SAPS forms 508(a).

²⁶³ Ms Bornman supports this assumption. Strategic Dialogue (virtual) 9 February 2022.

victims of domestic violence to engage a civil, criminal or combined remedy, it would arguably be remiss of the Legislature to remove this choice by criminalising all aspects of domestic violence before the amendments have been given sufficient time to determine their efficacy. The Commission is therefore not convinced that legislating for an omnibus offence of domestic violence would provide further protection to victims of domestic violence, ensure further accountability of perpetrators, strengthen the criminal justice system response and those responsible for implementing the law, improve implementation of the law and improve or change the attitudes or response of criminal justice personnel who often do not take domestic violence seriously.

107. The Commission further believes that there is merit in the caution expressed by the National Commissioner of the SAPS that if domestic violence is framed as a separate offence, any sexual offence, such as rape within a domestic relationship will constitute domestic violence, and not rape as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007. This would mean that the particulars of a person convicted of domestic violence would, among others, not be included in the National Register for Sex Offenders, as a conviction for an offence of domestic violence would not constitute a sexual offence.

108. The Commission notes, with concern, the submission by Advocate Koekemoer highlighting the abuse of charges of domestic violence, particularly by lawyers in the realm of the family law, and the deleterious effect that lodging spurious claims has on minor children and inevitably the parties involved. The criminalisation of all acts of domestic violence in a standalone offence would arguably exacerbate this highly charged environment. The Commission believes that this matter is deserving of further attention.

Preliminary recommendation

3. The Commission endorses the submission by the Commission for Gender Equality that time should be given for the recent changes to the Domestic Violence Act to be implemented, and that the impact thereof should be monitored and assessed before any further technical amendment to crime categories is made. The Commission's preliminary view does not support the enactment of a standalone offence of 'domestic violence' or the introduction of a category of offences in the Domestic Violence Act in duplication of the existing criminal law.

4. The Commission seeks comment on whether spurious civil or criminal claims of domestic violence following advice by legal practitioners needs attention.

4 The need for additional substantive crimes including strangulation as a domestic violence offence

109. No need for additional substantive crimes other than strangulation was raised during the virtual stakeholder meetings and submissions. The following evaluation and discussion will therefore focus on the need for a substantive crime of strangulation. However, as the debilitating effects of stalking; and emotional and psychological abuse were raised in the stakeholder meetings in the context of a tentative recognition of such abuse as part of an all-encompassing crime of domestic violence, the viability of specifically criminalising this abuse will also be addressed here.

a. Strangulation

110. The issue paper flagged the manifestation of strangulation or choking in domestic violence matters as an area that may deserve closer inspection. While the issue paper dealt with this behaviour in broad brush strokes, reflecting that a charge (if at all any was made) for such behaviour ranged on a spectrum from common assault to murder; it has become apparent that there is a need to clearly differentiate between fatal strangulation and non-fatal strangulation. Whereas multiple examples exist of the courts emphasising the gravity of murders either caused by the strangulation or choking by an intimate partner of the deceased within the context of domestic violence, there is a dearth of cases dealing with non-fatal strangulation or choking as assault or assault with the intent to do grievous bodily harm as an alone-standing charge. The former matters provide examples of the care with which the court approaches these matters and the severe sentencing that follows. A number of reports of domestic violence including strangling, many with fatal outcomes, have made media headlines.²⁶⁴ In April 2022, the former boyfriend of a woman strangled and murdered in Winterton following years of acrimony was sentenced to 25 years behind bars.²⁶⁵ In June 2022, it was reported that a father who had strangled and killed his 11 year old daughter and her mother in Mamelodi in

²⁶⁴ *Rohde v S* (815/2019) [2021] ZASCA 134; 2021 (2) SACR 565 (SCA); [2021] 4 All SA 710 (SCA) (5 October 2021).

²⁶⁵ Legalbrief Today “KZN man jailed for girlfriend’s murder” 22 June 2022.

March 2022, was arrested and charged with murder, rape and robbery with aggravating circumstances.²⁶⁶

111. The issue paper noted that UN Women had issued a recommendation that legislation “should provide specific penalties for strangulation, observing that many victims of domestic violence have experienced strangulation and that it is often a precursor to death.”²⁶⁷ Although the issue paper referenced the codification of a specific crime of strangulation or choking in a number of states in the United States of America,²⁶⁸ New Zealand, the Australian states of New South Wales, Queensland and Tasmania, and the following two territories, the Australian Capital Territory and the Northern Territory, the enactment of a specific offence is in the context of a legislative system of codification of all crimes. Conversely, the issue paper reflected, at the time, that the United Kingdom and Canada, which like South Africa, operate under a bi-jural system in

²⁶⁶ Legalbrief Today “Father accused of murdering daughter and girlfriend”.

²⁶⁷ UN Women, *Felony Strangulation and Other Provisions* (2012) available at <http://www.endvawnow.org/en/articles/834-felony-strangulation-and-other-provisions.html> as referenced by Douglas & Fitzgerald “Strangulation, Domestic Violence and the Legal Response” 251. See paragraph 47 of the Issue Paper

²⁶⁸ See paragraph 56. LCNZ “Strangulation The Case for a New Offence” 34; Douglas & Fitzgerald “Strangulation, Domestic Violence and the Legal Response” 237. A recent example is to be found in Colorado. With effect from 1 July 2021 Colorado revised its statutes by inserting a provision concerning assault by strangulation. In respect of Assault in the first degree the criminal code provides that this offence is committed in the following circumstances:

18-3-202. Assault in the first degree (1) A person commits the crime of assault in the first degree if:

(g) With the intent to cause serious bodily injury, he or she applies sufficient pressure to impede or restrict the breathing or circulation of the blood of another person by applying such pressure to the neck or by blocking the nose or mouth of the other person and thereby causes serious bodily injury.

In respect of Assault in the second degree the statute regulating this offence was amended as follows:

18-3-203 Assault in the second degree. (1) A person commits the crime of assault in the second degree if:

(i) With the intent to cause bodily injury, he or she applies sufficient pressure to impede or restrict the breathing or circulation of the blood of another person by applying such pressure to the neck or by blocking the nose or mouth of the other person and thereby causes bodily injury.

In addition the Colorado Revised Statutes provide that assault in the second degree as described in section 18-3-203 is a felony. It lists this offence as a crime that presents an extraordinary risk of harm to society.

Another example is found in New York as follows:

Section 121.11 of the New York Penal Code (PEN) Chapter 40, Part 3 Title H criminalises Criminal obstruction of breathing or blood circulation as follows:

“121.11 Criminal obstruction of breathing or blood circulation

A person is guilty of criminal obstruction of breathing or blood circulation when, with intent to impede the normal breathing or circulation of the blood of another person, he or she:

a. applies pressure on the throat or neck of such person; or

b. blocks the nose or mouth of such person.

Criminal obstruction of breathing or blood circulation is a class A misdemeanour.

which the criminal law is regulated by way of statute and the common law, acknowledge that strangulation serves as a marker for increased risk of future violence, but have opted not to enact a distinct offence.

112. In an update to the codification of crimes in the United Kingdom, the Domestic Abuse Act 2021 inserted the offence of strangulation or suffocation in section 75A of Part 5 of the Serious Crimes Act 2015 (protection of children and others). It seems to be broadly applicable and not restricted to domestic abuse. The offence provides as follows:

75A Strangulation or suffocation

- (1) A person (“A”) commits an offence if –
 - (a) A intentionally strangles another person (“B”), or
 - (b) A does any other act to B that –
 - (i) affects B’s ability to breathe, and
 - (ii) constitutes battery of B.
- (2) It is a defence to an offence under this section for A to show that B consented to the strangulation or other act.
- (3) But subsection (2) does not apply if –
 - (a) B suffers serious harm as a result of the strangulation or other act, and
 - (b) A either –
 - (i) intended to cause B serious harm, or
 - (ii) was reckless as to whether B would suffer serious harm.
- (4) A is to be taken to have shown the fact mentioned in subsection (2) if –
 - (a) sufficient evidence of the fact is adduced to raise an issue with respect to it, and
 - (b) the contrary is not proved beyond reasonable doubt.
- (5) A person guilty of an offence under this section is liable –
 - (a) on summary conviction –
 - (i) to imprisonment for a term not exceeding 12 months (or 6 months, if the offence was committed before the coming into force of paragraph 24(2) of Schedule 22 to the Sentencing Act 2020), or
 - (ii) to a fine,
 or both
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or both.
- (6) In this section “serious harm” means –
 - (a) grievous bodily harm, within the meaning of section 18 of the Offences Against Persons Act 1861,
 - (b) wounding, within the meaning of that section, or
 - (c) actual bodily harm, within the meaning of section 47 of that Act.

113. Section 71 of the Domestic Abuse Act 2021 further provides that consent to serious harm for sexual gratification is not a defence. For the purpose of this offence “relevant offence” means an offence under section 18, 20 or 47 of the Offences Against

the Person Act 1861 (offences relating to bodily harm and injury); and “serious harm” means

- (a) grievous bodily harm, within the meaning of section 18 of the 1861 Act,
- (b) wounding, within the meaning of that section, or
- (c) actual bodily harm, within the meaning of section 47 of the 1861 Act.

114. In respect of both of the offences referenced above, the law has extra-territorial application in respect of any behaviour that constitutes an offence in England and Wales.²⁶⁹ In turn, section 37(2) of the New South Wales Crimes Act 1900 provides for a substantive offence of choking with intention to commit an indictable offence. In *R v Tran*,²⁷⁰ the New South Wales District Court explained that the rationale for the offence as explained during the Second Reading Speech before the House of Parliament was that at the time the law was not adequate to bring a charge of assault if the assault itself was an act of strangulation. A separate indictable offence, such as sexual assault or robbery had to have occurred with strangulation as an aggravating factor. Secondly, to establish that an assault constituted serious assault there had to be proof of particular bodily harm. In the case of strangulation, although serious, there may be minimal visible external injuries. Additionally, there may be significant fear and psychological damage without visible physical injuries.²⁷¹

115. Significantly, the New Zealand Sentencing Act 2002 legislates aggravating and mitigating factors for sentencing of crimes which a court is obliged to consider. One of

²⁶⁹ Section 72 of the Domestic Abuse Act 2021.

²⁷⁰ *R v Tran* [2020] NSWDC 723.

²⁷¹ *R v Tran* [2020] NSWDC 723 para 63; The Act as amended provides as follows:

37 Choking, suffocation and strangulation

(1A) A person is guilty of an offence if the person intentionally chokes, suffocates or strangles another person without the other person's consent.

: Maximum penalty--imprisonment for 5 years.

(1) A person is guilty of an offence if the person -

(a) intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and

(b) is reckless as to rendering the other person unconscious, insensible or incapable of resistance.

: Maximum penalty--imprisonment for 10 years.

(2) A person is guilty of an offence if the person--

(a) chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and

(b) does so with the intention of enabling himself or herself to commit, or assisting any other person to commit, another indictable offence.

: Maximum penalty--imprisonment for 25 years.

(3) In this section--

"another indictable offence" means an indictable offence other than an offence against this section.

the listed grounds for aggravation of sentence is that the offence was an offence of family violence as provided for in section 123A of the same Act; that the offender was subject to a protection order and that the victim was a protected person for purposes of the protection order.²⁷² Importantly, in the first appeal against sentencing under this offence, the New Zealand Court of Appeal published guidelines for sentencing judges in future which could arguably provide guidance in all matters where strangulation or choking are present. The Court held that a list of eight aggravating factors should be considered:

- Premeditation,
- A history of strangulation or very serious domestic violence,
- Vulnerability of the victim,
- Home invasion or breach of a protection order,
- Aggravated violence, or repeated or extended strangulation, in particular where the victim loses consciousness,
- Threatening to kill,
- Enduring harm – physical or psychological,
- Harm to “associated person”, particularly in the presence of children.²⁷³

116. The appeal judges further graded the acts of strangulation in three bands with suggested minimum sentences as follows:

The most serious level was accorded five and a half to six years;

The middle level was accorded three to four years; and

²⁷² Family violence is in turn defined in the Family Violence Act 2018 as follows:

9 Meaning of family violence

(1) In this Act, family violence, in relation to a person, means violence inflicted –

(a) against that person; and

(b) by any other person with whom that person is, of has been, in a family relationship.

(2) In this section, violence means all or any of the following:

(a) physical abuse;

(b) sexual abuse;

(c) psychological abuse.

(3) Violence against a person includes a pattern of behaviour (done, for example, to isolate from family members or friends) that is made up of a number of acts that are all or any of physical abuse, sexual abuse, and psychological abuse, and that may have 1 or both of the following features:

(a) it is coercive or controlling (because it is done against the person to coerce or control, or with the effect of coercing or controlling, the person);

(b) it causes the person, or may cause the person, cumulative harm.

(4) Violence against a person may be dowry-related violence (that is, violence that arises solely or in part from concerns about whether, how, or how much any gifts, goods, money, other property, or other benefits are –

(a) given to or for a party to a marriage or proposed marriage; and

(b) received by or for the other party to the marriage or proposed marriage).

(5) Subsection (2) is not limited by subsections (3) and (4) and must be taken to include references to, and so must be read with, sections 10 and 11.

²⁷³ Stevens “Strangulation law: eight factors that will count towards a stiffer jail sentence for domestic abusers” 18 July 2022.

The least serious was accorded two years with possible home detention.²⁷⁴

117. Recognising the seriousness of being strangled or choked generally, but specifically in domestic relationships, by the victim themselves and by law enforcement is important given the international recognition in studies conducted in New Zealand and the United States, of these events.²⁷⁵ Recent research conducted in the United States has revealed that in domestic violence and co-occurring substance use disorders, women have a 90 to 95% incidence of neurotrauma events from concussion or hypoxia but only a 1 – 2% rate of early identification.²⁷⁶ The reason for this is that neurotrauma can mimic psychiatric disorders or Post Traumatic Stress Disorder (PTSD). Although both are often present, neurotrauma events are overlooked. The fact that research shows that more than 90 percent of all injuries in domestic violence are to the head, neck or face region highlights the importance of recognising symptoms of neurotrauma.²⁷⁷

118. According to Wilson et al two areas deserve attention in respect of non-fatal strangulation, namely that strangulation is a risk factor for future fatal attacks; and that strangulation characteristically leaves few external marks or signs, even when life threatening.²⁷⁸ Aside from the obvious aftermath of pressure on the throat, i.e. not being able to breathe properly and possible redness, research shows that there is very little obvious injury to be found in victims who survive being strangled, and consequently little apparent evidence to present to the court.²⁷⁹ Post-mortem examinations in fatal strangulation cases provide valuable evidence of damage to the tissues of the neck and brain.²⁸⁰ Non-fatal cases require an understanding of the physical and neurological signs, which provide evidence which may otherwise be overlooked. Injuries may include a half-moon-shaped abrasion caused by a finger(s) of the hand that wrapped around the victim's neck; fingernail scratches or marks on the victim's chest, neck, arm or face as she claws to escape; bite-marks on the upper chest or shoulder of the accused in an attempt to release his hold; bumps or injuries to the head as she loses consciousness

²⁷⁴ Stevens "Strangulation law: eight factors that will count towards a stiffer jail sentence for domestic abusers" 18 July 2022.

²⁷⁵ LCNZ "Strangulation the Case for a New Offence" 4; Strack GB & Gwinn C On the edge of homicide strangulation as a prelude American Bar Association Criminal Justice vol 26 No 3 Fall 2011; Issue paper par 50.

²⁷⁶ Lewis 'Neurotrauma of Domestic Violence and Substance Use Disorders' (2022) Webinar.

²⁷⁷ Lewis 'Neurotrauma of Domestic Violence and Substance Use Disorders' (2022) Webinar.

²⁷⁸ Although Wilson et al report that most victims of domestic violence will survive being strangled there is an elevated risk of fatality of over six times that of a victim who has not experienced strangling. See Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2261.

²⁷⁹ McKay 'A closer look at strangulation cases' (2014).

²⁸⁰ McKay 'A closer look at strangulation cases' (2014).

and comes into contact with the floor or is thrown against a wall; and other unexplained injuries, such as a twisted ankle, where she lost consciousness and fell; swelling of the neck, lips or tongue; delayed bruising and occasionally petechiae.²⁸¹ Non-visible injuries include difficulty breathing, dizziness, nausea, headaches, being disoriented or feeling faint, coughing, loss of bladder control (need for immediate urination), defecation, vomiting, dry-heaving, blacking out or loss of consciousness and memory of the event, changes in voice or ability to swallow, experiencing pain or difficulty speaking, dry or raspy voice, difficulty in turning her head; change or loss of vision. The latter may indicate damage to the trachea (windpipe), which indicates more severe pressure than found in occlusion of the carotid artery or jugular vein.²⁸²

119. Cerebral hypoxia may also present in victims of domestic violence who have been strangled or choked. This may also present in cases of deliberate smothering, suffocation or drowning.²⁸³ According to Dr Lewis, hypoxic events in domestic violence seldom occur in “one’s” and present as repetitive traumatic injuries.²⁸⁴ He further explains that these are angry, violent, but short-lived events - a minimum pressure of only 3 – 5 seconds will lead to unresponsiveness; and in less than 10 seconds a “brown out” will occur (disruption of oxygenated blood supply).²⁸⁵ The importance of recognising this abuse is that hypoxia causes frontal lobe dysfunction, which presents as the impaired capacity to recognise own deficits and difficulties. Although the outcome may mimic bipolar mood disorder, it may have other more subtle yet significant consequences such as overall loss of reading/word memory and resulting in the victim being unable to comprehend the content of a document they sign.²⁸⁶

120. With regard to strangulation, it is not unusual that the victim feared death. This fear runs contrary to the defence often used by the accused that he was merely trying to restrain the victim as an act of self-defence.²⁸⁷ Schwartz submits that

As a power and control tactic, strangulation is tremendously effective for abusers. Victims believe that they are being killed and, as a result, feel deeply and justifiably terrified both during the incident and for a long time afterwards.²⁸⁸

²⁸¹ McKay ‘A closer look at strangulation cases’ (2014).

²⁸² McKay ‘A closer look at strangulation cases’ (2014).

²⁸³ Lewis ‘Neurotrauma of Domestic Violence and Substance Use Disorders’ (2022) Webinar.

²⁸⁴ Lewis ‘Neurotrauma of Domestic Violence and Substance Use Disorders’ (2022) Webinar.

²⁸⁵ Lewis ‘Neurotrauma of Domestic Violence and Substance Use Disorders’ (2022) Webinar.

²⁸⁶ Lewis ‘Neurotrauma of Domestic Violence and Substance Use Disorders’ (2022) Webinar.

²⁸⁷ McKay ‘A closer look at strangulation cases’ (2014).

²⁸⁸ Schwartz ‘Strangulation and Domestic Violence: Important Changes in New York Criminal and Domestic Violence Law’ (2010).

121. McKay emphasises that a clear message is sent to the victim that the perpetrator has the power, with little effort, in a short period of time and with little evidence to take the victim's life.²⁸⁹

122. Wilson et al document the presence of strangling over a number of jurisdictions as a particularly common yet dangerous form of domestic violence with multiple adverse physical and psychological outcomes.²⁹⁰ They, however, reflect that many cases may go unreported due to the victim not realising that notwithstanding a lack of visible injury, they may need medical attention.²⁹¹ Non-fatal strangulation may at the same time "go unrecognised, misidentified, or minimised by police, health professionals, and prosecutorial authorities."²⁹² The combined outcome of not addressing non-fatal strangulation may be continued exposure to behaviour, which increasingly becomes more serious and even fatal due to future instances of strangulation; or that internal injuries which are not attended to may result in deleterious outcomes such as a stroke.²⁹³

123. In a large-scale analysis of police recorded domestic violence cases in New South Wales, Australia, it was found that non-fatal strangulation occurred in 3.8% of domestic violence events.²⁹⁴ These cases were accompanied by soft tissue injuries such as bruising and red marks and included non-specific wounds. Emotional and verbal abuse, such as a threat to kill the victim or social abuse was also more commonly recorded alongside non-fatal strangulation.²⁹⁵ The risk of non-fatal strangulation rose in a residential setting as opposed to being in public; was more prevalent in association with the use of alcohol and was 10 times as likely as other acts of domestic violence to be accompanied by other physical abuse. It is significant that prior to the first report to the police, no previous occurrence of strangulation had been reported to the police.²⁹⁶ Furthermore, similar to other documented studies it was found that the majority of

²⁸⁹ McKay 'A closer look at strangulation cases' (2014).

²⁹⁰ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2260

²⁹¹ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2261.

²⁹² Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2261.

²⁹³ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2262.

²⁹⁴ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2267.

²⁹⁵ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2271, 2273.

²⁹⁶ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2273.

perpetrators were male, with the victims being female.²⁹⁷ However, in keeping with other forms of domestic violence a similar proportion of cases occurred under same sex partners.²⁹⁸

124. Given the intimate nature of these relationships it is likely that only the more serious cases would find their way to the attention of the police. Consequently, a whole cycle or escalation of abuse may underpin the first intervention by law enforcement.²⁹⁹ Wilson et al point out that although serious, non-fatal strangulation may produce no visible signs of injury and if present may only seem minor. As non-fatal strangulation is most often accompanied by other acts of domestic violence. It could therefore be assumed that a large number of victims who experience other acts of domestic violence have experience non-fatal strangulation or are at risk thereof.³⁰⁰

125. Wilson et al identify an important outcome of this study to be timely risk assessment and intervention to prevent escalation of abuse. It is therefore intuitive that to stop a fatality or further cognitive deterioration, the remedy is to prevent future episodes of strangulation or choking.³⁰¹ This requires equipping first responders with accurate knowledge around domestic violence and the use of non-fatal strangulation, including being equipped to ask the right questions.³⁰² Part of this equipping is understanding that non-fatal strangulation may present in the victim being unable to remember the details of the event, appearing intoxicated and/ or hostile due to the reduced oxygen to the brain, or presenting with evidence of incontinence.³⁰³ They further recommend that medical attention be arranged under these circumstances to correctly document non-visual trauma with a view to a better health outcome for the victim. It is also recommended that due to the heightened presence of non-fatal strangulation where other physical abuse is present that a routine assessment for non-fatal strangulation be done.³⁰⁴

²⁹⁷ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2275.

²⁹⁸ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2275.

²⁹⁹ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2275.

³⁰⁰ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2275.

³⁰¹ Lewis 'Neurotrauma of Domestic Violence and Substance Use Disorders' (2022) Webinar.

³⁰² Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2279.

³⁰³ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2279.

³⁰⁴ Wilson et al 'Nonfatal Strangulation During Domestic Violence Events in New South Wales' (2022) 2279.

126. It would seem that training is crucial to ensure successful prosecutions in matters relating to strangulation. Where it occurs in the context of domestic violence, it mostly occurs in the confines of a private space, where there are no third-party witnesses.³⁰⁵ Furthermore, the offence is underpinned and complicated by factors such as coercion, power, fear, control and recantation.³⁰⁶ First responders, through recording the signs and symptoms associated with strangulation, are therefore key to the success of such cases.³⁰⁷ It would, however, seem that training and awareness raising of the danger of acts of strangulation or choking, however brief, and the effect thereof on victims is lacking not only in general society and by victims of domestic violence, but by the police taking statements, the health sector, magistrates assessing applications for protection orders and court officials in criminal trials. Although autopsies are able to reveal the internal damage caused by strangulation; the presentation of confusion, forgetfulness or gaps in memory in survivors of acts of strangulation are seldom accredited to the lack of oxygen caused by strangulation. If the police were summoned or a charge is laid, it would be appropriate for the charge sheet to contain all the elements of the offence. Determining whether a victim has been strangled may require focussed questions and observations, for example, if the victim appears disoriented or had soiled herself.

127. The Commission notes the view that an act of strangulation, in the same manner as a wound caused by a knife, axe or firearm, already forms part of various materially defined crimes. It further agrees that recognising strangulation in respect of domestic violence only and not broadly would mean that the same conduct among strangers would form part of a materially defined crime such as assault or murder as opposed to an offence of strangulation and would therefore give rise to an anomaly. The Commission further recognises the incongruity pointed out by the National Commissioner of the police that recognising strangulation as a defined crime would, where death has ensued, give rise to the question of whether the charge and ensuing conviction would be for strangulation or murder. The Commission is of the view that the evidence based research presented by the SAMRC in respect of non-fatal strangulation points to the need to register this behaviour as attempted murder and/or attempt to do grievous bodily harm; and that the evidence of its effects beyond just the physical effects, e.g. psychological and psychiatric should be used in sentencing considerations and carry a heftier

³⁰⁵ McKay 'A closer look at strangulation cases' (2014).

³⁰⁶ McKay 'A closer look at strangulation cases' (2014).

³⁰⁷ McKay 'A closer look at strangulation cases' (2014).

sentence. The severity of this behaviour should be given the necessary attention it deserves.³⁰⁸

128. The case-law provides ample evidence that it differentiates between fatal strangulation and non-fatal strangulation. Whereas multiple examples exist of the courts emphasising the gravity of murders either caused by the strangulation or choking by an intimate partner of the deceased within the context of domestic violence, there is a lack of cases dealing with non-fatal strangulation or choking as assault or assault with the intent to do grievous bodily harm as an alone-standing charge. The former matters provide examples of the care with which the court approaches these matters and the severe sentencing that follows.

129. Although strangulation emerged as one of the key risk factors for escalation of severity of domestic violence and increased risk of fatality, neither of the Commission's expert dialogues nor the submissions expressed uniform support for an additional substantive crime of strangulation or any other substantive crime. The predominant view was that contrary to the position in New Zealand, an act of strangulation or suffocation is already criminalised and actionable as common assault; assault with the intent to inflict grievous bodily harm; or attempted murder depending on the circumstances.

b. Emotional harm

130. Emotional harm related to the behaviour of another person and particularly that of a person with whom they are in an intimate relationship may flow from, among others, verbal and physical behaviour which is offensive and degrading. The Constitution unequivocally protects the right of all persons to have their dignity respected and protected.³⁰⁹ This right has been considered and upheld by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*³¹⁰ where the court held that human dignity constitutes the "value and worth of all individuals as members of our society." Consequently applying the test of a reasonable person's understanding thereof, insulting, contemptuous or disrespectful words or conduct towards the victim in question may impair the victim's dignity.³¹¹ Redress may be had through the civil remedy provided for in the Domestic Violence Act or the Protection from Harassment Act through

³⁰⁸ Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council.

³⁰⁹ Section 10.

³¹⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999(1)SA 6 (CC) (1998 (2) SACR 556) par 28

³¹¹ Burchell Principles of Criminal Law 2016 648.

which a protection order may be granted against a range of behaviour including emotional or psychological harm. Non-compliance could action the crime of contempt of court and would not be for the causing of the emotional harm as such.

131. However, this remedy would only be available if a protection order had been sought and granted. Redress may also be sought through the civil and criminal remedy of *crimen iniuria*. Burchell explains that in addition to claiming damages through a civil action, the criminal law may be used where the insults to the dignity of the person “are so gross as to evoke public outrage and to call for public denunciation through the criminal law.”³¹² Van der Bijl argues that the common law crime of *crimen iniuria* does not explicitly incorporate inflicting emotional harm and would arguably not be applicable.³¹³ Burchell is however of the view that there is no reason why the reach of this crime cannot be expanded. In doing so, he explains that the conduct would have to meet the objective standards of the prevailing norms of society determined by the reasonable man to meet the element of unlawfulness and would have to be intentional.³¹⁴ Van der Bijl in turn questions whether the common law crime of *crimen iniuria* will rise to the task of adequately catering for the infliction of emotional harm. In advocating in favour of a crime proscribing inflicting of emotional harm, Van der Bijl recognises the need for clear proscription. She states that law reform is needed to provide for a crime of inflicting emotional harm to provide explicit recognition of the harm caused to victims and to set clear parameters for would be perpetrators as to what is or is not considered acceptable.³¹⁵

132. Van der Bijl observes that the criminalisation of the inflicting emotional harm and or psychological harm in its own right, either focusing on the effect of the harm on the victim or on the conduct that causes the harm, is gaining traction in a number of comparative jurisdictions.³¹⁶ Section 47 of the United Kingdom Offences Against the Persons Act 1861, which criminalises assault occasioning bodily harm, has been extended to include psychiatric injury but not emotions such as fear, distress or panic. However, the interpretation has been nebulous with the court finding in *R v Dhaliwa*³¹⁷

³¹² Burchell Principles of Criminal Law 2016 649.

³¹³ Van der Bijl ‘Considering the infliction of emotional harm within the context of criminal law’ (2020) 206.

³¹⁴ Burchell Principles of Criminal Law 2016 649 - 650.

³¹⁵ Van der Bijl ‘Considering the infliction of emotional harm within the context of criminal law’ (2020) 206.

³¹⁶ Van der Bijl ‘Considering the infliction of emotional harm within the context of criminal law’ (2020)192.

³¹⁷ *R v Dhaliwal* [2006] EWCA Crim 1139.

that although the deceased was subjected to prolonged psychological abuse occasioned by physical abuse, in turn leading to her suicide, that this did not amount to a recognised psychiatric injury. Her husband was therefore acquitted from the charge of causing the harm. Section 76 of the Serious Crime Act 2015, which provides for the criminalising of conduct that may have an “adverse psychological and behavioural effect on another person” may remedy this gap. Section 76 which criminalises “controlling or coercive behaviour” in a family or intimate relationship provides as follows:

- 76(1) A person (A) commits an offence if –
- (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
 - (b) at the time of the behaviour, A and B are personally connected,
 - (c) the behaviour has a serious effect on B, and
 - (d) A knows or ought to know that the behaviour will have a serious effect on B.
- (2) A and B are ‘personally connected’ if –
- (a) A is in an intimate personal relationship with B, or
 - (b) A and B live together and –
 - (i) they are members of the same family, or
 - (ii) they have previously been in an intimate personal relationship with each other.
- (3) But A does not commit an offence under this section if at the time of the behaviour in question –
- (a) A has responsibility for B, for the purposes of Part 1 of the Children and Young Persons Act 1933 (see section 17 of that Act), and
 - (b) B is under 16.

133. Van der Bijl explains that section 76(4) stipulates that behaviour which has a substantial adverse effect on B’s usual day-to-day activities by causing B to fear on at least two occasions that violence will be occasioned or will cause B serious alarm or distress, is considered as having a “serious effect” for the purposes of section 76(1)(d).³¹⁸

134. A criticism against the application of section 76 of the Serious Crimes Act 2015 is that it is “poorly drafted and inconsistently applied”.³¹⁹ It is argued that section 76 is utilised to primarily prosecute “psychological abuse”, “with some low level physical violence incorporated in some of the cases”.³²⁰ In the view of Wiener and Palmer, “coercive control” is constructed as something different from sexual offending, which

³¹⁸ Van der Bijl ‘Considering the infliction of emotional harm within the context of criminal law’ (2020) 201.

³¹⁹ Wiener & Palmer ‘Telling the wrong stories: Rough sex, coercive control and the criminal law’.

³²⁰ Wiener & Palmer ‘Telling the wrong stories: Rough sex, coercive control and the criminal law’.

means that it is not being used to prosecute rough sex, which may lead to fatal or non-fatal injuries, as coercive control.³²¹

135. In Australia, the State of Tasmania criminalises intimidation and emotional abuse in the context of domestic violence. Section 9 of the Family Violence Act 2004 provides as follows:

9. Emotional abuse or intimidation

(1) A person must not pursue a course of conduct that he knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, is or her spouse or partner.

136. Van der Bijl points out that while this section provides an example of the criminalisation of emotional abuse, the manner in which it has been done has been shown to have a number of shortcomings. This has primarily been in respect of not defining concepts such as “mental harm” and not clarifying what would be considered to be reasonable in this regard.³²²

c. *Stalking*

137. The 2006 Commission’s Report on Stalking, while recommending a civil process mirroring the Domestic Violence Act, did not recommend the creation of a crime of stalking. The legislative recommendations of this report were enacted as the Protection from Harassment Act 17 of 2011. The Commission reflected that the “defining character of stalking and harassment in policing terms is its perceived complexity.”³²³ Furthermore, that in order to define a crime of this nature with the flexibility that the common law provides, would result in a crime that was so open ended that it would not be clear what exactly was being proscribed.³²⁴ The prosecuting authority needs to prove every element of a crime and a loose-fitting broadly crafted crime is not conducive to this. In arriving at this conclusion, the Commission referred to *Carmichele v Minister of Safety and Security*³²⁵ where the Constitutional Court recognised that the common law is a “living

³²¹ Wiener & Palmer ‘Telling the wrong stories: Rough sex, coercive control and the criminal law’.

³²² Van der Bijl ‘Considering the infliction of emotional harm within the context of criminal law’ (2020) 202.

³²³ SALRC Report on Stalking 18.

³²⁴ SALRC Report on Stalking 18.

³²⁵ *Carmichele v Minister of Safety and Security* (CCT 48/00) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (16 August 2001).

and developing body of the law” and that it should be developed to “reflect the spirit, purport and objects of the Bill of Rights”; and section 39(2) of the Constitution which acknowledges the continuing value and role of the common law.³²⁶ It is instructive that the Commission, in recommending against the inclusion of a crime, submitted that the purpose of having a crime was to provide appropriate and timely redress to victims of stalking. The dual vehicle of having a civil remedy and a criminal remedy couched in the flexibility of the crime of *crimen iniuria* or any other appropriate crime such as assault would allow for a remedy that could be shaped by the prosecuting authority to the unique circumstances of each case.³²⁷ It is notable that the Commission expressly states that applying for a protection order should not be a prerequisite to obtaining redress through the criminal courts.³²⁸

Preliminary recommendation

5. The Commission is of the preliminary view that the law as it stands allows for differing levels of redress through a civil or criminal process for stalking, emotional harm and strangulation. The need for adequate recognition of the risk and severity, particularly of strangulation and emotional harm, would point towards the need for broad societal awareness raising; training for law enforcement and officials within the criminal justice system, health and social services; focussed risk identification and a swift response.

³²⁶ *Carmichele v Minister of Safety and Security*; SALRC Report on Stalking 17.

³²⁷ SALRC Report on Stalking 19.

³²⁸ SALRC Report on Stalking 19.

CHAPTER 3: REMOVING BARRIERS TO ACCESSING THE CRIMINAL JUSTICE SYSTEM

A Introduction

1. Although the view is held that providing a mechanism through the civil court to deal with domestic violence recognises that victims of domestic violence are best placed to identify the correct pathway of recourse for them; the view is also held that dealing with domestic violence outside of the mainstream criminal courts undermines the overall value of the remedy. It could also be argued that this approach does not hold the offender to account as they should be as violence in the home or between family members may be viewed as less serious than violence between persons who are unrelated.³²⁹

2. The issue paper identified a number of barriers to engaging the criminal justice system, which predominantly are ascribed to the police response³³⁰ including relegating domestic violence to the private sphere with a preference to referring victims to obtain a protection order before engaging the criminal process. While section 3 of the Domestic Violence Act requires mandatory arrest where there is physical violence,³³¹ a discretion still exists with regard to the execution of a warrant of arrest for breach of a protection order to arrest or to issue the respondent with a written notice to appear in court for the breach.³³²

3. The issue paper notes that the amendments to the Domestic Violence Act, in seeking to provide a clear pathway of services and to remove barriers in accessing services including that provided by the criminal justice system, has inserted section 2A

³²⁹ CEDAW Committee Report Inquiry concerning South Africa 2021 para 6.11.1.

³³⁰ See para 21 of the issue paper. The report by the United Nations Committee on the Elimination of Discrimination against Women contains, with a few exceptions, a number of areas in which the police “frequently” fail victims of domestic violence and the reasons therefor.

³³¹ Clause 4 of The Domestic Violence Amendment Bill [B20D-2020] as approved by the National Council of Provinces on 11 August 2021 seeks to amend section 3 of the Domestic Violence Act whereby a peace officer attending the scene of an incident of domestic violence has a discretion to arrest a perpetrator of domestic violence for an act of domestic violence which constitutes an offence in terms of the law. It further provides that a peace officer is mandated to arrest such person where the act of domestic violence contains an element of violence.

³³² Section 8 of the Act; Clark Cold comfort? A commentary on Prevention of Family Violence Act 596.

into the Domestic Violence Act. This section imposes obligations on functionaries, who are separately defined as “a medical practitioner, health service provider, social worker, official in the employ of a public health establishment, educator or a care-giver or any other person or entity designated in terms of section 2A(1)”, to among others do a risk assessment, refer the victim for further services or where they are dealing with a child, a person with a disability or an older person make a report to the police.³³³ Furthermore, the insertion of section 18B in the Domestic Violence Act has placed specific obligations on officials in the departments of Health, Social Development, Basic Education, Higher Education and Training as well as Communications and Digital Technologies to ensure that a victim of domestic violence is provided with protection, assistance, information and services as required.³³⁴ This includes risk assessment and designation of accredited shelters.³³⁵ The issue paper noted that “the inclusion of the Department of Communications and Digital Technologies is critical to bring about normative change in society through education and awareness-raising”.³³⁶

4. The issue paper pointed out that there is a disjuncture between what is expected from officials within the criminal justice system; and what they are equipped to or the criminal justice system is able to do.

B Consideration of submissions

1 Normative and societal change

5. Respondents identified a wide range of barriers to accessing the criminal justice system for victims of domestic violence. The reality that violence against women, including domestic violence, has been ingrained into society through religion, education, tradition and other factors, in spite of the illegality thereof, was identified as a barrier to accessing recourse through the criminal justice system. Therefore, notwithstanding the existence of crimes of domestic violence, the victim may not report them. The view is held that a whole-system approach is necessary to remove these barriers with the recognition that every area of society has a role to play in reducing the incidence of domestic violence and stemming attitudes and practices that enable or normalise

³³³ Section 2A of the Domestic Violence Amendment Act.

³³⁴ Section 18B of the Domestic Violence Amendment Act.

³³⁵ Section 18B of the Domestic Violence Amendment Act.

³³⁶ See para 35.

domestic violence. In this regard, it is submitted that while an attempt to change attitudes is extraordinarily challenging, it is an attainable goal.

6. The SACBC reflects on the Commission for Gender Equality's recommendation that there must be prioritisation of interventions that facilitate economic opportunities for addressing women's economic vulnerability. It recognises that

[T]his is clearly a long-term and potentially complex economic policy goal as it seeks to address the deep-rooted and structural causes of the economic vulnerability of women as a group and to find concrete ways of addressing them.³³⁷

7. The SACBC also flags the need for attitudes to change. In so doing, it highlights "the need for advocacy programmes to be targeted at changing both women's and men's attitudes towards gender relations". It reflects that "engaging men and youth in the fight to reduce levels of GBV is crucial". It suggests that fatherhood programmes such as those run by Sonke Gender Justice³³⁸ should become common and states that churches are well placed to develop and provide such programmes. In respect of child care practitioners such as Africa Tikkun (an NGO which provides education, health and social services to young people and their families),³³⁹ the SACBC references their research findings that

to solve the crisis of violence against women we need to look to boys' experience of childhood in South Africa. Behaviour disorders that lead to violence in later life are already present at the age of 10. It clarifies that this is not to say that all boys who experience abuse become violent. But if we want to heal our communities, we must turn our attention to cycles of abuse that begin at a very early age. [...] It is therefore crucial that the persistent nature of violence is recognised. If we want to improve safety of women, we must begin with the protection and safety of all children from harm as a matter of priority.³⁴⁰

8. In this regard the SACBC comments that the Ntsika yeThemba (Pillars of Hope) Project teaches young men "to redefine masculinity through mentorship in an outdoor-

³³⁷ Commission for Gender Equality ERAP Report 2021.

³³⁸ Sonke Gender Justice (Sonke) works in all of South Africa's nine provinces and in more than twenty countries across Southern, East, Central and West Africa to prevent domestic and sexual violence, reduce the spread and impact of HIV and AIDS and promote gender equality and human rights.

³³⁹ SACBC submission in which it also reflects that 'Africa Tikkum' seeks to provide education, health and social services to young people and their families in South African townships. Their main goal is to create a sustainable future for the youth of South Africa.

³⁴⁰ <https://www.dailymaverick.co.za/article/2018-09-12-the-protection-of-womens-rights-begins-with-childhood/>.

based education project". It explains that the aim is "to form male activists who stand up for the rights of women, to create an equal society, and to create an entire generation of men who are changing the narrative."³⁴¹ The SACBC further references Jaco van Schalkwyk, the founder of a mentoring programme for boys called "The Character Company",³⁴² and pertinently his observation that

probably one of the biggest failures of our time is that we have neglected to prepare our sons for their role in being the stewards of the dream for our rainbow nation. Never before in our history have men found themselves at a crossroads quite like this, never before have we failed this badly and the consequences will become our legacy.³⁴³

9. Belinda Sellers agrees with the need for a change in norms. She submits that more work can be done in terms of the development of healthy community norms and healthy non-violent environments within South African Schools.³⁴⁴ Belinda Sellers flags the need for collaboration and the need for preventative work. She submits that collaboration takes place once violence has already occurred, between NGO's, social workers, clinics/hospitals and courts and schools.³⁴⁵

10. Professor Andrews proposes that a whole-system approach to breaking down barriers includes four components i.e. Public and Private Institutions, (NGOs, government service providers and schools); Religious Institutions (churches, mosques, synagogues, and others); Private Institutions (businesses and professional bodies) and addressing cultural issues.³⁴⁶ It is suggested that under the first component "Public and Private Institutions: NGOs, Government Service Providers and Schools", government, through its network of service to victims has an accessible way to interact and influence widespread cultural attitudes that either tolerate or ignore domestic violence.³⁴⁷ This might include government funding to NGOs who work with domestic violence victims, thereby creating the possibilities of collaboration with organisations that may not only support victims of domestic violence, but also advocate for them both in the criminal

³⁴¹ SACBC submission with reference to <https://www.one.org/international/blog/gender-based-violence-ngo-cape-town-2/m>.

³⁴² The aim of 'The Character Company' is to effect change in South Africa's current culture of violence and abuse through an initiative for boys helping them to grow into good men by instilling honourable values.

³⁴³ Presentation at UWC Faculty of Community Health Sciences 'Child and Family Studies' (CFS) and 'Parenting in Africa Network' (PAN) Conference on 'Strengthening Families Through Parenting', May 2017; Southern African Catholic Bishop's Conference Parliamentary Liaison Office.

³⁴⁴ Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager.

³⁴⁵ Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager.

³⁴⁶ Professor Penelope Andrews, New York Law School.

³⁴⁷ Professor Penelope Andrews, New York Law School.

courts and in policy and law-making processes. It might also include television advertisements, print and social media campaigns, and school curricula. It is argued that by focusing on educational programs in primary and high schools, as well as universities, the government acts proactively in preventing domestic violence before it starts. Professor Andrews is of the view that this is a way to prepare young people to enter intimate relationships by giving them the warning signs of an abusive or toxic partner, as well as to provide them with the tools necessary to leave an abusive partner, or lodge a criminal complaint, where necessary.³⁴⁸ A key learning in her view would be understanding what consent means as opposed to coercion. On this point, the National Commissioner of SAPS recommends that public awareness campaigns should be comprehensive and in all official languages. Professor Andrews further suggests that education should extend to university level, especially at law schools, where criminal justice courses should have mandatory sections on domestic violence. These sections should be incorporated into all criminal justice classes, rather than being offered as a separate optional course.

11. Under the second component identified by Professor Andrews, “Religious Institutions: Churches, Mosques, Synagogues, and Others” recognition is given to the role that these institutions play in providing a sanctuary to victims of domestic violence and to the support they provide.³⁴⁹ It is submitted that staff and volunteers should be educated about domestic violence and may elect to run support and resource programs for victims of domestic violence which in turn may render the criminal justice system more accessible to victims of domestic violence, for example, by engaging with the police and other actors in the criminal justice to address the needs of individual domestic violence victims, as well as to lobby governmental support for domestic violence victims.³⁵⁰ Ms Hassan agrees that from the perspective of a social worker there needs to be engagement with community and religious leaders. Many victims are refused assistance by the police as they refuse to leave the home in spite of the violence thereby exposing their children to repetitive violence. However, they have returned home following religious counselling in patriarchal structures where the woman is required to be submissive. The question is raised whether different spaces to report would better facilitate assistance by officials in the criminal justice system.

³⁴⁸ Professor Penelope Andrews, New York Law School.

³⁴⁹ Professor Penelope Andrews, New York Law School.

³⁵⁰ Professor Penelope Andrews, New York Law School.

12. Under the third component identified by Professor Andrews, “Private Institutions: Businesses and Professional Bodies” education and empowerment within the workplace is highlighted.³⁵¹ For example, many bars and restaurants have flyers in the women’s restroom telling women that if they are in a dangerous situation, if they feel unsafe or if they are victims of trafficking, they can say a secret code to their bartender or waitron (usually asking for somebody who does not exist), and the staff will help the victim get away from the situation and contact the police for them. Professional bodies, such as nurses’ associations, lawyers’ associations, and unions, can take strong public stances against domestic violence. Additionally, they can create internal resources for their members to report domestic violence, as well as receive support after making such reports.

13. Finally, Professor Andrews submits in respect of “cultural issues” that ideas, values, customs, and norms of a particular society tolerating any aspect of domestic violence and cultural attitudes about equality in relationships and traditional gender roles ascribed to women need to be addressed.³⁵² It is argued that for example, men continue to be viewed as providers, breadwinners, and the primary source of survival, whereas women are seen as mothers, caretakers and housekeepers. This imbalance in gender roles creates situations where women are unable to leave abusive relationships because they believe they are unable to support themselves without a man.

2 The role of structural barriers

14. The Social Justice Coalition further flags the effect that structural inequality plays in the low conviction rates of GBV in informal settlements, where inadequate public lighting prevents crime prevention and collection of evidence. This in turn translates into low arrests and conviction rates. It is submitted that the extent of the systemic barriers runs so deeply that victims remain subject to secondary victimisation in all areas of the process.³⁵³ This includes their treatment at police stations, waiting for long hours at courts, being sent back to police stations to drop off their orders for service, having to accompany members to serve orders, having to return to the clerk of court with the return of service, having to return again to obtain their warrant of arrest (in interim orders), and having to attend the hearing in the presence of the abuser.³⁵⁴ Legal Aid SA submits that

³⁵¹ Professor Penelope Andrews, New York Law School.

³⁵² Professor Penelope Andrews, New York Law School.

³⁵³ Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager; Ilitha Labantu; Legal Aid SA concurs.

³⁵⁴ Sharon Ellison, Law Lecturer, Justice College; endorsed by Legal Aid SA.

“lack of capacity of the police to investigate sexual matters and the National Prosecuting Authority's (NPA) choice to prosecute only cases that are likely to result in a conviction leave a complainant feeling ignored, despondent and frustrated due to the lack of institutional support.”

15. The Social Justice Coalition is of the view that “GBV in South Africa is one of the most pressing social issues in South African society today.” It references statistics quoted by the 2019 World Economic Forum in respect of the number of women killed in South Africa between 2017 and 2018, which it states illustrate a structural and systemic failure from the government in ensuring safety and justice for women. The Social Justice Coalition is further of the view that the breakdown in relations between the police and the communities they serve has also contributed to the underreporting of many cases.³⁵⁵ In addition to the systemic issues mentioned above, it submits that there is a crisis of access to efficient and quality police services in informal settlements, where police stations and Family Violence, Child Protection and Sexual Offences Units (FCS) are situated in seemingly arbitrary locations. Illustrating the reality on the ground, the Social Justice Coalition relates that reporting offences “becomes a bread-and-butter issue as one has to choose between spending approximately R40 to travel and report an incident or to use that money for their next meal.”³⁵⁶

16. The Social Justice Coalition submits that the current incidents of GBV in South Africa affect women in informal settlements disproportionately due to a non-functional justice system that is severely under-resourced in the areas that they reside in. Moreover, women living in informal settlements are often economically marginalised, thus, their lack of economic opportunities results in them being unable to leave abusive domestic relationships due to being economically dependent on their abusers.³⁵⁷

17. The Social Justice Coalition further submits that the relationship between GBV and the subculture of violence and criminality, especially in informal settlements, is incredibly understudied. A subculture of violence and criminality refers to the investment of criminal identity by young men as a way of performing a masculine identity. This includes a glamorisation of crime and weapons, particularly in a township and informal

³⁵⁵ <https://sjc.org.za/posts/press-statement-the-social-justice-coalitions-reaction-to-recent-crime-statistics-presented-by-the-minister-of-police>.

³⁵⁶ Social Justice Coalition.

³⁵⁷ Enaifoghe, A.O., 2019. Gender Based Violence and the Global Gendered Viewpoint Approaches to Building a Peaceful South Africa. *Journal of Social and Development Sciences*, 10(2 (S)), pp.15-25; Social Justice Coalition.

settlement setting. Moreover, the crime statistics, released every quarter, illustrate that for the past five years and over, the leading cause of death in South Africa is violence caused by arguments. This means that violence is widely recognised as an appropriate way of conflict resolution.³⁵⁸

3 Designation of shelters

18. The SACBC points out that at the heart of addressing and protecting women and children from domestic violence is the economic factor. There are no long-term shelters and only a few short-term shelters take children older than 5 years of age. The spectre of separating families and placing children in state care militates against women leaving their abusers. In the SACBC's view, there is a desperate need for support services including accommodation, access to social grants and/or other forms of financial support, trauma counselling, employment opportunities, and legal advice and medical care.³⁵⁹ The provision of such services would enable women to "rebuild their lives with confidence that their human rights abuses have been addressed with the necessary respect and appropriate protection."³⁶⁰

4 Dual physical and remote electronic applications

19. The anticipated introduction of remote electronic applications through the recent amendments to the Domestic Violence Act is cautiously welcomed.³⁶¹ A concern around implementation is raised around the access to the internet and navigation of technological systems on an electronic platform.³⁶² The need for available and accessible physical magistrates courts in the vicinity of or coupled to a police station, where a complainant is able to be provided with assistance to understand the application to be made, the relief that can be sought, the process that will ensue, and the consequences of the application, is considered a necessity.³⁶³ Adv Koekemoer submits that the physical access to courts should not be substituted by the electronic platform, but should be expanded.³⁶⁴

³⁵⁸ Social Justice Coalition.

³⁵⁹ SACBC.

³⁶⁰ '*When I Call for Help*' Pastoral Statement by the US Catholic Bishops Conference, 1994 as referenced by the SACBC.

³⁶¹ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

³⁶² Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

³⁶³ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

³⁶⁴ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

5 Inadequate response and implementation

20. It is submitted that more legislation should not be created to address behaviour when implementation is the problem.³⁶⁵ The view is held that systemic problems relating to implementation of various laws to protect women and children from GBV generally and specifically with the application process of protection orders need to be addressed.³⁶⁶ The Social Justice Coalition ascribes the barrier created by inadequate response and implementation to a lack of political will. It notes that the non-commitment to reducing violence against women is illustrated by the fact that South Africa's report to the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Committee that was due in February 2015, had, not been submitted in time.³⁶⁷

21. The Social Justice Coalition adds that due to the prevailing lack of assistance by the police a number of charges are not initiated by victims due to the lack of confidence in the criminal justice system. This sentiment is endorsed by the Women's Legal Centre and MOSAIC. Mses Vetton and Bornman in turn report that there is ample anecdotal evidence that victims are routinely turned away from police stations and given false information by police officials, including but not limited to:

- SAPS cannot assist with private matters in the home: or
- SAPS cannot assist or open a criminal charge docket unless the victim has not only applied for, but obtained a DVA protection order; or
- The correct remedy is a DVA protection order, and there is no crime (an inability to recognise existing substantive crimes in a set of facts presented by a complainant).

22. Lungile Mashaba³⁶⁸ submits that this behaviour by SAPS results in secondary victimisation of victims of domestic violence. The Women's Legal Centre is of the view that encouraging women to only seek a civil remedy as provided for in the Domestic Violence Act effectively removes the involvement of the police from policing domestic violence, requiring fewer resources and application of its mandate as required in terms

³⁶⁵ Ms Pithey, Strategic Dialogue (virtual) 9 February 2022.

³⁶⁶ Sharon Ellison, Law Lecturer, Justice College; Ms Pithey, Strategic Dialogue (virtual) 9 February 2022.

³⁶⁷ Enaifoghe, Andrew, Melita Dlelana, Durokifa Anuoluwapo Aboosedo, and Nomaswazi P. Dlamini. "The Prevalence of Gender-Based Violence against Women in South Africa: A Call for Action." *African Journal of Gender, Society and Development (formerly Journal of Gender, Information and Development in Africa)* 10, no. 1 (2021): 117-146.

³⁶⁸ Lungile Debra Mashaba, Childline Mpumalanga.

of section 205(3) of the Constitution (other than breaches of protection orders and the administrative tasks of service of protection orders).

23. Ms Bornman states frankly that in her view, the SAPS as the gatekeeper to the criminal justice system is an implementation barrier.³⁶⁹ Complainants are allegedly directly referred by the police to the court even where a statutory crime such as intimidation has occurred. Ms Bornman further adds that it is disturbing that social workers are required to approach the police with evidence before they investigate. In her view, this is an implementation barrier at entry level.³⁷⁰

24. Following the bleak exposé of the current barriers that victims of domestic violence face when seeking support from the criminal justice system, the Social Justice Coalition provides a stark analysis of factors contributing to non-performance or implementation by the police. The first being that there are inadequate human resources in institutions that are meant to assist in fighting GBV. It reflects that the FCS in Khayelitsha is severely understaffed. It goes on to explain that these units are situated one per cluster in areas where there is severe levels of GBV, specifically sexual violence and violence against children. Further that, a recommendation from the Khayelitsha Commission of Inquiry held in 2014, aimed at facilitating service delivery, but not actioned, was that the unit at Site B precinct in Khayelitsha should not be shared with any other precincts other than Harare and Lingeletu West.³⁷¹

25. However, challenges were also identified in respect of the courts not issuing suspended warrants of arrest with interim protection orders. Ms Mophulane of Lawyers Against Abuse, Orange Farm notes that warrants of arrest are routinely not issued by the court for interim protection orders. This means that victims are unable to approach the police to activate the warrant when a breach occurs. Victims therefore have to approach the court again. This has financial and safety implications for the victim.³⁷² The discussion that ensued between participants attending the second strategic virtual dialogue revealed that magistrates may be choosing not to issue the warrant at that stage as there was a risk that it could be used before the order was issued on the respondent or that a final order may not be granted. It further revealed that while the

³⁶⁹ Endorsed by Ms Pithey, Ms Serote, Ms Hassan DD: Probation, VEP & Substance Abuse, Johannesburg Metro Region, Department of Social Development Strategic Dialogue (virtual) 9 February 2022.

³⁷⁰ Strategic Dialogue (virtual) 9 February 2022.

³⁷¹ Social Justice Coalition.

³⁷² Strategic virtual dialogue, 9 February 2022.

hesitancy could be understood that it was incorrect in law and denied protection to the victim in a time where she was most vulnerable i.e., the period between issuing the interim order and service.

6 Domestic violence to be prioritised for prosecution

26. The National Commissioner of the SAPS further submits that consideration should be given to prioritise cases in court involving domestic violence. Mses Vetton and Bornman suggest that the investigation and prosecution of intimate femicide should be strengthened through the incorporation of prior history of domestic violence in assault cases, as well as murder and culpable homicide. They submit that the evidentiary rules around similar fact evidence prohibits prosecutors from leading such evidence in matters where women have been killed by their partners. In their view, this evidence may be very important in matters where an accused argues that the relationship was not abusive, or the lethal incident an aberration. Further that, this evidence can only be introduced if there was a protection order in place at the time of the woman's death and the prosecutor also charges the accused with breach of the protection order. They submit that only a few prosecutors instruct investigating officers to search for previous dockets in order to reinstate these charges too.³⁷³ The view is also held that when acts of strangulation are identified they should be referred only to senior prosecutors to make decisions in these cases.³⁷⁴

7 Accountability and oversight monitoring

27. The Commission for Gender Equality further submits that in its collective experience, especially at the provincial level where their offices deal directly with public complaints, it has no doubt that the current challenges of “uptake, use, and implementation” of the Domestic Violence Act of 1998 (as recently amended) persist as a direct result of:

- Poor knowledge of the law and low levels of empowerment in relation to how to use the law, among those who are likely to be victims of domestic violence;
- Poor knowledge of the law (including existing criminal law and domestic violence law) by state officials tasked with implementation, including but not limited to:

³⁷³ Lisa Vetton & Sanja Bornman.

³⁷⁴ Adv Linda Le Roux, TTC Case Manager, Port Elizabeth.

- SAPS officers;
- clerks of domestic violence courts; and
- presiding officers, from time to time.
- Impunity for exceptionally poor service delivery by state officials tasked with implementation, including but not limited to:
 - SAPS officers;
 - clerks at Domestic Violence courts; and
 - presiding officers, from time to time.

28. The Commission for Gender Equality suggests that these are practical implementation challenges that require practical interventions and will not be improved by technical amendments to crime categories and the creation of new crimes in codified law. It further submits that it is not convinced that additional crime categories will instil new respect for the deleterious societal effects of domestic violence among state officials, “after 24 years of the existence of the Domestic Violence Act and the great public furore over sexual and GBV in the last five years”.

29. The SACBC states that the justice system has failed victims of domestic violence. It reflects that in the case of *S v Baloyi and Others*,³⁷⁵ the Constitutional Court found that:

the ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic behaviour are normalised rather than combated.

30. The SACBC points out that there is an inter-generational aspect to domestic violence both in terms of those who perpetrate it and those who accept it as “normal”, which deserves consideration. It, however, notes that the responsibility of the state to protect the dignity, corporal integrity and safety of its citizens does not stop at the front door of the family home. Ilitha Labantu submits that there should be consequences in place for police officials and other functionaries who fail to heed the call of assistance coming from victims of domestic violence, such as fines or warnings. It submits that police stations should have a stricter monitoring policy when it comes to complaints laid by victims for non-assistance from a specific police station as they have a clear mandate and responsibility as per the Domestic Violence Act.

³⁷⁵ *S v Baloyi and Others* 26 2000 (1) BCLR 86 (CC).

31. Mses Vetton and Bornman flag a lack of accountability for the poor implementation of the Domestic Violence Act and related legislation by officials in the criminal justice system as problematic. They particularly flag the transfer of legislative accountability functions from the erstwhile Independent Complaints Directorate to the Civilian Secretariat of Police as the reason for the erosion of police accountability for the policing of domestic violence.³⁷⁶ Mses Vetton and Bornman explain that the reason for this is that while the Civilian Secretariat of Police audits police stations, it is unable to compel the SAPS to provide information regarding implementation and non-compliance. In their view, this in turn renders the Civilian Secretariat of Police recommendations toothless, and without an evidence base, ultimately leaving the Civilian Secretariat of Police unable to influence disciplinary action taken against non-compliant police officers. This, in their view, effectively renders the Civilian Secretariat of Police “an accounting agency, rather than an accountability mechanism.”³⁷⁷ Ms Bornman, during the second Strategic Virtual Dialogue, submits that weak monitoring of non-implementation of legislated processes in the SAPS is also a concern. She explains that the Civilian Secretariat of Police is obliged to report to Parliament on non-implementation but that this process is fraught with difficulties. She explains that the Secretariat is under-capacitated. In her view, the Parliamentary reports are tick box exercises. They allegedly only choose 100 stations and either go to other stations and do not compare or go back to the same and only report on 100 stations. Mses Vetton and Bornman recommend that oversight should be strengthened as a matter of urgency.

32. Mses Vetton and Bornman further submit that, notwithstanding the Domestic Violence Act and its related National Instructions placing positive duties on police officers and thereby setting a clear standard of service, there is non-performance and a failure of the oversight mechanism for the implementation of the Domestic Violence Act, especially in respect of non-compliance. They are of the view that “service standards and codified legal obligations are undermined when oversight remains impotent.” Regional Court Judge President, Ms Wessels, identifies non-compliance by various role-players in the criminal justice system as a problem. She uses examples of the NPA withdrawing cases when they should not, and reluctance by the police to register criminal cases.³⁷⁸

³⁷⁶ Vetton “Aluta continua Police Accountability and the Domestic Violence Act 1998” 11.

³⁷⁷ Vetton “Aluta continua Police Accountability and the Domestic Violence Act 1998” 15.

³⁷⁸ Strategic Dialogue (virtual) 2 February 2022.

33. A worrying submission flagging re-direction by gatekeepers in contravention of obligations in the Domestic Violence Act notes that a primary challenge in this regard is the failure by criminal justice system role-players to correctly advise victims of domestic violence, in accordance with their legal obligation to provide assistance and provide accurate and complete information.³⁷⁹ The Commission for Gender Equality report that police officers routinely fail to advise victims of domestic violence of their right to apply for a protection order **and** file criminal charges, as civil and criminal processes that can take place concurrently. Instead, police officials are often too quick to “pass the buck” by referring victims to local magistrates’ courts for protection orders alone, creating the misleading impression that a protection order is a victim’s only legal recourse, and/or that the police’s hands are tied until the victim obtains such an order. The Commission for Gender Equality submits that police officers who send victims of domestic violence away from police stations, without properly informing them of all their rights under law, are engaged in police misconduct in terms Section 18(4)(a) of the Domestic Violence Act of 1998. The view is held that this severely undermines the national project of combatting GBV and intimate-partner violence (IPV) and should be subject to serious disciplinary action. Exacerbating this claim is the submission by Lungile Mashaba of Childline Mpumalanga who reports that a key barrier from her experience is that victims are being required by the SAPS to gather their own evidence before the police are willing to open a case. Ilitha Labantu submits that criminal charges go a long way in deterring offenders and that if a criminal charge has not been opened at the point of first reporting, it should be lodged once a protection order is granted.

34. Mses Vetton and Bornman refer to the African Centre for Justice Reform’s analysis of discipline in the SAPS contrasted against discipline in the Department of Correctional Services. The general focus of the analysis is on conduct defined as “improper, disgraceful and unacceptable” but is not focussed on misconduct specific to domestic violence. They report that in spite of the SAPS disciplinary code gazetted in 2016, disciplinary actions are low and declining. Furthermore, that it is evident that the police put far less effort into disciplinary proceedings than Department of Correctional Services – with worrisome implications for how the police deals with misconduct in relation to domestic violence. They further recommend that basic administrative compliance must be prioritised and improved, with more serious disciplinary

³⁷⁹ Commission for Gender Equality per Dr Dennis Matotoka, Legal Services referring to section 2 of the Domestic Violence Act No. 116 of 1998, as amended by the Domestic Violence Amendment Act No. 14 of 2021.

consequences for non-compliance.³⁸⁰ Ms Vetton expanded on this submission during the second Strategic Virtual Dialogue where she stated that this would include consequences for charging a perpetrator with breach of a protection order only instead of assault with the intention to cause grievous bodily harm where the victim has been seriously assaulted and breach of a protection order. Dr Papakyriakou adds that all corruption related to these matters must also be rooted out.³⁸¹ Ilitha Labantu agrees and flags the frequent release of perpetrators after receiving bribes and destruction of collected evidence or not collating and recording enough evidence in the docket to make a strong case for the prosecution. Mses Vetton and Bornman summarise the following barriers identified in their research that need to be part of the turn-around measures:

- No copy of National Instruction 7/1999, dealing specifically with domestic violence, readily available in police stations;
- Domestic Violence Act incidents not recorded in the Domestic Violence Register 508(b);
- Responses to domestic violence incidents not recorded on SAPS forms 508(a);
- Monthly procedures of File 39/4/2/3 on Domestic Violence Act incidents not maintained;
- Procedures of SAPS 10 (occurrence book) on Domestic Violence Act not thoroughly maintained;
- Protection orders are not served, and return of service is not filed;
- Copies of protection orders received are not filed;
- Copies of warrants of arrest received are not filed; and
- Form 1 (explaining rights and remedies) are not issued to complainants.³⁸²

35. Mses Vetton and Bornman further recommend that the legal duty of explaining rights and remedies to complainants at police stations should be strengthened.³⁸³ They recommend that section 2(c) of the Domestic Violence Act, as recently amended, should be further amended to read as follows:

The police must explain to the complainant the content of such notice in the prescribed manner, including the remedies at their disposal in terms of this Act and the right to lodge a criminal complaint, if applicable. If reasonably possible, to do so, this must be done in the language of the complainant's choice.³⁸⁴

³⁸⁰ Lisa Vetton & Sanja Bornman.

³⁸¹ Dr Beba (X M) Papakyriakou (PhD) (Psychology); Legal Aid SA; Ilitha Labantu.

³⁸² Lisa Vetton & Sanja Bornman reference the Effective Implementation of the Domestic Violence Act, workshop minutes 9 November 2016, Western Cape Government Department of Community Safety, UCT Gender Health & Justice Research Unit, Western Cape Police Ombudsman, at pg 6.

³⁸³ Lisa Vetton & Sanja Bornman.

³⁸⁴ The underlined portion is the proposed insertion by Lisa Vetton & Sanja Bornman.

8 Review of SAPS National Instructions

36. Mses Vetton and Bornman are further of the view that the SAPS National Instructions and related training relating to arrest should be reviewed and simplified. They importantly suggest that the revision should be informed by the experiences of organisations that provide direct assistance to complaints from victims of domestic violence.³⁸⁵ A number of other respondents concur with the need for comprehensive training in respect of all service providers.³⁸⁶

9 Administrative barriers

37. Mses Vetton and Bornman highlight the deleterious effect on arrest, both with, and without warrant, where protection orders, return of service notices and suspended warrants of arrest have not been filed and cannot be incorporated into the docket to give effect to the arrest.³⁸⁷ Linked to these administrative barriers are what they identify as a lack of understanding or poor discretion in giving effect to the powers of arrest provided in the Domestic Violence Act, read together with the Criminal Procedure Act, specifically Section 40(1)(a), (b) and (q) on arrest without a warrant.

10 Role of Metro Police

38. A suggestion was made that, in an attempt to augment the role of the police, the role of Metro Police officials in responding to domestic violence matters should be explored.³⁸⁸ In this regard, mention is made of the National Policing Standards for Municipal Police Services regarding Domestic Violence, which were introduced in 2006³⁸⁹ and the establishment of a specialised unit reportedly established in Tshwane in the same year.³⁹⁰

³⁸⁵ Lisa Vetton & Sanja Bornman.

³⁸⁶ Dr Beba (X M) Papakyriakou (PhD) (Psychology); Sharon Ellison, Law Lecturer, Justice College.

³⁸⁷ Lisa Vetton & Sanja Bornman.

³⁸⁸ Lisa Vetton & Sanja Bornman.

³⁸⁹ Available at <https://www.gov.za/documents/south-african-police-service-act-national-policing-standard-municipal-police-services>

³⁹⁰ See <https://www.iol.co.za/news/south-africa/cops-to-help-victims-of-domestic-violence-272138>.

11 Availability of trained expert personnel in social services

39. The National Commissioner, SAPS submits that trained expert personnel in social services should be available at all hours, especially after hours and over weekends when domestic violence is prevalent. In this regard it is submitted that the majority of incidents of domestic violence do not take place during office hours when the majority of state departments operate. The result is that police officials are increasingly required to fill the void left by the unavailability of other departments. It is submitted that a real commitment to curb domestic violence effectively in the country requires co-operation and availability of services offered by departments at all hours when there is a need.

12 Providing safe spaces to report domestic violence and apply for assistance

40. The Social Justice Coalition explains that closer scrutiny of the placement of the FCS units revealed that the arbitrary location of these units makes them completely inaccessible to the women and children who need them. By way of example, it submits that there is only one FCS unit that caters to the needs of more than 500 000 people in Khayelitsha, an area, in its own words “wrecked by violence and crime” and has been evident in the crime statistics released by the Minister of Police quarterly. The Social Justice Coalition submits that its community engagements have revealed that community members in informal settlements would be more comfortable with practical interventions such as having rooms in police stations where victims can be assisted instead of having them open cases and give statements in front desks where people can hear and see them with no privacy. Regional Court Judge President, Ms Wessels, shares the view that some victims of domestic violence are scared of being seen to go to a police station or the court. She is of the view that alternate ways of reporting to police are needed and that there should be an option to testify from another safe space that is not in a court room as they will be unable to testify from home.³⁹¹

³⁹¹ Strategic Dialogue (virtual) 2 February 2022.

13 Establishing domestic violence forums and multi-sectoral collaborative accountability

41. MOSAIC strongly advocates for local, community-based multi-sectoral collaborative accountability structures to strengthen domestic violence prevention and response at a local level. It believes that meaningful collaboration between civil society and government departments will create opportunities for the exchange of local knowledge and expertise, enhance first response services and increase access to justice for service users. It suggests that collaboration between criminal justice stakeholders and civil society at a precinct or magisterial district level, could include the facilitation of access to regular refresher training sessions that are responsive to community specific needs.

42. MOSAIC submits that the findings from the MOSAIC SAFE Baseline study³⁹² found incidents of justice officials, police members and civil society instituting community responsive mechanisms to close implementation gaps and enhance peer and partner accountability. It is of the view that the formation of local domestic violence forums is key to strengthening the prevention and response to domestic violence. MOSAIC explains that these structures bring together stakeholders engaged in domestic violence response and prevention at a local, community-based level to co-create a domestic violence prevention and response strategy. It further explains that stakeholders include representatives from the SAPS, the Department of Justice and Constitutional Development, Department of Social Development, Department of Health, Non-Governmental Organisations, Community Based Organisations, Faith-based leaders, Community leaders, Traditional leaders and Community members. MOSAIC submits that the benefit of collaborative platforms is five-fold i.e. it provides coordination of information and services, develops capacity and relationships, tightens support and referral processes; provides a shared performance measurement system and reinforces accountability between sectors in terms of the delivery of these services.

43. As part of a collaborative approach Professor Andrews submits that the optimal approach is to have specialised units dealing with domestic violence who are trained on how to enter, analyse, and control a domestic violence situation. In her view, these units

³⁹² Rehse et al MOSAIC SAFE Baseline study 2021. Protection orders must protect: exploring the implementation of the Domestic Violence Act (116 of 1998) at local Magistrates' Courts and police stations in Cape Town and the Cape Winelands. MOSAIC Training, Service and Healing Centre for Women, Cape Town. MOSAIC Training, Service & Healing Centre for Women.

should be staffed with people who the community can trust and who are based in the same area they serve in.³⁹³ Legal Aid SA suggests that there should be an automatic referral of victims of domestic violence to institutions such as Department of Social Development or FAMSA where debriefing sessions are rendered and to educate the victims on the possible dangers. In its view, this will assist the victim where the victim wishes to withdraw charges upon reconciliation.³⁹⁴

14 Withdrawal of charges and counter-charges

44. Adv Koekemoer is of the view that in order to address shortfalls in practice, additional measures should also be taken. In her view, this would include not allowing parties to simply withdraw criminal charges. She notes that on many occasions, specifically when complainants are arrested and charges and counter charges are laid, both the parties simply, by agreement, withdraw their charges to avoid further detention and trauma from being incurred. This, she says, occurs even in the context of one of the parties being a true victim of domestic violence. Her recommendation is that instead, it should be brought to the party's attention that charges and counter charges carry equal weight, and that both parties must be certain about their allegations and the truth thereof.³⁹⁵ Police officials should not allow the withdrawal if there is an indication that it is not being done without undue influence and may not be in the interest of justice.³⁹⁶ If acceded to, the reasons for the withdrawal should be recorded. Adv Koekemoer recommends that for record purposes and in order for police officials to exercise this discretion it would still be necessary for a J88 form to be completed, which would include documenting of the necessary medical and physical evidence.³⁹⁷

15 Training

45. Legal Aid SA proposes that proper training of police officials on how to deal with victims upon reporting domestic violence matters is needed. The view is further held that it is imperative that front line workers dealing with domestic violence complainants and perpetrators are adequately trained in the approach to be taken in matters of this nature. The first response to a report of domestic violence will determine the course of the

³⁹³ Professor Penelope Andrews, New York Law School.

³⁹⁴ Legal Aid SA.

³⁹⁵ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

³⁹⁶ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

³⁹⁷ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

complainants approach in pursuing the matter further, be it criminal or civil.³⁹⁸ There are many obstacles to implementation, but the particular areas where time, effort and resources should be focused include police training, creating support services for victims of domestic violence, and enforcement by courts and prosecutors.³⁹⁹ Ilitha Labantu supports the need for training, but extends this to all officials and functionaries in the criminal justice system, including magistrates and prosecutors with a view to producing sensitivity towards the needs of women to promote wellness and encourage reporting of domestic violence. It submits that this should include awareness around emotional and psychological abuse where there is no evidence of physical harm, so as to prevent secondary victimisation from the police.⁴⁰⁰ Dr Molefe emphasises the need for training of the police and prosecution on how survivors of domestic violence interact with the criminal justice system. In her view, there needs to be an understanding of symptoms of Post-Traumatic Stress Disorder (PTSD), memory problems and the effect of the trauma of domestic violence. The need for the training of police officials, social workers, medical practitioners and prosecutors in order to recognise the seriousness of strangulation and perform timely risk assessments was also highlighted as early identification may prevent loss of life.⁴⁰¹ Dr Naidoo suggests that training of health care workers is important in this regard so that these murders are flagged during post mortems.⁴⁰²

46. It would seem that barriers to implementation of the criminal law, while primarily linked to a lack of training and lack of collaboration between the courts and police, cannot only be ascribed to a lack-lustre response from the criminal justice system. Both Regional Court Judge President Wessels and Senior Magistrate, Ms Prag submit that “whichever response is followed, we need a lot of training for police, prosecution and judiciary.”⁴⁰³ More detailed comment on training will be included below under barriers to accessing support or engaging the criminal justice system.

47. From this broad perspective and that of a trainer within the Department of Justice and Constitutional Development, Justice College makes the following recommendations:

³⁹⁸ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates; Professor Penelope Andrews, New York Law School.

³⁹⁹ Professor Penelope Andrews, New York Law School.

⁴⁰⁰ Ilitha Labantu.

⁴⁰¹ Legal Aid SA; This sentiment is endorsed by Belinda Sellers, Childline Mpumalanga, who submits that proper risk assessments need to be done by the police, doctors and other roleplayers; Dr Molefe Strategic Dialogue (virtual) 2 February 2022.

⁴⁰² Strategic Dialogue (Virtual) 9 February 2022

⁴⁰³ Strategic Dialogue (virtual) 2 February 2022.

1. SAPS as first responders need to be better trained and equipped to deal with victims.⁴⁰⁴ Private interview rooms need to be mandatory together with ensuring that every police station has visible contact numbers for shelters and medical attention. This will exclude the current trend of police sending victims direct to clerks of court to deal with these matters, resulting in secondary victimisation. SAPS should also be trained in the intricacies of the Domestic Violence Act to avoid jurisdictional issues where they are refusing to assist victims in situations where, according to them, there is no jurisdiction.
2. Once interim orders are granted there needs to be a uniform procedure across all courts to ensure the order is taken/sent to the police station for immediate service. Currently in many courts the victim is being sent to the station with the order. Once at the station there should be a specific time period within which the interim orders need to be served. Many stations take weeks to serve the orders or in some cases fail to do so. This places the victim at risk. There should be harsh consequences for members who fail to serve timeously.
3. To ensure service victims are being forced to accompany the police. This places the victim in a tenuous situation. The victim is then expected to take the return of service back to the clerk, at their own time and expense.
4. Special measures should be implemented similar to those available in sexual offences and family courts whereby protective screens are used or the ability to give evidence via video links to support vulnerable courts users.
5. Many victims prefer not to report abuse to avoid having to attend a hearing with the abuser. One solution would be to widen the list of evidence that is required by a court to prove abuse to enable protection orders to be granted in absentia. These could include medical reports, a letter from an employer, social worker or doctor.
6. Many victims fail to attend the hearing due to fear or threats from the abuser. Courts should be mandated to grant orders when the victim fails to appear where there is clear evidence of abuse in the file.
7. Hospitals and medical centres must have updated lists of social workers/shelters that can be contacted once victims have received medical attention and do not want to return to the abuser. Department of Social Development should come on board in this regard.
8. Magistrates need training on the domestic violence application process. There are instances where jurisdictional issues are incorrectly decided as well as excluding certain forms of abuses.
9. Clarity is urgently required as to whether an abuser can be evicted from the property where the property is in the name of the victim and the parties are not married. Some courts are refusing to evict the abuser, leaving the victim at risk in their own home. Other courts use semantics to get around the issue by ordering that the abuser may not enter the property. Uniformity is required. Consideration should be given to rulings (such as in Italy, Austria and Germany) which state that the abuser must leave the

⁴⁰⁴ Legal Aid SA concurs.

family home rather than the victim. This would apply despite the marital regime or marital status.⁴⁰⁵

10. There must be an expansion of helplines and information sharing through guides and resources.
11. Additional funding to be allocated for shelters and other safe accommodation options for victims to allow them and any accompanying children to temporarily escape abusers.
12. Victims should have access to free legal advice and assistance before taking legal action. Currently Legal Aid only offers free assistance to minors and victims over the age of 60.
13. Additional financial support is to be made available to non-governmental organisations and other women's associations working with victims of domestic violence
14. Gender equality education and education on non-violent behaviour to be given at a very early stage at schools and to ensure adequate training for teachers on domestic violence and gender equality issues.
15. Immigrant women who have been or who are victims of domestic violence should be entitled to an independent right of residence.
16. There must be continuing cooperation and understanding between the police and the court by more providing more training for police and specified members to deal with victims.
17. Consideration should be given to establishing training programmes for perpetrators of violence against women
18. Immigrants who are perpetrators of domestic violence should be deprived of their residence status and be expelled from the country.⁴⁰⁶

48. Legal Aid SA in turn suggests that existing laws and policies should be reviewed to ensure a victim centred approach is followed, including creating or improving user-friendly facilities affixed to the criminal justice system for victims of domestic violence; that severe penalties for preventing access to criminal justice system should be legislated; and that the presiding officers should permit the submission of supplementary affidavits by the complainants prior to the respondents filing opposing affidavits in cases where there are legal representatives involved.

49. Respondents are of the view that training be provided to relevant stakeholders and the broader public on how to complete a detailed application for a protection order. Dr Molefe and Senior Magistrate, Ms Prag submit that a protection order is granted on the content of the application, including protection against strangulation if it is mentioned. It is therefore necessary to adequately place the relevant information and extent of the

⁴⁰⁵ Ilitha Labantu concurs.

⁴⁰⁶ Sharon Ellison, Law Lecturer, Justice College.

risk to the victim before the court.⁴⁰⁷ In this way, all forms of violence can be covered together with the proper protection.⁴⁰⁸

16 Specific barriers in respect of strangulation and femicide

50. The SAMRC focuses specifically on measures to overcome barriers in respect of strangulation and femicide. These measures are as follows:

- Regular & timely training & assessment of police in gender-responsive policing, using reviewed & evolving curricula with measurable outcomes
- Improving training for entire CJS on legal requirements for firearms & licencing, strangulation charges, in prosecution, bail and parole considerations for victims of GBV and of femicide cases.
- Set up femicide specialized unit/s for management, investigation, prosecution & sentencing of femicide cases
- Adapt/develop a GBV/femicide danger assessment tool & safety plans for the South African context
- Effectively implement danger assessment tools & safety plans at institutional level (police, shelter, mental health & helpline services), and use that as evidence in charging and sentencing.⁴⁰⁹

17 Victim's advocate

51. Ms Dildar is of the view that the absence of a legal representative to assist the victim of domestic violence navigate the system is a barrier. She suggests that magistrates should be trained to prevent secondary abuse.⁴¹⁰ Regional Court Judge President, Ms Wessels, states from a civil perspective that the presence of a victim advocate should be considered. She cautions that countries with victim advocates have a smaller case load and less constraints than local courts. She further states that although prosecutors are “a lawyer for the people”, the reality is different. They have a huge workload and hardly have time to consult properly and really look into the matter. This often leaves the victim in limbo. She suggests that although court preparations are usually put in place for sexual offences, that this role may need to be expanded to include matters of domestic violence, or to appoint a victim's advocate or someone similar to

⁴⁰⁷ Strategic Dialogue (virtual) 2 February 2022.

⁴⁰⁸ Ms Prag Strategic Dialogue (virtual) 2 February 2022.

⁴⁰⁹ Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council.

⁴¹⁰ Strategic Dialogue (virtual) 2 February 2022.

provide a watching brief to address the inadequacies of the current system as not all prosecutors get specialised training in GBV.⁴¹¹

18 Revising the format of the application for a protection order and completion thereof

52. Legal Aid SA further points out that the format of the application may be a barrier. It explains that at the application phase of an interim order, the complainant is restricted to putting information on the space afforded on the application form. The form does not give ample space to record all allegations that warrants the granting of a final order. Respondents who are legally represented easily oppose the application by filing an extensive affidavit.

53. Legal Aid SA reports that victims “often experience difficulties completing application forms due to language and literacy limitations.” Additional barriers to implementation include lack of support services external to the criminal justice system and being faced with discriminatory attitudes and unhelpful responses from personnel in various sectors (including legal, health, social and criminal justice).⁴¹² These deterrents coupled with family and societal stigma, and victim-survivors’ fears are powerful factors that prevent victims of domestic violence from seeking recourse through the legal system. Legal Aid SA is of the view that awareness-raising around GBV and training of relevant stakeholders need attention.

19 Certainty of response

54. Dr Papakyriakou is of the view that there should be a concerted marketing effort to foster and instil trust in the entire system, i.e. that a victim will not be ridiculed or their complaints dismissed; that they will be treated with respect and not fall victim to secondary victimisation by the very instruments tasked with protecting them; that perpetrators will be caught, tried, charged, and be accountable for restitution of whatever nature. She submits that this will impact the general view that is held that it is pointless to report any crime because criminals are not caught, and that if caught, bringing them to trial takes years. Further that, this effort should be coupled with tangible results, in

⁴¹¹ Strategic Dialogue (virtual) 2 February 2022.

⁴¹² Legal Aid SA.

other words that perpetrators of such crimes will not be given bail, allowed out on parole, or given a get-out-of-jail-free pass under any circumstances.

20 Abuse of process by attorneys

55. Adv Koekemoer states that spurious applications for protection orders are being made by unscrupulous legal practitioners to gain the upper hand in divorce proceedings. This in turn may lead to reciprocal orders and mutual applications for rescinding thereof even where one of the parties is a genuine victim in need of protection. In this regard, Legal Aid SA, in recognising the wide-ranging protection provided by a protection order and the issuing of a suspended warrant of arrest, notes that a warrant of arrest in the hands of a complainant of domestic violence is a powerful tool that may be open to abuse. It references Judge Meer in the matter of *Seria v Minister of Safety and Security and Others*⁴¹³ as follows:

I note in passing that a warrant of arrest in the hands of a complainant of domestic violence is a powerful tool which can be used or indeed abused to secure the arrest of a person against whom a protection order has been granted. Consequently section 8(4)(b) entrusts an enormous responsibility to police officers asked to effect arrests, a responsibility which must be exercised with care and wisdom, striking an equitable balance between the rights of complainants and those of respondents who may be deprived of their liberty... In their endeavours to rout out the serious social evil that domestic violence is, it is incumbent on police officers to be properly acquainted with the Act so that its provisions are equitably and fairly applied.

21 Timely service of interim protection order

56. Legal Aid SA further comments that time frames are important and that regulations should be made to hold SAPS accountable for serving the interim protection order and the time frame in which this is done.

22 Jurisdiction

57. Legal Aid SA submits that the fact that the Domestic Violence Act can only be enforced in Magistrates' Courts or Family Courts is a barrier. It reflects that

⁴¹³ *Seria v Minister of Safety and Security and Others* 2005 (5) SA 130 (C).

there is no provision for traditional courts to issue protection orders. Yet there are a number of customary courts operating in SA. Socio-cultural, practical, linguistic and economic reasons may limit the abilities of many rural women to access the Magistrates' Courts. Most rural women lack access to the infrastructure and facilities provided in urban and semi-urban areas. This infrastructure includes access to courts, shelters and other services provided by NGOs assisting victims of domestic violence. Because women in rural areas usually don't own their homes, they are unable to protect themselves by having abusive partners/spouses evicted. Curran⁴¹⁴ notes that 'traditional' ways of dealing with matrimonial problems, including domestic violence, determines that women should obtain help from 'private sources' like their own and their husband's families, rather than to bring the issue to public attention by approaching a traditional leader. The private nature of women's customary remedies against domestic violence means that women largely depend on the goodwill of family members. This will also influence women's reliance on non-customary forms of combating domestic violence like going to shelters and using the Domestic Violence Act.

58. It flags the need for courts to deal with all related matters, i.e. that Magistrates seized with an application for a protection order should address matters relating to care and contact of children, even though it may, strictly speaking, fall outside of their jurisdiction; and that conversely High Courts should take account of domestic violence matters when making orders relating to care and contact of children. It concurs with Bonthuys⁴¹⁵ that failing to do so will result in the link between parental rights and domestic violence as reflected in the Domestic Violence Act not being translated into court orders, which aims to protect women and children from domestic violence.

23 Access to remedies for children

59. Legal Aid SA has drawn the Commission's attention to the disjuncture between the needs of minors who are victims of domestic violence and recourse to justice. It submits that minors are exposed to high levels of domestic violence, but either do not identify the abuse they have been subjected to as domestic violence or do not have faith in the criminal justice system to protect them. It bases its analysis on a study conducted

⁴¹⁴ Curran & Bonthuys Customary law and domestic violence in rural South African communities (2005).

⁴¹⁵ Bonthuys "Domestic Violence and gendered socio-economic rights" 12.

in the Limpopo province in which 80% of the minors reported the abuse to the police, but only 50% thereof were granted protection orders.⁴¹⁶

24 Bystanderism

60. The SACBC Parliamentary Liaison Office notes that the complexity surrounding domestic violence includes the challenge that there may be no witnesses who are prepared to come forward. Although women may be able to document the violence by taking photographs of injuries or other damage, in these cases the onus of proof rests with the victim alone.

C Evaluation and preliminary recommendations

61. Article 5(a) of CEDAW⁴¹⁷ enjoins State Parties to “take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;”

62. The CEDAW Committee emphasises that State parties are under a due diligence obligation under article 2(e) of CEDAW to “take all appropriate measures to prevent, investigate, prosecute, punish and provide reparations for acts or omissions by non-State actors that result in GBV against women, including domestic violence.”⁴¹⁸ It further submits that failure by the State “provides tacit permission or encouragement to perpetrate domestic violence.”⁴¹⁹

63. The CEDAW Committee emphasises that under articles 2(f) and 5(a) of CEDAW, State parties are enjoined to address the root causes of domestic violence and bring about normative change by dismantling stereotypes and cultural norms perpetuating violence against women. Furthermore, that awareness raising needs to be broadly

⁴¹⁶ Lee et al “An analysis of the efficacy of the mechanisms for the protection of minor children against domestic violence in South Africa and Zimbabwe” 8904.

⁴¹⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1). South Africa ratified the Convention on 15 December 1995 and acceded to the Optional Protocol on 18 October 2005.

⁴¹⁸ CEDAW Committee Report Inquiry concerning South Africa 2021 par 87.

⁴¹⁹ CEDAW Committee Report Inquiry concerning South Africa 2021 par 87.

targeted, together with “mandatory and recurrent capacity-building for the judiciary, law enforcement officers and forensic medical and health-care personnel to eliminate gender bias and stereotypes; ensure the strict application of criminal law provisions, the collection and preservation of evidence and the issuance and monitoring of protection orders in domestic violence cases and to assess the impact of such measures.”⁴²⁰ The United Nations Economic and Social Council Commission on the Status of Women in its Sixty-fifth session reiterates the need for normative change.⁴²¹

64. Various awareness raising and public education measures on government services, legislation and matters relating to gender empowerment and equality are run by government. The South African Government’s fifth periodic report on CEDAW reports that these campaigns are conducted through the use of the media, booklets, pamphlets and community gatherings.⁴²² The fifth periodic report on CEDAW further describes the various measures in place to support victims of violence against women. These measures include One-Stop Centres, 109 shelters (at the time of the report in 2019) providing accommodation and rendering psychosocial services to victims in accordance with the Minimum Standards for Shelters for Abused Women and the National Command Centre on Gender Based Violence whereby victims of GBV are able to access counselling by trained social workers and police support.⁴²³ The fifth periodic report on CEDAW documents various measures by way of training and workshops aimed at equipping and supporting government officials to respond to victims and perpetrators of GBV.⁴²⁴

65. The CEDAW Committee’s concluding observations on the fifth periodic report of South Africa express concern that the police consistently fail to investigate, prosecute and adequately punish negligence and mishandling of criminal investigations by their own officials; the lack of training of judges, prosecutors and police officers on the criminal law applicable to gender-based violence; and the particularly high risk of GBV against women with intersecting forms of discrimination.⁴²⁵ It is therefore encouraging that training and capacity building is currently being conducted by the South African Police

⁴²⁰ CEDAW Committee Report Inquiry concerning South Africa 2021 par 92.

⁴²¹ UNESC Commission on the Status of Women Sixty-fifth session 6.

⁴²² In May 2019 South Africa submitted its fifth periodic report to the CEDAW Committee as a combined report of the second to fifth reporting periods – the report falling due under article 18 of the Convention in 2015. CEDAW Fifth periodic report submitted by South Africa para 72-81.

⁴²³ CEDAW Fifth periodic report submitted by South Africa para 82 – 83.

⁴²⁴ CEDAW Fifth periodic report submitted by South Africa para 84 – 91.

⁴²⁵ CEDAW Fifth periodic report submitted by South Africa para 9(b).

Service Division: Visible Policing and Operations. Basic training for new intakes contains a module on domestic violence.⁴²⁶ Furthermore, in service training is conducted as follows:

- Domestic Violence Learning Programme 5 days
- Domestic Violence Train the Trainer Course 10 days
- National Victim Empowerment Training 5 days⁴²⁷

66. The Basic Police Development Learning includes courses on victim empowerment; first responder to sexual offences; domestic violence; and vulnerable children.⁴²⁸ The police trainers, however, identify societal challenges to internalising this training. Norms and values are first learnt in communities, from peers, religious affiliations, culture and exposure to media.⁴²⁹ It is therefore pertinent to realise that before assuming that more training will result in better policing, the following questions as posed by Kelly Stone of the Institute for Security Studies should be interrogated:

1. Who is currently training SAPS members on their obligations to victims of GBV?
2. What knowledge and skills does the current training curriculum aim to build? Are those competencies responsive to the needs of victims?
3. When does the training take place and is it mandatory for all SAPS members? Is it ongoing, once-off or is the learning “on the job”?
4. What methodologies are currently used to train members? Do they align with the evidence of how adult professionals learn most effectively?
5. Do SAPS members feel adequately prepared to respond to incidents involving GBVF once training is complete? ⁴³⁰

67. With regard to the identified need for evidence to be led through intermediaries, it is instructive to note that recent legislative amendments have made the comment redundant. It should, however, be recognised that amendments such as these were in response to these needs being identified by NGOs and other stakeholders. The Criminal and Related Matters Amendment Act, 12 of 2021 amended section 170A of the Criminal Procedure Act 51 of 1977 to extend the availability of testifying through an intermediary where such witness “suffers from a physical, psychological, mental or emotional condition”; or is an older person as defined in section 1 of the Older Persons Act 13 of

⁴²⁶ Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

⁴²⁷ Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

⁴²⁸ Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

⁴²⁹ Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

⁴³⁰ Stone K presentation SAPS & DHET Training Webinar (2022).

2006; where testifying in criminal proceedings would expose them to “undue psychological, mental or emotional stress, trauma or suffering”. Prior to this amendment, an intermediary could only be appointed for a person below the biological or mental age of 18 years. Arguably, this amendment will bring about some respite to adult survivors of domestic violence. While the Domestic Violence Act provides that questions may be posed through the presiding officer, prior to this amendment an adult victim of domestic violence had no protective measures and if testifying may have been subjected to cross-examination by the accused or their legal representatives. It is notable that the United Kingdom brought about a ban on cross-examination by those alleged to have abused the complainant in a criminal matter in July 2022.⁴³¹

68. As pointed out in a number of submissions, it is trite that the history, geographic location and demographics of Khayelitsha bear witness to the socio-economic and structural barriers, which underpin and seem to continue to haunt the daily challenged existence of residents in this area.⁴³² It is unclear why the recommendations of the Commission of Inquiry into allegations of police inefficiency and a breakdown in relations between the police and the community of Khayelitsha in 2014, referred to by a number of respondents, are yet to be actioned upon. A press statement issued by the Social Justice Coalition on 26 August 2019, five years after the recommendations by the Khayelitsha Commission were made, starkly reflect that the recommendations remain unimplemented.⁴³³ Significantly, Khayelitsha continues to be served by only one FCS Unit, with the remaining police officials inadequately trained to deal with acts of domestic violence.⁴³⁴

69. In *S v Baloyi*, the Constitutional Court gravely describes the effect of an ineffective criminal justice system:

the ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic behaviour are normalised rather than combated.⁴³⁵

⁴³¹ Fouzder ‘Insufficient lawyers’ to cross-examine parties in domestic abuse cases.

⁴³² Khayelitsha Commission of Inquiry Report (2014) 33.

⁴³³ Social Justice Coalition Press Statement “The Khayelitsha Commission of Inquiry”.

⁴³⁴ Social Justice Coalition Press Statement “The Khayelitsha Commission of Inquiry”.

⁴³⁵ *S v Baloyi* 2000(1)BCLR 86 (CC) para 12; Vetten et al The price of protection: costing the implementation of the Domestic Violence Act.

70. Section 205(3) of the Constitution states that:

The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

71. As such, the SAPS is key to realising the right to freedom and security of the person, which includes the right to be free from all forms of violence whether from a public or private source.⁴³⁶ It is also key in achieving the vision set by the Constitution, namely a transformed society founded on human rights, which includes equality and human dignity.⁴³⁷

72. The SAPS National Instruction no 7 of 1999 regulates the implementation of the Domestic Violence Act in so far as the duties it places on the police. In accordance with the National Instruction, each police station should have in its possession records of information relevant to acts of domestic violence as follows:

- Domestic Violence Incident Forms (SAPS 508(a));
- Domestic Violence Register (SAPS 508(b));
- A file with a copy of every protection order and warrant of arrest that is received in accordance with the Registration and Record Control procedure provided for in National Instruction 7/1999; and
- Records of any complaints made against SAPS regarding implementation of the Domestic Violence Act.⁴³⁸

73. The purpose of the incident form is to provide a record of the response of a police official to all reported incidents of domestic violence, irrespective of whether a criminal offence has been committed or not. If accurately recorded the data, which would in turn be documented in the register, would provide a reflection of the nature of the acts reported, and the assistance or referrals provided.⁴³⁹ Evidence would, however, suggest that this is not being done. The non- or inaccurate recording of data on the Domestic Violence Register (SAPS 508(b)) may in turn have a knock on effect in respect of the safety of the victim or complainant.⁴⁴⁰ Sections 9(2)(h) and (l) of the Firearms control Act, 60 of 2000 renders a person who is convicted of the offence of being in breach of a protection order and sentenced to imprisonment without the option of a fine; or has been convicted of “physical or sexual abuse in a domestic relationship” ineligible for a

⁴³⁶ Section 12 of the Constitution.

⁴³⁷ Khayelitsha Commission of Inquiry Report (2014)15.

⁴³⁸ Khayelitsha Commission of Inquiry Report (2014)141.

⁴³⁹ Khayelitsha Commission of Inquiry Report (2014)141.

⁴⁴⁰ Khayelitsha Commission of Inquiry Report (2014)144.

competency certificate to obtain a firearm. Section 102 of the Act further provides for an assessment of continued competency to possess a firearm following the issuing of a protection order. Section 102, read together with section 103(i), automatically results in the perpetrator becoming unfit to possess a firearm if convicted of physical or sexual abuse in a domestic relationship or for the conviction of any offence with imprisonment without the option of a fine.

74. The challenges faced by the police to address crimes in general and crimes of domestic violence specifically bridge matters related to understaffing, lack of training, failure of oversight and the inevitable consequences of vicarious trauma.⁴⁴¹ Therefore, the recommendations flowing from the Commission of Inquiry, while recognising the comprehensive and useful nature of the National Instruction on Domestic Violence, read together with the Domestic Violence Act, do not include recommendations for substantive amendments of legislation or policy.⁴⁴² However, in terms of process the recommendations include that the Domestic Violence Act should be amended to remove provisions that provide the police with unnecessary discretion; and to provide clarity on the manner in which protection orders should be served.⁴⁴³ No recommendation could be found to substantively change the law. More particularly no recommendation was made to amend the law to provide for a stand-alone offence of domestic violence as a response to the practical implementation challenges that the police and complainants were exposed to.⁴⁴⁴ This position was confirmed in the 2016 KPMG Report on diagnostic review of the state response to violence against women and children which found that:

While the Act is an impressive piece of legislation and is widely regarded as one of the best examples of legislation on domestic violence internationally, several issues have been raised around its implementation.⁴⁴⁵

75. The KPMG report further identified the fact that the provisions of the Domestic Violence Act had not been costed before implementation and therefore had consequently neither been adequately budgeted for nor specifically funded; and the inconsistency of training of court and police officials as the core drivers of inequitable service delivery.⁴⁴⁶ The 2010 UN Handbook for Legislation on Violence against Women clearly states that allocation of a budget to enable each provision in legislation aimed at combating violence

⁴⁴¹ Khayelitsha Commission of Inquiry Report (2014) 336.

⁴⁴² Khayelitsha Commission of Inquiry Report (2014) 141.

⁴⁴³ Khayelitsha Commission of Inquiry Report (2014) 338.

⁴⁴⁴ Khayelitsha Commission of Inquiry Report (2014) 458 - 459.

⁴⁴⁵ KPMG Report (2016) 37; 46.

⁴⁴⁶ KPMG Report (2016) 37.

against women; and training and capacity building of public officials should be mandated in legislation to ensure adequate implementation.⁴⁴⁷

76. Following the promulgation of the Domestic Violence Act in 1998, the view was held that behind the goal of providing legal recourse were broader political aims, namely “to change the power dynamics between men and women; to shift the attitudes of law enforcement agents, to create a climate of intolerance for violence against women, to mention a few.”⁴⁴⁸ At the time, it was recognised that “the subtleties of domestic violence, stemming from the complexity of human relationships, makes legal remedy difficult”⁴⁴⁹ and that a more “nuanced and inclusive remedy than a purely legal one would be needed.”⁴⁵⁰

77. On the one hand, often due to financial reasons, victims do not want the law to run its course but for the violence to end without their partners being charged, arrested, prosecuted and sentenced. On the other hand, police and court officials are faced with budgetary, human resource and administrative hurdles when criminal charges are lodged, only to have them withdrawn, and in turn may be less tolerant towards victims who seek to lodge criminal charges.

78. A number of the barriers raised relate to implementation issues. The content of the recently enacted amendments and regulations to the Domestic Violence Act would seem to address a number of the concerns raised above. For example, with regard to the concern around non-issuance of a suspended warrant of arrest with interim protection orders, regulation 13 unequivocally provides that “certified copies of the interim protection order **and** original warrant of arrest must be served on the complainant in the manner set out in regulation 32(1).”⁴⁵¹ This regulation clearly confirms that a warrant of arrest is not optional in terms of section 5(7) of the Domestic Violence Act and that it should accompany interim protection orders and in turn final protection orders if granted.

⁴⁴⁷ 2010 United Nations Handbook for Legislation on Violence Against Women 17 – 18.

⁴⁴⁸ Vetten et al The price of protection: costing the implementation of the Domestic Violence Act 110.

⁴⁴⁹ Vetten et al The price of protection: costing the implementation of the Domestic Violence Act 107.

⁴⁵⁰ Vetten et al The price of protection: costing the implementation of the Domestic Violence Act 106.

⁴⁵¹ Own emphasis added.

79. CEDAW General recommendation No.33 further identifies a range of factors that make it more difficult for women to access justice. The factors pertinent to domestic violence include illiteracy, trafficking, status as an asylum seeker, internal displacement, statelessness, migration, living with HIV, deprivation of liberty, criminalisation of prostitution, and geographic remoteness.⁴⁵² Women who belong to vulnerable groups “often do not report violations of their rights to the authorities for fear that they will be humiliated, stigmatised, arrested, deported, tortured or have other forms of violence inflicted upon them, including by law enforcement officials.”⁴⁵³

80. Mmamabolo et al, in conducting a study of the challenges that the SAPS face in rendering services to victims of crime, identify several internal and external factors that create barriers to service delivery.⁴⁵⁴ The study reveals the perennial refrain of lack of training (including poor access to information and unclear roles and responsibilities) and lack of human and physical resources, alongside “poor location and management of Victim-Friendly-Rooms (VFRs) and language barriers”.⁴⁵⁵ The conclusion was drawn that skilling and capacitation would need to take place bearing the unique dynamics of communities in mind and that training would need to be impact driven and not generic. Further that, a clear pathway of services was needed. As a precursor to the Domestic Violence Amendment Act, 2022, the need was identified for clear policy in this regard matched, with a binding legislative framework to ensure robust collaboration and coordination between role-players.⁴⁵⁶ Mmamabolo et al list a raft of initiatives, policies, frameworks and programs aimed at victim support. The latter programs include a court preparation program, Thutuzela Care Centre programs, Restorative Justice Programs, the One-Stop Shelter Project, Women’s Dialogues; a 24-hour Gender-Based Violence Command Centre, the White Door project for temporary shelter, Emergency medical services, re-modelled sexual offences courts and a “My Safety” plan as a risk assessment tool.⁴⁵⁷ It would seem that the theory is in place but needs to be fully understood, owned and implemented on the ground. The first link of response in the chain of service delivery is only as strong as the weakest link in the rest of the chain of service delivery. Even if the police provide the correct support, they may be stymied in

⁴⁵² CEDAW General recommendation No.33 On women’s access to justice 2015 4.

⁴⁵³ CEDAW General recommendation No.33 On women’s access to justice 2015 5.

⁴⁵⁴ Mmamabolo et al Rendering victim-friendly services for women and children in South Africa 12.

⁴⁵⁵ Mmamabolo et al Rendering victim-friendly services for women and children in South Africa 12.

⁴⁵⁶ Mmamabolo et al Rendering victim-friendly services for women and children in South Africa 13.

⁴⁵⁷ Mmamabolo et al Rendering victim-friendly services for women and children in South Africa 14.

providing further service by the unavailability or inaccessibility of shelters and social workers after hours. The 2016 KPMG report notes that “unclear responsibilities in terms of the provision of shelters . . . weakens the SAPS ability to effectively provide victims with adequate protection”.⁴⁵⁸ Arguably section 18B of the Domestic Violence Act ameliorates this challenge by unequivocally placing a legislative obligation on the Department of Social Development to, in conjunction with other relevant departments, issue directives which include the designation of accredited shelters and which are binding on its officials.

81. It is evident that the SAPS is aware of its internal and external challenges and is taking steps to address these challenges.⁴⁵⁹ The proposed two-step intervention process to help improve services to victims and encourage a coordinated approach in the provision of services requires the SAPS to improve the initial victim support as the first point of contact with the Criminal Justice System; and to ensure cooperation between stakeholders to support the SAPS.⁴⁶⁰ Key to ensuring entry into the Criminal Justice System is access to a Customer Service Centre or police station; and ensuring that police officers at the frontline are willing and able to provide the necessary service to the victim.

82. The Commission for Gender Equality is mandated to conduct oversight and monitor progress at police stations and Thuthuzela Care Centres (TCCs), and to assess the provision of victim-friendly services for victims and survivors of GBV.⁴⁶¹ In its most recent oversight visits, 66 of the 1 155 SAPS police stations and 12 of the 55 TCCs were visited.⁴⁶² These observations are in turn submitted to the National Commissioner of Police and the relevant Parliamentary Portfolio Committee to enable them to implement the necessary remedial steps.

83. The Commission for Gender Equality found that the international experience that GBV is rising is mirrored in South Africa.⁴⁶³ It raises with particular concern, the large number of withdrawal of cases. However, these may not only relate to problems in the

⁴⁵⁸ KPMG Report (2016) 37.

⁴⁵⁹ Mmamabolo et al Rendering victim-friendly services for women and children in South Africa 19.

⁴⁶⁰ Mmamabolo et al Rendering victim-friendly services for women and children in South Africa 19.

⁴⁶¹ Commission for Gender Equality Biannual SAPS Report (2022) 5; 26.

⁴⁶² This represents 5.7% of all police stations overall. However, 43% of the stations visited were identified as police stations in GBV hotspots. Commission for Gender Equality Biannual SAPS Report (2022) 5, 27. The NPA reported at the GBVF Presidential Summit Two that the number of TCCs had increased to 61.

⁴⁶³ Commission for Gender Equality Biannual SAPS Report (2022) 5.

criminal justice response. There are a number of reasons for withdrawal of charges. Some reasons include the boomerang effect whereby violence escalates after reporting⁴⁶⁴. This may include threats by the respondent or others and the fear generated against a backdrop of historical abuse. Internal and societal stigma around reporting and being seen to engage with the criminal justice system may also act as a deterrent. It appears from the limitations documented by the Commission for Gender Equality that at times and certain places there seems to be no clear chain of case management indicating a fractured process flow.⁴⁶⁵

84. The Commission for Gender Equality raised its concern around the high levels of poverty and the continued presence of structural barriers to accessing justice. For example, inaccessibility of police stations and courts due to the distance and related hindrances. The interrelation between poverty and unemployment, especially among the youth, was found to be a key factor in keeping GBV victims dependent on their abusers.⁴⁶⁶

85. In certain areas that reflect a high number of reported domestic violence cases that progress to the stage of prosecution, a contemporaneous level of withdrawals of cases and even acquittals in respect of domestic violence against women and children is evident. Few convictions are recorded.⁴⁶⁷ For example, in Seshego in Limpopo Province four convictions and six acquittals followed the prosecution of 90 cases of rape. None of the prosecutions were recorded as being for rape in the context of domestic violence. The status of cases in the Western Cape Province, in particular that of the Blue Downs/Delft, reflect an interesting development in that 39 cases of domestic violence out of the 108 cases that went to court were mediated. The larger picture reflects a high number of case withdrawals (105) in court. The referral for mediation should be seen against the backdrop of non-reporting and withdrawals due to victims and family members electing to deal with the issue of domestic violence as a family unit. This demonstrates the complexity of responding to domestic violence with a criminal law response.

86. Barriers to dealing with GBVF matters efficiently and effectively include a lack of skills on how to deal with GBVF cases at police stations; and the turnaround time of DNA

⁴⁶⁴ DoJ&CD Pillar 3 of the National Strategic Plan on GBVF Webinar 10 November 2022.

⁴⁶⁵ Commission for Gender Equality Biannual SAPS Report (2022) 28.

⁴⁶⁶ Commission for Gender Equality Biannual SAPS Report (2022) 5.

⁴⁶⁷ Commission for Gender Equality Biannual SAPS Report (2022) 32.

evidence and ballistic reports from the forensic laboratory.⁴⁶⁸ Other barriers are structural, with the location of the police station playing an important role in reporting, case retention, referrals and convictions – in other words access to justice. Victims are not only hindered from reporting, but from sustaining court visits particularly where cases are postponed.⁴⁶⁹ Socio-economic factors seem to underpin not only the prevalence of domestic violence but redress thereof.⁴⁷⁰ For example, the threat of a criminal conviction and imprisonment almost always means the simultaneous cessation of financial support to a family. When already facing poverty, the very difficult choice is then between food and physical safety.

87. The Commission for Gender Equality reflects police accounts of high vacancy rates, low morale and lack of budget.⁴⁷¹ Lack of resources extends to basic equipment such as a computer, mobile phone and access to a car to not only respond to cases of domestic violence but to serve protection orders.⁴⁷² The level of psychosocial support and infrastructure in informal settlements and townships is disproportionate to other areas.⁴⁷³ Further barriers to receiving support include needing to have a case number for entry into shelters.⁴⁷⁴

88. The Commission for Gender Equality report suggests a number of interventions to assist with ensuring that GBV victims are able to access justice. These include:

- Standardisation of resourcing of police stations;
- Standardisation and formalising referral systems across provinces and stations;
- Training of staff, particularly those who provide GBV specific services;
- Expediting the processing of forensic and DNA evidence;
- Ensuring immediate establishment of victim-friendly rooms across all police stations;
- Advocacy and education campaigns on the danger of withdrawing rape cases;
- Establishing mobile regional courts and mobile stations;
- Crime prevention should include awareness raising, initiatives to change norms about non-violent conflict resolutions and male violence towards women.⁴⁷⁵

⁴⁶⁸ Commission for Gender Equality Biannual SAPS Report (2022) 5.

⁴⁶⁹ Commission for Gender Equality Biannual SAPS Report (2022) 38.

⁴⁷⁰ Commission for Gender Equality Biannual SAPS Report (2022) 40.

⁴⁷¹ Commission for Gender Equality Biannual SAPS Report (2022) 42.

⁴⁷² Commission for Gender Equality Biannual SAPS Report (2022) 45.

⁴⁷³ Commission for Gender Equality Biannual SAPS Report (2022) 46.

⁴⁷⁴ Commission for Gender Equality Biannual SAPS Report (2022) 47.

⁴⁷⁵ Commission for Gender Equality Biannual SAPS Report (2022) 61.

Preliminary recommendation

6. The Commission recognises the significant and concerted strides that have been made across all sectors to ensure that GBVF, including domestic violence, is dealt with effectively and efficiently. It recognises too that the multi-varied interplay of socio-economic, normative and relational complexities often make the law an ineffective tool to address these complexities.

While efforts may be underway to address some of these areas the Commission supports the Commission for Gender Equality's recommendations that:

- Urgent attention should be given to the forensic laboratory backlog, prioritising of these crimes and building blocks such as a dedicated courier to ensure safe delivery of DNA samples;
- There should be awareness raising of the dangers of withdrawing cases;
- The link between alcohol and gender-based violence needs attention with a view to mitigating harm facilitated by the abuse of substances;
- Mobile police stations and regional courts should be established to cater to rural and impoverished communities;
- Early intervention should be prioritised to stop children from perpetuating the cycle of violence;
- Staff training should range from basic competencies like computer literacy to GBVF specific services;
- Collaboration between the South African Police Service, the Department of Health; Department of Home Affairs; and Department of Social Development to deal with matters involving foreign nationals, shebeens and GBV crimes;
- Harnessing of intersectoral partnerships to reduce and prevent intimate partner violence through awareness, changing norms and promoting non-violent conflict resolutions;
- There should be a focus on mental health as depression and suicide often accompany sexual abuse. It also affects victim readiness to testify. In order to do this the Department of Social Development should take ownership of support provision to ensure a proper referral system and pathway to services.

CHAPTER 4: ADDITIONAL SENTENCING OR PREVENTATIVE MEASURES

A Introduction

1. The issue paper concluded with posing the question as to whether additional sentencing or preventative measures might be required. It expanded the scope of the question by providing an example of such a measure, i.e. forewarning a victim/potential victim of the potential danger a repeat offender of a domestic violence offence might hold. The comment elicited by this question can broadly be separated into two themes, namely sentencing measures and prevention and will be dealt with in this manner below.

B Consideration of submissions: sentencing measures Introduction

2. The Commission for Gender Equality with reference to the Criminal and Related Matters Amendment Act No. 12 of 2021, makes the point that the sentencing law regime applicable to domestic violence has very recently been amended by Parliament in which harsher sentences for crimes involving gender-based violence, and crimes against people with whom perpetrators are in a domestic relationship are provided. It cautions that complications that may arise from enacting further legislation before the impact of the recent amendments on implementation are gauged may include, but would not be limited to, questions relating to charging, competent verdicts and sentencing in criminal courts.

3. The view is held that prosecutors and judges play a critical role in properly enforcing domestic violence laws.⁴⁷⁶ Professor Andrews states that the outcome of a guilty verdict in the United States of America for a domestic violence offence is that following conviction the offender may not lawfully purchase or access a firearm and the conviction of domestic violence would appear on a background check and can affect divorce and custody proceedings. Additionally, changing the cultural conversation and the educational approach to domestic violence can have a large impact on the way the

⁴⁷⁶ Professor Penelope Andrews, New York Law School.

actors in the court system view and respond to criminal behaviour in the context of domestic violence. If the rest of the community begins to take domestic violence more seriously, judges and magistrates would be forced to do so as well by pressure from the community in which they operate.⁴⁷⁷ MOSAIC submits that there should be a specific process in the manner in which the court adjudicates and imposes sanctions on the domestic violence crimes. Ilitha Labantu in turn submits that the sentences for criminal charges for domestic violence should be comparable to those for other violent crimes.⁴⁷⁸ The comment of the aforementioned three respondents is, however, in the context of their support of a single offence of domestic violence.

4. Although the view is held that there should be a minimum sentence on crimes committed as part of domestic violence,⁴⁷⁹ the countervailing view is that legislating for minimum sentences may have a chilling effect on reporting of acts of domestic violence.⁴⁸⁰ Complainants will have to face:

1. The possible loss of an income in the household if a spouse or partner is convicted and sentenced for such a long period of time.
2. The possibility of financial hardship.
3. The effect thereof on the minor children's best interests.
4. The effect thereof on any extended family relationships.⁴⁸¹

5. The view is held that the root cause of the domestic violence should be addressed. For example, as substance abuse is often a factor in these matters and where the offender is a first offender that an order facilitating rehabilitation may be more appropriate. Providing the court with a discretion in such matters would ensure that unnecessary hardship on a family and unintended consequences are avoided.⁴⁸² Similarly, MOSAIC proposes the introduction of a suspended sentence, linked to mandatory referral to evidence-based interventions. MOSAIC recommends a remedy putting behavioural change (restorative and secondary prevention) up against the imposition of imprisonment (punitive measures). It reasons that domestic violence is complex in that some forms of domestic violence are not visible and also that it is familial, so many victims, in as much as they want the violence to stop, do not want the relationship to end. It further reasons that instead of imprisonment, behaviour change

⁴⁷⁷ Professor Penelope Andrews, New York Law School.

⁴⁷⁸ Endorsed by Legal Aid South Africa.

⁴⁷⁹ Adv Linda Le Roux, TTC Case Manager, Port Elizabeth.

⁴⁸⁰ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁴⁸¹ Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

⁴⁸² Unchain our children, Advocate Amber Koekemoer, Circle Chambers Advocates.

linked to restorative justice is better suited to address domestic violence behaviour which is deeply rooted in socialisation. Ilitha Labantu suggests that a default system should be put in place for every perpetrator of domestic violence. In its view, this would require that all perpetrators of domestic violence would be obliged to undergo a programme such as an anger rehabilitation programme and psychiatric assessments. The Southern Catholic Bishops' Conference (SACBC) Parliamentary Liaison Office notes that "there are no remedial programmes in South African correctional facilities that focus on domestic violence and how to avoid such behaviour in the future."⁴⁸³ In its view "[P]risons are overcrowded, brutal and violent places. Hence, recidivism rather than reform might be the result. Imprisonment also results in the breakdown of the family and makes family reintegration difficult."⁴⁸⁴ Dr Papakyriakou supports the need for rehabilitation to prevent recidivism.

6. Legal Aid SA submits that sentencing in these matters should be used to send a clear message that violence in the context of domestic relationships will not be tolerated.⁴⁸⁵ It proposes that legislation should provide for schedules to categorise severity of these offences and applicable penalties in relation to those offences as this will assist in both the legal practitioners and presiding officers in formulating the sentences that could be imposed. MOSAIC proposes that where an act of domestic violence does not involve any aggravated violence then it could be listed as Schedule 1, 2 and/or 3 offences thus allowing the imposition of police and/or prosecutor bail, suspended convictions and sentences that are linked to a referral of the respondent to a vetted behaviour change programme. Should the respondent not attend the behaviour change programme or/and violates the conditions of the protection order, sentence and conviction is then imposed.

7. Legal Aid SA is of the view that when it comes to sentencing, an offence committed in the context of domestic violence should not be treated differently from other similar offences. MOSAIC submits that where the domestic violence involves aggravating circumstances (as already outlined in the Criminal Procedure Act as amended), the court must impose imprisonment and other penalties as per the Criminal Procedure Act. It is MOSAIC's opinion that a restorative justice process, coupled with suspended punitive measures, will contribute to the prevention of future acts of violence and breaking the intergenerational cycle of violence within a familial setting. It further

⁴⁸³ SACBC Parliamentary Liaison Office.

⁴⁸⁴ SACBC Parliamentary Liaison Office.

⁴⁸⁵ Endorsed by Dr Beba (X M) Papakyriakou (PhD) (Psychology).

strengthens the existing protection order system, ensuring that Protection Orders do indeed protect. Further, it suggests that where there is serious violence that is harmful and possibly fatal, the courts should impose strict bail conditions and/or imprisonment. MOSAIC believes that this approach will potentially support the national Femicide Prevention Strategy.⁴⁸⁶ Although Ilitha Labantu believes that additional sentencing and preventive measures are necessary to deter potential perpetrators of domestic violence, it supports the imposition of a prison sentence instead of a warning or eviction from the shared residence. It submits that a sentence should consider the severity of the physical and psychological harm by analysing the victim's impact statements.⁴⁸⁷

8. During the first strategic dialogue the question was posed whether there should be a special provision to call for evidence of risk involved when an accused is facing a charge of strangulation as an act of domestic violence. Regional Court Judge President, Ms Wessels is of the view that it would be helpful to call expert witnesses, but this is a challenge in rural provinces. For this reason she would not support making this mandatory.⁴⁸⁸ Ms Gihwala,⁴⁸⁹ is of the view that resources are available and can be made available to the court and prosecutors through research portals. She agrees that it may not be feasible to use paid for experts but that NGOs, universities and related institutions could be used.⁴⁹⁰ Regional Court Judge President, Ms Wessels notes that from a sentencing perspective it is important that the Victim Impact Report needs to address the extent of the domestic violence and impact on victim and family. Often it is lacking and the content is a "copy and paste" of a standard report. She submits that the reports must be of good quality, describing the specific impact psychologically etc. on the victim and her family. She is of the view that the recently enacted amendments to the sentencing regime will help. Ms Wessels is further of the view that providing victims with the proper assistance based on the impact the acts of domestic violence have had, such as counselling and support is important but it is unclear if it can be legislated for.⁴⁹¹

9. It is suggested that a conviction for an offence of domestic violence should be coupled with a monetary fine, which would seek to ensure that survivors are compensated for the pain and suffering that they have undergone as a result of domestic

⁴⁸⁶ MOSAIC.

⁴⁸⁷ Ilitha Labantu.

⁴⁸⁸ Strategic Dialogue (Virtual) 2 February 2022.

⁴⁸⁹ Research Officer, Gender, Health & Justice Research Unit, Division of Forensic Medicine, Department of Pathology Faculty of Health Sciences, University of Cape Town.

⁴⁹⁰ Strategic Dialogue (Virtual) 2 February 2022.

⁴⁹¹ Strategic Dialogue (virtual) 2 February 2022.

violence.⁴⁹² Domestic violence often results in the victim needing to find safer accommodation and needing medical treatment for both physical and psychological trauma.⁴⁹³ Ilitha Labantu is further of the view that repeat offenders should be sanctioned heavily, taking into account the need for safety of the victim and the need for additional safety measures including witness protection during and after criminal proceedings.

10. Ms Vetton expresses her concern that where a woman is beaten to death, the charge and sentence handed down is for assault with the intent to do grievous bodily harm. She questions why “a bad tempered person or a person who says they cannot control their temper get the benefit thereof in terms of reduction of sentence because it was not premeditated”. In her view, this is an evidentiary problem which requires introducing the prior history of domestic violence in cases, and not a definitional issue.⁴⁹⁴ She states that a relevant question is why five percent of women who are murdered are in possession of a domestic violence protection order. A further question is whether human error or negligence on the part of the state contributed to the outcome and why the Criminal Justice System has not provided the assistance that was requested.⁴⁹⁵

11. Participants of the first strategic dialogue question whether convictions for acts of domestic violence could, at sentencing, be included in the National Register for Sex Offenders and whether its reach could therefore be expanded.⁴⁹⁶ Regional Court Judge President, Ms Wessels, however reasons that there is no such register for murders or other violent crimes and there may be a reluctance to expand it. However, she notes that the electronic repository provided for in the Domestic Violence Act, which will contain interim and final protection orders, would be available to the police and prosecution. She reasons that it would not be open for general access and that there are valid reasons for this. She further notes that the recent amendment to the bail provisions requires disclosure of previous protection orders.⁴⁹⁷

⁴⁹² Ilitha Labantu.

⁴⁹³ Ilitha Labantu.

⁴⁹⁴ Strategic virtual dialogue 9 February 2022.

⁴⁹⁵ Strategic virtual dialogue 9 February 2022.

⁴⁹⁶ Strategic Dialogue (Virtual) 2 February 2022.

⁴⁹⁷ Strategic Dialogue (Virtual) 2 February 2022.

C Preventative measures

12. A few respondents are of the view that mechanisms should be put in place to forewarn a prospective partner to the possibility of violence in a new relationship,⁴⁹⁸ as a perpetrator of domestic violence is prone to re-offend.⁴⁹⁹ It is therefore suggested that a register detailing previous offences perpetrated in the context of a domestic relationship, including the manner in which they were perpetrated (*modus operandi*) would provide an objective reflection of events.⁵⁰⁰ The question was posed whether, if the register was to remain closed to the public, it would be an option for the information to be accessed with the permission of the prospective partner.⁵⁰¹ Ilitha Labantu submits that registration on a domestic violence perpetrators list should be made public. It is of the view that this would forewarn a victim or potential victim of the potential danger of a repeat offender. It suggests that this may also extend further to future employers just as there is a provision not to allow persons who have been convicted of sexual offences with children or vulnerable people to work within the sphere of children or vulnerable people or progressive institutions that believe in gender equality. Legal Aid SA argues that people desirous of entering into a relationship or in a relationship should have the right to contact SAPS in a prescribed manner to establish if the prospective partner or partner has a history of domestic or sexual abuse. In so doing, it refers to similar legislation in the United Kingdom (the Domestic Violence Disclosure Scheme also known as Clare's law), which enables the British Police to disclose information to a victim or potential victim of domestic abuse about their partner's or ex-partner's previous abusive or violent offending.⁵⁰² The proposal is that a "Repeat Domestic Violence Offender Register" akin to the National Register for Sex Offenders be introduced to forewarn a victim or potential victim of the potential danger of a repeat offender, and that a victim/offender impact report could be useful in this regard. This would entail maintaining a National Register of Domestic Violence related offences from which victims must be warned by the police in writing of the previous convictions and the victim must sign to acknowledge receipt of the copy of the record.

⁴⁹⁸ Adv Linda Le Roux, TTC Case Manager, Port Elizabeth; Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council; Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager; Legal Aid SA.

⁴⁹⁹ Adv Linda Le Roux, TTC Case Manager, Port Elizabeth.

⁵⁰⁰ Adv Linda Le Roux, TTC Case Manager, Port Elizabeth.

⁵⁰¹ Strategic Dialogue (Virtual) 2 February 2022.

⁵⁰² Legal Aid SA

13. It further submits that mitigating risk or harm is a preventative measure. Healthy relationships can be promoted by addressing risk, by using the “Risk Assessment Tool for Victims of Domestic Violence” developed by the Department of Justice and protective factors at the individual, relationship, community and societal levels. In its view, prevention efforts should ultimately reduce the occurrence of inter-personal violence by promoting healthy, respectful, non-violent relationships.⁵⁰³ However, the National Commissioner of the SAPS has raised a concern around the efficacy of such a register, questioning whether the police could be held vicariously liable where a person was not notified of the risk of abuse.

14. In respect of further prevention measures, Legal Aid SA makes reference to a Technical package developed by the US Division of Violence Prevention in conjunction with the National Center for Injury Prevention and Control⁵⁰⁴ entitled “Preventing Intimate Partner Violence Across the Lifespan: A Technical package of Programs, Policies and Practices”, which contains a variety of strategies and approaches that could be used in combination in a multi-level, multi-sector approach to preventing intimate partner violence. Emphasis is placed on the primary prevention of intimate partner violence as well as support services rendered to victims. The package includes at primary prevention level, socio-emotional learning programs for the youth which have borne positive results; at secondary intervention level a program for substance-abusing partners and a couples-based program the Behavioural Couples Therapy (BCT) which in turn is associated with significant reductions in perpetration of inter-personal violence among couples participating in treatment groups. The package engages influential adults and peers in promoting positive relationship expectations and condemning violent and unhealthy relationship behaviours among adolescents and young adults; seeks to create protective communities through community-level approaches for creating protective environments against the perpetration of violence, which includes efforts to improve school climate and safety as well as modifying the physical and social environments of communities and to establish victim-centred support services which includes shelters, hotlines, crisis intervention and counselling, medical and legal services and access to community resources to help improve outcomes for survivors and mitigate long-term effects of domestic violence. These services aim to address the victims’ immediate and long-term needs and safety.

⁵⁰³ Legal Aid SA.

⁵⁰⁴ Niolon et al “Preventing Intimate Partner Violence Across the Lifespan”.

15. Mses Vetton and Bornman, however, view the forewarning of people seeking to enter a relationship of the danger that the prospective partner is a repeat offender of domestic violence and particularly in the form of a register impractical.⁵⁰⁵ Similarly, the National Commissioner of the SAPS questions the feasibility of a register as it would be seen as interfering in the intimate personal lives of persons by dictating the suitability of their interpersonal relationships.

16. Alternatively, it was suggested that it would be more effective to widen options for victims of domestic violence, including family members.⁵⁰⁶ In this regard, it is further suggested that greater duties should be placed on the Department of Human Settlements, Water and Sanitation to address the homelessness and housing instability experienced by women in abusive relationships and those subjected to family violence. Mses Vetton and Bornman submit that this would reduce dependence on abusive individuals and enable victims to leave abusive situations sooner rather than later, thus reducing their exposure to repeat victimisation.⁵⁰⁷ Pertinently, the SAPS comments that without implementing long-term solutions to address domestic violence, for example, the alleviation of the socio-economic circumstances to enable a victim to earn her own income, the offering of long term housing or accommodation to victims or even extensive counselling to break the cycle of violence, the arrest and detention of the perpetrator will remain cold comfort.⁵⁰⁸

17. Adv Coetzee of the National Prosecuting Authority (NPA) Sexual Offences and Community Affairs (SOCA) Unit submits that there is a need to explore the root cause of domestic violence.⁵⁰⁹ She submits that the aim of legislation is to place external controls on people without inner control. They are therefore highly unlikely to adhere to these controls. If the root cause is the psycho-social and economic impact of exposure to violence on children then this is where the intervention should be.⁵¹⁰ Ms Serote of Access Chapter 2 supports the suggestion that attention should be given to children exposed to domestic violence.⁵¹¹ She, however, questions the applicability of Western research being transposed in the Global South. She further relates that the reporting clause in both the Children's Act and the Sexual Offences Act require that there needs to be

⁵⁰⁵ Lisa Vetton & Sanja Bornman.

⁵⁰⁶ Lisa Vetton & Sanja Bornman.

⁵⁰⁷ Lisa Vetton & Sanja Bornman.

⁵⁰⁸ National Commissioner, South African Police Service.

⁵⁰⁹ Strategic Dialogue (virtual) 9 February 2022.

⁵¹⁰ Strategic Dialogue (virtual) 9 February 2022.

⁵¹¹ Strategic Dialogue (virtual) 9 February 2022.

evidence before a case is registered.⁵¹² This means that the Criminal Justice System is not preventative by nature, but only responsive after an incident.⁵¹³ In her view, victims need to be empowered to develop their skills and to make money in order to economically liberate themselves from these relationships. Ms Vetton agrees that the focus should rather be on deeply entrenched problems rather than providing a criminalised response.⁵¹⁴

18. Some respondents submit that the correct implementation of the law and a focus on prevention would ensure that all acts of domestic violence, including strangulation is treated with the necessary caution.⁵¹⁵ Dr Ramsoomar-Hariparsaad comments that one of the key barriers to femicide prevention is a lack of awareness on the part of the victim, the police, the courts and the wider criminal justice system of strangulation, previous death threats etc. as markers for femicide risk. She suggests that there needs to be awareness raising and risk assessment at every level to ensure joint understanding of when a woman, or someone who identifies as a women is at risk of near femicide or femicide. She further recommends that the current risk assessment and safety plans for women must be implemented, evaluated and that data used to inform secondary prevention of GBV and primary prevention of femicide.⁵¹⁶

19. Professor Andrews endorses the need to provide adequate and comprehensive support to victims of domestic violence so that they are able to engage with the criminal justice system.⁵¹⁷ This would include a guide on what to expect from the various role-players in the criminal justice system and should incorporate emotional support.⁵¹⁸

20. Respondents point out that a key goal of the Domestic Violence Act is to prevent repeat violence.⁵¹⁹ Consequently, the importance of analysing matters in which violence has not been prevented was raised. Mses Vetton and Bornman suggest that any family homicide in which the victim, or a family member, was in possession of a protection order obtained through the Domestic Violence Act at the time of their death (or had applied for

⁵¹² Strategic Dialogue (virtual) 9 February 2022.

⁵¹³ Strategic Dialogue (virtual) 9 February 2022.

⁵¹⁴ Strategic Dialogue (virtual) 9 February 2022.

⁵¹⁵ Lungile Debra Mashaba, Childline Mpumalanga; Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager; Commission for Gender Equality per Dr Dennis Matotoka, Legal Services.

⁵¹⁶ Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council.

⁵¹⁷ Professor Penelope Andrews, New York Law School.

⁵¹⁸ Professor Penelope Andrews, New York Law School.

⁵¹⁹ Lisa Vetton & Sanja Bornman.

one) should automatically trigger review by a panel comprising, at a minimum, the SAPS and independent experts in domestic violence.⁵²⁰ This should also be the case for intimate partner killings perpetrated by police officers.⁵²¹ The purpose of such reviews would not only be to determine whether or not police negligence contributed to the victim's death, but also to learn more about the prevention of intimate femicide.⁵²² They suggest that the following procedures could be adopted by the panel:

- All intimate femicides perpetrated by police officials must be immediately reported to either the provincial complaints coordinators of the SAPS Inspectorate, or the national office of the CSP⁵²³.
- Any other intimate femicide which occurs must be checked against SAPS 508(a), 508(b) and file of protection orders maintained by the police station in the jurisdiction where the killing occurred. Should the victim have been in possession of a protection order, or in the process of obtaining such an order, then this case must automatically be forwarded to the CSP.
- When a child is killed by a parent, their details must also be checked against this documentation to ascertain whether or not one of the parents was in possession of a protection order, or was in the process of applying for one. Where this is found, such cases must also be forwarded to the panel.⁵²⁴

21. With reference to recent research published by the SAMRC Mses Vetton and Bornman reason that in 2017 approximately 23 of the women murdered by their partners were in possession of a protection order at the time of their death,⁵²⁵ and that this is a manageable number for a panel to evaluate. They envisage obtaining useful learnings from such an evaluation, which in turn could be built into the risk assessments proposed by the amendments to the Domestic Violence Act.⁵²⁶

22. The National Commissioner of the SAPS is of the view that the focus should rather be on prevention as opposed to being reactive in nature as by that time the damage, including establishing of dependency on the abuser, has already occurred. It is suggested that the focus should particularly be on education, from a young age, to ensure the social reprogramming of society on the roles of sex and gender. Education should also include life orientation lessons, such as signs or warnings of trouble in a relationship, including the dangers of controlling and manipulative behaviour. Children should be taught from a young age that violence and abuse in a relationship is never

⁵²⁰ Lisa Vetton & Sanja Bornman.

⁵²¹ Lisa Vetton & Sanja Bornman.

⁵²² Lisa Vetton & Sanja Bornman.

⁵²³ An abbreviation for the Civilian Secretariat for Police.

⁵²⁴ Lisa Vetton & Sanja Bornman.

⁵²⁵ See Abrahams et al 'Decrease in Femicide in South Africa' (2022).

⁵²⁶ Lisa Vetton & Sanja Bornman.

normal or acceptable.⁵²⁷ It is also suggested that education at schools on gender norms would lead to non-acceptance of violence or harmful norms and stop cycles of violence in communities.⁵²⁸

23. The Commission for Gender Equality is further of the view that in terms of prevention and early intervention much more can be done, particularly in health and other social sectors. It comments that clinics and other health services have a significant role to play in detecting the possible presence of domestic violence and inter-personal violence in patients' homes and lives. It provides an example of an innovation in this regard, by referring to the recent introduction of mandatory domestic violence training for hairdressers and salon workers in Tennessee in the USA,⁵²⁹ on the understanding that hair and beauty salons are often at the heart of communities. The Commission for Gender Equality submits that this is an interesting possibility for the early detection of intimate-partner and domestic violence that can be extended to range of social sectors.⁵³⁰ During the first strategic dialogue the example of the system created in Florida, USA which also requires that all hairdressers should be trained in identifying and responding to domestic violence was used to demonstrate a preventative measure.⁵³¹

24. Ms Vetton agrees that the Department of Health and the Department of Social Development need to develop their guidelines in conjunction with civil society in order to make their role relevant to the needs of the victim.⁵³²

25. From a preventative perspective, a number of respondents submitted that in addition to legislation that is aimed at protecting women from violence, prevention initiatives should be developed and supported nationally and locally. In the view of Legal Aid SA "[C]ritical prevention initiatives should include universal screening for strangulation injury in women assessed to be victims of intimate partner violence, community-level substance abuse and domestic violence prevention programmes, and accessible and affordable support services and networks" as some of the critical prevention initiatives that require development and support at both the local and national levels.⁵³³

⁵²⁷ The National Commissioner of the South African Police Service.

⁵²⁸ Belinda Sellers, Childline Mpumalanga: Social Work and Helpline Manager.

⁵²⁹ Sparks "Salon workers will get domestic violence training thanks to new law"

⁵³⁰ Commission for Gender Equality per Dr Dennis Matotoka, Legal Services.

⁵³¹ Strategic Dialogue (virtual) 2 February 2022.

⁵³² Strategic Virtual Dialogue, 9 February 2022.

⁵³³ Legal Aid SA; This sentiment is endorsed by Belinda Sellers, Childline Mpumalanga, who submits that proper risk assessments need to be done by the police, doctors and other

26. In its submission, the SAPS comments that it is mindful of the devastating effect of domestic violence in society, is committed to the implementation of all legislative measures to address this scourge and that the protection of women and children is a priority for the Service.⁵³⁴ It emphasises that “no other organ of state is more involved in the addressing of domestic violence on a full-time basis than the Service, especially during weekends when these incidents are more prevalent, and when very limited other state resources are more available to support victims.” The SAPS submits that the recent amendments to the Domestic Violence Act limiting the granting of bail and imposing of minimum sentences in respect of certain domestic violence offences are aimed at strengthening the response, in the context of the criminal justice system, to domestic violence.⁵³⁵

27. The SAPS questions the current focus on the criminal law to address the ills of domestic violence.⁵³⁶ It submits that a preventative lens in which normative change is brought about in society would bear better results. It submits that society must be transformed to value the importance of different sexes and genders.⁵³⁷ This would, in its view, require a change in societal beliefs, cultural values and even systemic institutional prejudices that still form part of society.⁵³⁸ Furthermore, that key messaging would centre on respect and alternate methods of dispute resolution, emphasising that the use of violence is not the answer to resolve relational or any conflict. The SAPS emphasises the need for a holistic approach by all government departments and particularly the departments responsible for Education, Social Development and Communication towards moral regeneration. It submits that the criminal justice system cannot effect this change. Even if respondents of domestic violence remain in detention until their first appearance in court, this will not stop domestic violence in society. In fact, it is doubtful, in its view, that this measure will have a deterrent effect on other perpetrators of domestic violence.⁵³⁹

roleplayers; Dr Molefe Strategic Dialogue (virtual) 2 February 2022.

⁵³⁴ National Commissioner, South African Police Service.

⁵³⁵ National Commissioner, South African Police Service.

⁵³⁶ National Commissioner, South African Police Service.

⁵³⁷ National Commissioner, South African Police Service.

⁵³⁸ National Commissioner, South African Police Service.

⁵³⁹ National Commissioner, South African Police Service.

D Evaluation and preliminary recommendations

28. Comparatively, neither the United Kingdom nor Canada have a specific umbrella offence or system of sentencing for domestic violence.⁵⁴⁰ These countries choose rather to use the existing and new criminal law offences coupled with providing protective measures to victims of domestic violence, such as making assault an arrestable offence, making restraining orders available on conviction or acquittal or by providing a discretion on whether an offender should be released on bail.⁵⁴¹ The fact that violence has occurred in the context of a family or intimate relationship is furthermore seen as an aggravating factor when it comes to sentencing.⁵⁴² For example, section 742.1 of the Canadian Criminal Code limits the range of sentencing options in these matters by limiting the use of conditional sentences that would allow an offender to serve a sentence in the community.⁵⁴³

29. In New South Wales, the Crimes (Domestic and Personal Violence) Act No 8 of 2007 seeks to provide redress to persons in domestic relationships and those who experience personal violence outside a domestic relationship in one statute. It, however, colours existing crimes with the additional layer of being a domestic violence or personal violence crime without creating a stand-alone domestic violence crime. The underlying stance is

(g) that domestic violence is best addressed through a co-ordinated legal and social response of assistance and prevention of violence and, in certain cases, may be the subject of appropriate intervention by the court.⁵⁴⁴

30. To this end, it provides for a court to issue an apprehended domestic violence order which automatically prohibits the alleged offender from assaulting or threatening; stalking, harassing or intimidating the protected person or a person whom they are in a domestic relationship with; or intentionally or recklessly destroying or damaging any property, or harming an animal, that belongs to, or is in the possession of, the protected person or someone they are in a domestic relationship with.⁵⁴⁵ It additionally incorporates a stand-alone offence of stalking or intimidation. This is, however, in the context of a

⁵⁴⁰ Domestic Violence, Crime and Victims Act, 2005 (Canada); Criminal Code (Canada).

⁵⁴¹ See section 40 and further of the issue paper, the content of which is considered incorporated.

⁵⁴² Section 718.2 of the Criminal Code (Canada).

⁵⁴³ Government of Canada Family Violence Laws Available at <https://www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html> Accessed on 17 September 2021.

⁵⁴⁴ Section 9(3)(g) of the Crimes (Domestic and Personal Violence) Act 8 of 2007.

⁵⁴⁵ Section 36 of the Crimes (Domestic and Personal Violence) Act 8 of 2007.

completely codified criminal law system. The recent amendment of section 60(12)(b) of the Criminal Procedure Act 51 of 1977 by the Criminal and Related Matters Amendment Act, 2021 similarly provides that if the court is satisfied that bail may be granted in the context of domestic violence that the court must hold an enquiry and issue a final protection order before releasing the accused. The order is automatically issued with a suspended warrant of arrest that would be activated if the accused breached any of the prohibitions stipulated in the protection order.

31. The 2010 UN Handbook for Legislation on Violence against Women recommends that legislation by States Parties should provide for:

- increasingly severe sanctions for repeated incidents of domestic violence, regardless of the level of injury; and
- increased sanctions for multiple violations of protection orders.”⁵⁴⁶

32. The commentary to the Handbook however cautions that

repeated incidents of domestic violence are common and, when the same penalty is applied for each assault, the deterrent effect is questionable. In the United States and some countries in Europe, more severe penalties for repeated incidents have proven to be effective.⁵⁴⁷

33. The emphasis seems to be on providing a victim of domestic violence with adequate access to and protection by criminal justice stakeholders within the framework of the criminal law. The Handbook further cautions that in respect of sentencing, legislation should:

- provide that intervention programmes for perpetrators may be prescribed in sentencing and mandate that the operators of such programmes work in close cooperation with complainant/survivor service providers;
- clarify that the use of alternative sentencing, including sentences in which the perpetrator is mandated to attend an intervention programme for perpetrators and no other penalty is imposed, are to be approached with serious caution and only handed down in instances where there will be continuous monitoring of the sentence by justice officials and women’s non-governmental organizations to ensure the complainant/survivor’s safety and the effectiveness of the sentence; and

⁵⁴⁶ 2010 United Nations Handbook for Legislation on Violence Against Women 51.

⁵⁴⁷ 2010 United Nations Handbook for Legislation on Violence Against Women 52.

- mandate careful review and monitoring of intervention programmes for perpetrators and alternative sentencing involving women’s non-governmental organizations and complainants/survivors.⁵⁴⁸

34. The Criminal Procedure Act provides for the committal of an offender to a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992, in terms of section 296 in addition to or in lieu of any sentence. It also provides for conditional or unconditional postponement or suspension of sentence and caution or reprimand in terms of section 297. Where a prescribed minimum sentence has not been provided for, the court has the discretion to postpone the passing of sentence for five years on one or more of a number of conditions. These conditions include submission to instruction or treatment, and compulsory attendance or residence at a specified centre for a specified purpose. This includes a catch all condition “any other matter”. Arguably, this could include substance, psychological or psycho-social assessment and instruction, which may include anger management or relational skills. Notably, the recently amended Domestic Violence Act provides that in granting an interim or final protection order the court may order the respondent to appear before a specified magistrate’s court on a specified date to be assessed in terms of the Prevention of and Treatment for Substance Abuse, 2008 with a view to referral for treatment.⁵⁴⁹

35. Goodmark submits that alternatives to addressing violence in the context of domestic violence should be made available to victims. These alternatives could include restorative justice, which in addressing and redressing the violence, leaves the option open of continuing the relationship with the abusive partner. It is submitted that the victim is given the power to determine whether a restorative justice approach is appropriate to confront their partners.⁵⁵⁰ This process creates a platform for abusive partners to admit responsibility and to seek reparations. It could take the form of victim-offender mediation whereby the victim the offender and members of their community are brought together.⁵⁵¹ Stoops is of the view that domestic violence should be approached from the stance that it is a significant behavioural and public health issue. He submits that significant success has been had with reduction of recidivism, through domestic violence programs.⁵⁵²

⁵⁴⁸ 2010 United Nations Handbook for Legislation on Violence Against Women 53.

⁵⁴⁹ Section 7(4A) of the Domestic Violence Act.

⁵⁵⁰ Goodmark Healthy Alternatives to Prosecution Can Help Victims (2014).

⁵⁵¹ Goodmark Healthy Alternatives to Prosecution Can Help Victims (2014).

⁵⁵² Stoops ‘Mandatory Prosecutions Wouldn’t Change Violent Behaviour’ (2014).

36. In the United States, every state criminalises domestic violence and most courts engage a Coordinated Community Response (arrest, monitoring, and treatment) as part of their strategy to prevent future incidents of domestic violence.⁵⁵³ The outcome is that those convicted of domestic violence are mandated to attend a Batterer Intervention Program (BIP) for a period of 16 weeks of which there are an estimated 2500 – they use an approach which focuses on social and normative change. Some BIPs are coupled with cognitive behavioural change, restorative justice or conjoint or couple treatment, mostly occurring after the completion or after part-completion of the BIP (broken up in parts of 12 weeks and 4 weeks). In some cases, alternative options are offered instead of BIP.⁵⁵⁴ An analysis by Mills & Barocas of the BIPs delivered a number of themes. They are listed as follows:

- Attitudes and personal beliefs about gender roles and relationship dynamics of both offenders and victims;
- Identification as a perpetrator or victim;
- Perceptions of what led to the violence by both parties, including financial and housing stress, interpersonal communication, substance use and abuse, as well as children and parenting-related issues;
- Attitudes and beliefs and perceptions about the BIP including the desire for a conjoint treatment option;
- Attitudes and beliefs about the expectations of treatment and the mandatory nature thereof;
- Factors that influence the offender's participation in treatment - the offender's willingness to change and the role of the victim;
- The inclusion of restorative justice and the victim perspective emerged as a significant finding.⁵⁵⁵

37. The Mills & Barocas study found that voluntary victim participation in the treatment should not be prohibited and that the inclusion of restorative justice principles made the BIP more beneficial.⁵⁵⁶

38. The Council of Europe Convention on Preventing and Combating Violence against Women advocates for an integrated approach by all relevant organisations and enforcement agencies to collaborate to eliminate violence against women.⁵⁵⁷ The need to dismantle the underlying structural nature of GBV is identified as core to achieving

⁵⁵³ Mills & Barocas 'An In-depth Examination of Batterer Intervention' 1.

⁵⁵⁴ Mills & Barocas 'An In-depth Examination of Batterer Intervention' 1.

⁵⁵⁵ Mills & Barocas 'An In-depth Examination of Batterer Intervention' 7 - 10.

⁵⁵⁶ Mills & Barocas 'An In-depth Examination of Batterer Intervention' 11.

⁵⁵⁷ Endorsed by Rehse et al MOSAIC SAFE Baseline study 2021; Rehse presentation SAPS & DHET Training Webinar (2022).

substantive equality.⁵⁵⁸ Rehse et al note that in order to bring about structural change, training on GBV needs to be inter-woven with an understanding of the dynamics of GBV and not only the completion of forms as provided for in directives and the National Instructions of the police. The training should further not be generic but be informed by the local context and provided according to rank and role of the officials. Optimally this would mean that training is conducted using collaboration with local civil society organisations.⁵⁵⁹ The opening remarks by General Masemola, the National Commissioner of the SAPS at the South African Police Service and Department of Higher Education and Training Webinar: Addressing Gender-Based Violence and Femicide in South Africa held in August 2022 confirms an understanding at the highest level in the police that “a systems approach with implementable solutions” is needed to address GBVF as “it is a multi-faceted issue deserving of a multi-faceted approach.”⁵⁶⁰ The Webinar itself, evidence of the recognition of the need for collaboration, provided insight into practical interventions piloted by the SAPS. As part of the SAPS hotspot intervention programme, provincial offices were requested to identify factors contributing to and precipitating prevalence of GBV; to identify gaps or weaknesses in services provided and to develop intervention plans to improve response. The police identified the abuse of liquor and substances as common factors precipitating GBV. The proposed intervention includes conducting intensified liquor control, multi-sectoral operations together with awareness campaigns on what constitutes domestic violence, sexual offences, trends and encouraging reporting.⁵⁶¹

39. For the sake of comparison, the Council of Europe Convention on Preventing and Combating Violence against Women Convention defines “domestic violence” broadly to include “all acts of physical, sexual, psychological or economic violence”. Although it provides for a number of offences in the context of violence against women, it does not criminalise domestic violence as defined nor does it create offences that are specific to persons who are or have been in a relationship.⁵⁶² Pertinently, the Convention lists a number of aggravating circumstances to be taken into consideration at sentencing:

⁵⁵⁸ Council of Europe Convention on preventing and combating violence against women 2.

⁵⁵⁹ Rehse et al MOSAIC SAFE Baseline study 2021; Rehse presentation SAPS & DHET Training Webinar (2022).

⁵⁶⁰ Masemola opening remarks SAPS & DHET Training Webinar (2022).

⁵⁶¹ Gossman & Mncadi presentation SAPS & DHET Training Webinar (2022).

⁵⁶² The pertinent crimes that are created in the Convention are contained in Article 33 which calls for the criminalisation of psychological violence; Article 34 stalking; Article 35 physical violence; and Article 36 sexual violence, including rape. The offence of psychological violence is confined to “the intentional conduct of seriously impairing a person’s psychological integrity through coercion or threats”. In turn the offence of stalking is confined to “intentional conduct of repeatedly engaging in threatening conduct directed at

- a the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority;
- b the offence, or related offences, were committed repeatedly;
- c the offence was committed against a person made vulnerable by particular circumstances;
- d the offence was committed against or in the presence of a child;
- e the offence was committed by two or more people acting together;
- f the offence was preceded or accompanied by extreme levels or violence;
- g the offence was committed with the use or threat of a weapon;
- h the offence resulted in severe physical or psychological harm for the victim;
- i the perpetrator had previously been convicted of offences of a similar nature.⁵⁶³

40. It is notable that the Convention expressly prohibits mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence including domestic violence.⁵⁶⁴ Furthermore, although recognised as a vulnerable group, crimes of murder, assault and rape of those who identify as lesbian, gay, or any person contained in this associated range of identifiable vulnerable groups, are charged under these general crimes. The motive of the offender, however, prominently features in the sentencing of the offender.⁵⁶⁵

41. South African courts have consistently passed sentences, which reflect consideration of aggravating factors accompanying various crimes of domestic violence without being specifically mandated to.⁵⁶⁶ The nature of the violence perpetrated in these matters is, however, particularly grave and indicative of a complete lack of restraint within the domestic context, to the point of taking a domestic partners life.⁵⁶⁷ While financial woes may exacerbate domestic conflict, as evidenced in *Rohde v S*,⁵⁶⁸ domestic violence

another person, causing her or him to fear for her or his safety". The offence of physical violence is not specifically defined and the offence of sexual violence, including rape, while containing a broad description is also open-ended. See the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul 11.V.2011 Council of Europe Treaty Series – No.210 10.

⁵⁶³ Council of Europe Convention on preventing and combating violence against women 13.

⁵⁶⁴ Council of Europe Convention on preventing and combating violence 13.

⁵⁶⁵ CEDAW Committee Concluding observations on the fifth periodic report of South Africa 2021 para 177 - 178.

⁵⁶⁶ *Kgobane v S* High Court of South Africa, Gauteng Division, Pretoria Case no A150/2021 24 February 2022; *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009; *Cornelissen v S* High Court of South Africa, Free State Division, Bloemfontein A110/2021 10 February 2022.

⁵⁶⁷ *Rohde v S* (815/2019) [2021]ZASCA 134; 2021 (2) SACR 565 (SCA); [2021] 4 All SA 710 (SCA) (5 October 2021); *Rohde v The State* (Case no 815/2019) [2021] ZASCA 134 (5 October 2021)

⁵⁶⁸ *Rohde v S* (815/2019) [2021]ZASCA 134; 2021 (2) SACR 565 (SCA); [2021] 4 All SA 710

is not a respecter of social standing or economic stability. In the matter of *Kgobane v S*,⁵⁶⁹ Acting Judge Bokako summarises the guidelines on minimum sentences as found in *S v Malgas*⁵⁷⁰ as follows:

21.1 Courts are required to approach the imposition of sentence aware that legislature has imposed life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

21.2 The specified sentences are not to be departed from lightly and for flimsy reasons.

21.3 All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

21.4 If the sentencing court find the prescribed sentence is disproportionate to the crime, the criminal and the needs of the society it shall impose such lesser sentence.

21.5 The sentencing court must always take into account the benchmark that was provided by the Legislature.

42. After considering these guidelines, the court held that the court a quo had correctly considered the aggravating factors in the case and that notwithstanding the cumulative sentence being 25 years, there were no grounds to change the sentence of 15 years for attempted murder or the 10 year sentence for rape.⁵⁷¹ Both the Regional Court and the High Court viewed the acts of violence in a very serious light.

43. In *Rohde v S*,⁵⁷² the wife of the accused was murdered by way of smothering and/or manual strangulation, after which he attempted to stage a suicide scene. The conviction was tested and stood on appeal. While the victim was not subjected to a sustained assault, the manual strangulation was fatal followed by the placement of a ligature around her neck.⁵⁷³ The court in finding that the “sentence of this Court must reflect the abhorrence of society with regard to violence against women”⁵⁷⁴ sentenced the accused to the minimum sentence of 15 years for the murder of his wife under Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. He was additionally found unfit to possess a firearm.

(SCA) (5 October 2021)

⁵⁶⁹ *Kgobane v S* High Court of South Africa, Gauteng Division, Pretoria Case no A150/2021 24 February 2022 para 21.

⁵⁷⁰ *S v Malgas* 2001(1) SACR 469 SCA.

⁵⁷¹ *Kgobane v S* High Court of South Africa, Gauteng Division, Pretoria Case no A150/2021 24 February 2022.

⁵⁷² *Rohde v S* (815/2019) [2021]ZASCA 134; 2021 (2) SACR 565 (SCA); [2021] 4 All SA 710 (SCA) (5 October 2021)

⁵⁷³ See para 86.

⁵⁷⁴ Para 92.

44. In the matter of *Lorimer v S*⁵⁷⁵ the offender raised self-defence against the charge of murdering his wife. He alleged that in protecting himself he “grabbed her around her neck and throat with his arm and applied pressure in order to stop her attack and subdue her. This choking had led to the deceased’s death, but without any intent upon his part to kill her.”⁵⁷⁶ In cross-examination, he explained that it took between 30 seconds and a minute of the chokehold before his wife stopped resisting.⁵⁷⁷ The forensic pathologist testified that she did not die as a result of asphyxiation but as a result of the strong or serious pressure applied to her neck, which resulted in blocking of the veins alongside the vertebrae (veinous occlusion). The court found Lorimer guilty of culpable homicide since the chokehold was dangerous and the death of his wife was reasonably possible. He should therefore have taken steps to guard against this.⁵⁷⁸ He was convicted of defeating the ends of justice and culpable homicide and sentenced to 10 years imprisonment of which four years was suspended for a period of five years if he was not convicted of culpable homicide deriving from an assault upon another person, committed during the period of suspension. Although a report by a correctional officer and the probation officer’s report both recommended a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, the court found it one-sided. The court focussed on some of the other objects of sentencing, which included the impact on the deceased’s family and the need to deter domestic violence. A key consideration in the appeal against sentencing the offender to imprisonment in this matter revolved around maintaining the integrity of family care, the best interests of the children born of this relationship and the State’s duty to punish criminal conduct.⁵⁷⁹ The Constitutional Court laid down guidelines in *S v M*⁵⁸⁰ in respect of sentencing a primary caregiver revolving around the best interests of minor children. The crux of the case was that the “punishment imposed should be the one least damaging to the interests of the children, given the legitimate range of choices available to the sentencing court.”⁵⁸¹ The guidelines include assessing whether an accused is a primary caregiver, the effect on

⁵⁷⁵ *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009.

⁵⁷⁶ Para 3.

⁵⁷⁷ *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009 Para 12.

⁵⁷⁸ *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009 para 13.

⁵⁷⁹ *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009 Para 18.

⁵⁸⁰ *S v M* 2007 (2) SACR 539 (CC).

⁵⁸¹ *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009 Para 17.

the children of a custodial sentence if considered, steps to be taken to ensure that the children are adequately cared for during the caregiver's incarceration, that a non-custodial sentence is in the best interests of the children and using the paramountcy principle as a guide in deciding on the sentence – weighing up maintaining the integrity of family care and the State's duty to punish criminal misconduct.

45. The court held that the offender was a first time offender, was gainfully employed, carried out his parenting duties towards his children, had no previous history of violence against his deceased wife, would carry the stigma of the conviction for the rest of his life and would carry the burden of explaining to his children how their mother had died.⁵⁸² The court, however, emphasised that “the death occurred within the family or marriage sphere and, furthermore, at the hands of the appellant who bore a responsibility to protect both his wife and his children. However, other than the offender in *S v Nesani*,⁵⁸³ Lorimer not only initially concealed his crime but failed to express his remorse to the family or the court, rather opting to blame the deceased for her own death through his defence of self-defence.⁵⁸⁴ The court wisely identified the unique psychological challenge to be faced by children raised by a father who is revealed as the cause of their mother's death and who ostensibly is not punished for doing so.⁵⁸⁵ The High Court further recognised that the deceased's death occurred in the course of an unlawful assault by the offender on his wife and that he chose not to release the prolonged and powerful pressure applied by him through a choke-hold on her neck.⁵⁸⁶ The custodial sentence was found to be reasonable. Pertinently Justice Sachs held that:

As the Zinn triad recognises, the community has a great interest in seeing that its laws are obeyed and that criminal conduct is appropriately prosecuted, denounced and penalised. Indeed, it is profoundly in the interests of children that they grow up in a world of moral accountability where self-centred and antisocial criminality is appropriately and publically repudiated.⁵⁸⁷

46. It is trite that section 51 of the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act) has limited but not removed the court's discretion in imposing

⁵⁸² *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009 Para 24.

⁵⁸³ *S v Nesani* (079/2008) [2008] ZASCA 122 (26 September 2008).

⁵⁸⁴ *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009 Para 24.

⁵⁸⁵ *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009 Para 31.

⁵⁸⁶ *Lorimer v S* High Court of South Africa, Western Cape High Court, Cape Town Case number A57/2009 Para 34.

⁵⁸⁷ *S v M* 2007 (2) SACR 539 (CC) para 40

sentences in respect of the offences referred to in Part 1 of Schedule 2. The Criminal and Related Matters Amendment Act 12 of 21 has further enhanced the application of Schedule 2 by expressly including the crime of attempted murder in respect of offences listed in Part 1 and the inclusion of the death of a victim as a result of physical or sexual abuse in the context of domestic violence; and rape in the context of a domestic relationship. The penalty for committing a crime listed under Part 1 is life imprisonment.

47. Although the court in *S v SMM*⁵⁸⁸ confirmed the need for a court to be dispassionate and objective in passing sentence, the court emphasised that in striving to arrive at a sentence which is just and fair to both the victim and the perpetrator, it should have regard to the nature of the crime and the interests of society.⁵⁸⁹ *S v Rabie* further issues a reminder that although a judicial officer

[W]hile not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.⁵⁹⁰

48. In *Cornelissen v S*,⁵⁹¹ the Free State Division of the High Court was tasked with reviewing the conviction of the offender of life imprisonment imposed by the Regional Court in Bloemfontein for the rape, kidnapping and assault with the intent to do grievous bodily harm to his wife. The imposition of life imprisonment in terms of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 activated an automatic right to appeal in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977. The High Court assessed that the offender's denial of liability continued to place two mutually destructive versions of events before the court. As with matters of this nature, the offences in the main took place in private, rendering the complainant a single witness. The conviction of life imprisonment was activated by the rape of the offender's wife twice in the period she was kept captive. The High Court confirmed the conviction in spite of the offender being a breadwinner, father to three minor children and being a first time offender. The Court emphasized the abuse within the context of ongoing abuse and the trial court's observation that the conduct was indicative of a "masculine display of power". Weighing up the personal circumstances of the offender, the nature and seriousness of the offences and the interest of society, the High Court held that there were no substantial and compelling circumstances⁵⁹² to deviate from the prescribed life sentence.

⁵⁸⁸ *S v SMM* 2013 (2) SACR 292 (SCA)

⁵⁸⁹ *S v SMM* 2013 (2) SACR 292 (SCA) para 13

⁵⁹⁰ Insert reference

⁵⁹¹ *Cornelissen v S* High Court of South Africa, Free State Division, Bloemfontein A110/2021 10 February 2022

⁵⁹² *Cornelissen v S* High Court of South Africa, Free State Division, Bloemfontein A110/2021

49. Notwithstanding a protection order being in place and the complainant testifying that she collected the protection order to report the matter to the Bloemspruit police as they failed to respond to her call for assistance and her consequent laying of a charge of rape and kidnapping, the court found that the “terms thereof are of no relevance in the appeal as he was not charged with contravention thereof.”⁵⁹³ In the matter of *Kgobane v S*,⁵⁹⁴ where a jilted lover subjected a woman to grievous bodily harm including assaulting, raping, choking and attempting to hang her, Acting Judge Bokako states that “[T]he high incidence of sexual violence suggests that male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa. Some men view sexual violence as a method of reasserting masculinity and controlling women.”⁵⁹⁵ This sentiment was endorsed by the court in *Rohde v S*⁵⁹⁶ where it was held that “[R]egrettably violence against women and children has become a pervasive phenomenon internationally and this country has in recent times seen GBV increase to intolerable and unacceptable proportions.”

50. In the matter of *Ferreira, Chilambo, Koesyn v S*⁵⁹⁷ the tables were turned in that the victim of domestic violence was found guilty of the premeditated murder of her intimate partner, a man many years her senior who had repeatedly and extensively abused her mentally and physically for several years.⁵⁹⁸ Part of this abuse was throttling her during intercourse to the extent that her eyes bulged and she could not breathe and at one point had to undergo corrective throat surgery.⁵⁹⁹ It also entailed her leaving him and being traced and returned on four occasions followed by being raped by him and being threatened by rape by others leading to Rape Trauma Syndrome.⁶⁰⁰ The expert testimony confirmed that the fact that she elicited the assistance of third parties to kill her partner and did not do it herself was consistent with similar case studies.⁶⁰¹ The “victims” personal inability to defend herself against the abuse extended to not being able to kill

10 February 2022 para 41.

⁵⁹³ *Cornelissen v S* High Court of South Africa, Free State Division, Bloemfontein A110/2021 10 February 2022 para 6.

⁵⁹⁴ *Kgobane v S* High Court of South Africa, Gauteng Division, Pretoria Case no A150/2021 24 February 2022.

⁵⁹⁵ *Kgobane v S* High Court of South Africa, Gauteng Division, Pretoria Case no A150/2021 24 February 2022 para 19.

⁵⁹⁶ *Rohde v S* (815/2019) [2021]ZASCA 134; 2021 (2) SACR 565 (SCA); [2021] 4 All SA 710 (SCA) (5 October 2021) para 92

⁵⁹⁷ *Ferreira, Chilambo, Koesyn v S* Case No 245/03 SCA 22 March 2004.

⁵⁹⁸ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 2.

⁵⁹⁹ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 22.

⁶⁰⁰ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 26

⁶⁰¹ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 29.

him. In the words of the expert “The decision to kill Mr Parkman appears to have been a desperate act of self-preservation aimed at maintaining what little physical and psychological integrity Ms Ferreira felt she still possessed.”⁶⁰²

51. The court, in convicting the accused of murder, was bound to impose a sentence of life imprisonment in terms of the Criminal Law Amendment Act 105 of 1997 unless “substantial and compelling circumstances” were present.⁶⁰³ Referring to the Malgas judgment, the majority judgment in the Supreme court of Appeal confirmed that the sentence could be reduced if there were “truly convincing reasons” or “weighty justification” indicating that the sentence would be “unjust or disproportionate to the crime, the offender and the legitimate needs of society.”⁶⁰⁴ The Supreme Court of Appeal considered that the court would need to place itself in the position of the woman concerned and that judging the case to give effect to substantive equality in terms of section 9(1) of the Constitution included “treating an abused woman accused with due regard for gender difference in order to achieve equality of judicial treatment.”⁶⁰⁵ The subjectively perceived “real and present danger” was held to be at the core of understanding why alternate means to extricate herself from the clutches of her abuser were not followed.⁶⁰⁶ The majority judgment further held that “the criterion for determining moral blameworthiness, is subjective”. The belief and intent of the accused does not therefore impact on guilt but on the moral blameworthiness of the accused when it comes to sentencing.⁶⁰⁷ In other words, where the deceased has not been killed in self-defence, thereby providing an objective justification, the killing of an abusive spouse may still be justifiable in mitigation of sentence.

52. It stands to be noted that Justice Marais in his dissenting judgment held that in recognising the abhorrent nature of domestic violence, it should also be recognised that an understanding of and provision of remedies by the State and civil society have presented avenues of support to those who are victims of domestic violence.⁶⁰⁸ Furthermore, that most lawyers and judges are aware of the complexity of these matters. At the heart of his dissent is that presiding officers’ attempt “as best they can, to put themselves in the shoes of the persons who testify before them, whether they be

⁶⁰² *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 29.

⁶⁰³ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 3.

⁶⁰⁴ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 5.

⁶⁰⁵ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 40.

⁶⁰⁶ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 45.

⁶⁰⁷ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 21.

⁶⁰⁸ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 58 - 59.

witnesses, the litigants themselves, or, in a criminal case, the accused.” Further that, in doing so recognition is given to the subjectively held beliefs of an accused person to assess the truth of the allegation.⁶⁰⁹ Based on the evidence presented to the court, the dissenting judgment records that while sympathy was due to the victim for the gross abuse she was subjected to, that it could not automatically be deducted that society had failed to provide her with another way out of the relationship, as she had not made use of any of the other remedies available to her,⁶¹⁰ such as seeking intervention from the police,⁶¹¹ or giving society a fair chance of helping her.⁶¹² In a troubling, twist one of the suggested remedies proposed by the honourable justice was to subject the deceased to the very abuse (threats of abuse or physical abuse) that the accused had been subjected to.⁶¹³ The court, however, concluded that:

It goes without saying that it is also the duty of the courts to view domestic violence in a most serious light and impose sufficiently rigorous sentences upon offenders to put paid to any perception that courts and the authorities are soft on domestic violence.⁶¹⁴

53. Mention was made in both *Ferreira v S*⁶¹⁵ and *DS v S*⁶¹⁶ that the appellants (the alleged victims of domestic violence) had not laid criminal charges against the deceased in respect of the domestic violence. The complexity of these matters is, however, explained in *Minister of Police v Van der Watt and Another*⁶¹⁷ where the court records that “As Ms Van der Watt was financially dependent on her husband, she did not press charges against him.”⁶¹⁸ In *S v Engelbrecht*,⁶¹⁹ the court in turn held that “where a party relies on domestic violence to ameliorate a sentence, it must discharge an extra ordinary evidentiary burden of proving the existence, the extent, the nature, the duration and the impact of the domestic violence.”

54. While prevention may be touted as the least harm-filled approach, the CEDAW Committee reports that “[I]nstitutional weaknesses, limited resources, a lack of

⁶⁰⁹ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 60 - 61.

⁶¹⁰ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 63.

⁶¹¹ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 64.

⁶¹² *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 64.

⁶¹³ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 63.

⁶¹⁴ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 71.

⁶¹⁵ *Ferreira, Chilambo, Koesyn v The State* Case No 245/03 SCA 22 March 2004 par 63.

⁶¹⁶ *DS v The State* Case no 1292/2021 SCA 26 September 2022.

⁶¹⁷ *Minister of Police v Van der Watt and Another* (1009/2021) [2022] ZASCA 114 (21 July 2022).

⁶¹⁸ *Minister of Police v Van der Watt and Another* (1009/2021) [2022] ZASCA 114 (21 July 2022) par 6.

⁶¹⁹ *S v Engelbrecht* 2005 (2) SACR 163 (W) 47.

understanding of the root causes of domestic violence and a lack of coordination limit the effectiveness of GBV prevention programmes.”⁶²⁰ Furthermore, that notwithstanding awareness sessions and dialogues on domestic violence and femicide, and displaying a risk assessment tool at police stations and courts pointing to danger signals in abusive relationships, violent and patriarchal attitudes remain entrenched.⁶²¹

55. The perception internationally and nationally is that GBV has escalated during the COVID-19 lockdown periods and for the purpose of the latest Afrobarometer over the 2021 year.⁶²² The primary underlying factors were identified as alcohol and drug abuse and unemployment.⁶²³ Significantly, the majority of the general public in South Africa are of the view that GBV violence is a criminal matter requiring involvement and resolution by law enforcement.⁶²⁴ However, according to Amisi et al, framing GBV and in turn domestic violence, as an ever-worsening crisis “serves not only to catastrophize this form of violence but leaves little room for any hope that what is essentially a social condition can be stopped or addressed in any meaningful way”.⁶²⁵ While the knee-jerk reaction may be to ramp up punitive measures in respect of crimes against women and children, the outcome of increased punitive measures has been shown to have little effect on the levels of violence. Generally imprisonment is largely seen by society as a panacea for crime prevention or deterrence.⁶²⁶ This, however, begs the question as to how filling prisons with violent men will stop violence.⁶²⁷ In so doing, is society not providing a setting for increased violence? It is not contested that crimes committed within intimate relationships and towards family members should be dealt with swiftly and sufficiently to address the conduct. Direct incarceration may not be the solution, given the relational, emotional and financial intricacies and inter-dependencies that are involved. Non-custodial sentencing measures which include community service, house arrest and suspended sentences minimises unnecessary overcrowding in prisons and lowers the costs of incarceration. It gives the offender an opportunity to continue to be economically productive and could aid meaningful family reintegration.⁶²⁸

⁶²⁰ CEDAW Committee Report Inquiry concerning South Africa 2021par 42.

⁶²¹ CEDAW Committee Report Inquiry concerning South Africa 2021par 45 - 46.

⁶²² The Institute for Justice and Reconciliation Afrobarometer 2021.

⁶²³ The Institute for Justice and Reconciliation Afrobarometer 2021.

⁶²⁴ The Institute for Justice and Reconciliation Afrobarometer 2021.

⁶²⁵ Amisi et al ‘Framing gender-based violence as a ‘crisis’.

⁶²⁶ Mpedi & Mashabela ‘Justice cannot be done by imprisoning offenders as an example to others’.

⁶²⁷ Amisi et al ‘Framing gender-based violence as a ‘crisis’.

⁶²⁸ Mpedi & Mashabela ‘Justice cannot be done by imprisoning offenders as an example to others’.

56. Sentencing has evolved over time. In South Africa, the death penalty and physical punishment such as whipping have given way to minimum life sentences.⁶²⁹ The drive towards harsh sentencing has had the undesirable effect of overcrowding in prisons. Paradoxically therefore at a time when our prisons are so overcrowded and literally bursting at the seams, bearing witness to the ineffectiveness of the heightened use of the penal system to deter or prevent violence, the solution most often touted in response to acts of domestic violence is amplified sentences and lengthy incarceration. Arguably, although there may be a role for the criminal law to provide protection to the survivor of domestic violence in the immediate aftermath of an instance of domestic violence, a criminal record and harsh sentencing and incarceration may not be beneficial to survivors or provide appropriate redress in the wake of such a traumatic event.⁶³⁰ It may not only exacerbate or cause further financial stress but may make family reunification (if that is an option) near impossible. Most importantly though, “there is little evidence that harsh criminal legal strategies deter violence”.⁶³¹ These include pro-arrest policies, pro-prosecution policies, domestic violence courts and court-referred treatment programmes. According to Peacock and documented research it may in fact cause violence to escalate.⁶³² Should it be an option that where a crime of this nature has been committed alternative sentencing aimed at meaningful reintegration of the family should be considered, if the circumstances of the particular case and the willingness of the victim to embark on this journey so indicate?

57. Peacock advocates for adopting an approach which addresses the “social, structural, institutional, and historical drivers of violence”. The aim is to focus on preventing the violence from occurring in the first place as opposed to the increasing focus on criminalising acts of inter-personal violence. He argues that as the latter approach gives rise to an inappropriate authoritarian remedy often leading to incarceration, it does not meet the needs of the survivors or victims and does little to advocate for normative change to prevent violence in broader society.⁶³³ Peacock argues that in spite of one of the key outcomes of the 65th session of the UN Commission on the Status of Women in 2021, in which it emphasised the need to invest in sustainable

⁶²⁹ Mpedi & Mashabela ‘Justice cannot be done by imprisoning offenders as an example to others’.

⁶³⁰ Peacock Moving Beyond a Reliance on Criminal Legal Strategies (2022) 1892.

⁶³¹ Peacock Moving Beyond a Reliance on Criminal Legal Strategies (2022) 1893.

⁶³² Peacock Moving Beyond a Reliance on Criminal Legal Strategies (2022) 1893.

⁶³³ Peacock Moving Beyond a Reliance on Criminal Legal Strategies (2022) 1890.

solutions to violence, the response in a number of countries has been to emphasise punitive criminal sanctions over prevention.⁶³⁴

58. The 2011 United Nations General Assembly resolution emphasises the need to restore a sense of dignity and control to victims of GBV,⁶³⁵ and at the same time for States parties to review, evaluate and update criminal and civil laws in order to ensure that “all forms of violence against women are criminalized and prohibited”.⁶³⁶ Furthermore, that the “primary responsibility for initiating investigations and prosecutions lies with the police and prosecution authorities and does not rest with women subjected to violence, regardless of the level or form of violence”.⁶³⁷

59. In its paper on social transformation, the ANC’s 55th National Conference resolutions around Gender-based Violence and Femicide include a multi-varied response which includes that the criminal justice system response to GBVF should be enhanced and among others that there should be no bail and parole for perpetrators of GBVF.⁶³⁸ It also resolves that “other forms of societal interventions which may include rehabilitation or any other treatment” aimed at prevention should be considered.⁶³⁹ Related resolutions provide for facilitation of housing to victims and survivors of GBVF,⁶⁴⁰ conducting research into the impact of substance abuse,⁶⁴¹ up-scaling of social behavioural change programmes,⁶⁴² promotion of community dialogues⁶⁴³ and community-based mental health treatment.⁶⁴⁴ These resolutions recognise the drivers of GBV, namely normalisation of violence, patriarchy, substance abuse, trauma and mental health problems and “especially, exposure to violence, child abuse, and intergenerational transmission of violence.”⁶⁴⁵ The stance of the resolutions is, however, predominantly punitive.

60. In the context of domestic violence, the lack of affordable housing, access to public housing and inadequate provision of long-term safe housing, especially in rural

⁶³⁴ Peacock Moving Beyond a Reliance on Criminal Legal Strategies (2022) 1891.

⁶³⁵ UN General Assembly Sixty-fifth session (2011) 9.

⁶³⁶ UN General Assembly Sixty-fifth session (2011) 3.

⁶³⁷ UN General Assembly Sixty-fifth session (2011) 10.

⁶³⁸ ANC 55th National Conference Resolutions Social Transformation par 1(e) p3.

⁶³⁹ ANC 55th National Conference Resolutions Social Transformation par 6 p3.

⁶⁴⁰ ANC 55th National Conference Resolutions Social Transformation par 7 p3.

⁶⁴¹ ANC 55th National Conference Resolutions Social Transformation par 11 p3.

⁶⁴² ANC 55th National Conference Resolutions Social Transformation par 14 p3.

⁶⁴³ ANC 55th National Conference Resolutions Social Transformation par 16 p3.

⁶⁴⁴ ANC 55th National Conference Resolutions Social Transformation par 18 p3.

⁶⁴⁵ Peacock Moving Beyond a Reliance on Criminal Legal Strategies (2022) 1896.

areas means that women “are forced to remain in or return to situations of domestic violence . . . where they risk the safety and health of themselves and their children”, thereby transgressing the right to be free from violence.⁶⁴⁶ The Shadow report of 2011 specifically recommends that immediate and longer-term housing should be available to women exiting violent domestic relationships.⁶⁴⁷ Given the escalating levels of domestic and other inter-personal violence, it is perhaps time to carefully assess the efficacy of existing strategies and consider which strategies should be employed and funded to combat GBV.⁶⁴⁸

61. Article 16 of CEDAW general recommendation No.19 states that “[F]amily violence is one of the most insidious forms of violence against women.”⁶⁴⁹ It further acknowledges that “[L]ack of economic independence forces many women to stay in violent relationships.” In this respect, the CEDAW specifically recommends under paragraph 24 of Article 16 that:

- (k) States parties should establish or support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling;
- And (r) Measures that are necessary to overcome family violence should include:
 - (i) Criminal penalties where necessary and civil remedies in cases of domestic violence; . . .
 - (iii) Services to ensure the safety and security of victims of family violence, including refuges, counselling and rehabilitation programmes;
 - (iv) Rehabilitation programmes for perpetrators of domestic violence;
 - (v) Support services for families where incest or sexual abuse has occurred;”
- And (s) States parties should report on the extent of domestic violence and sexual abuse, and on the preventive, punitive and remedial measures that have been taken.⁶⁵⁰

62. Arguably, to develop evidenced based prevention programmes to address the prevalence of domestic violence and the causes thereof, reliable data is needed. Under-

⁶⁴⁶ CSVr et al Shadow Report on the Implementation of CEDAW (2011) 23.

⁶⁴⁷ CSVr et al Shadow Report on the Implementation of CEDAW (2011) 24.

⁶⁴⁸ Peacock Moving Beyond a Reliance on Criminal Legal Strategies (2022) 1903.

⁶⁴⁹ CEDAW/C/GC/19 1992 United Nations Committee on the Elimination of Discrimination against Women (CEDAW), General recommendation No.19 on violence against women par 24 (g) and (h).

⁶⁵⁰ CEDAW/C/GC/19 1992 United Nations Committee on the Elimination of Discrimination against Women (CEDAW), General recommendation No.19 on violence against women par 24.

reporting and reticence of help seeking measures, for various reasons, is common cause. Police and prosecution data and statistics are therefore not a good reflection of the extent of domestic violence in the broader population. Documenting incidences of domestic violence by functionaries employed by the Departments of Health, Social Development, Basic Education, and Higher Education and Training, coupled with targeted awareness raising by the Department of Communications and Digital Technologies; as provided for in the newly inserted section 18B of the Domestic Violence Act linked to the insertion of a category related to the prevalence of intimate and domestic violence in the national population surveys conducted by Statistics South Africa (Stats SA), may provide a more accurate reflection of not only the prevalence of violence generally but geographic areas which need specific attention.

63 Wilson et al propose that the prevention of domestic violence should be a priority. They identify domestic violence as “a global public health problem that places a significant economic and health burden on the community”.⁶⁵¹ If the end goal is zero tolerance of violence in the home or between intimate partners as an offshoot to zero tolerance of GBV, then the starting point would arguably be understanding the root causes of this violence.⁶⁵² One of the identified routes to achieving this would include prevention through changing social and cultural norms that underpin and contribute to the tolerance of violence in the home.⁶⁵³ A shift towards preventing violence before it happens seems to be gaining momentum in South Africa. In 2022, the Premier for the Western Cape announced that a Violence Prevention Unit would be established in the Western Cape Department of Health with a view to identifying and designing interventions to reduce violence in communities across the province as part of a multi-pronged whole-of-government approach to address GBVF in the Province of the Western Cape.⁶⁵⁴ This public health approach based on the Cardiff Model of Violence Prevention requires a data-led, evidence-based approach to crime and violence prevention, with data down to geographic level determining localised interventions required to reduce violence. The decision to locate the Unit in the Provincial Department of Health was taken on the basis that it is already the frontline in the battle against violence. As trauma cases end up in the Emergency Rooms, emergency centre data across the province is

⁶⁵¹ Wilson et al ‘Nonfatal Strangulation During Domestic Violence Events in New South Wales’ (2022) 2259.

⁶⁵² Department of Justice, Ireland Draft Third Domestic Violence, Sexual and Gender-Based Violence Strategy 2022 – 2026 Summary Report.

⁶⁵³ Department of Justice, Ireland Draft Third Domestic Violence, Sexual and Gender-Based Violence Strategy 2022 – 2026 Summary Report 9.

⁶⁵⁴ Legalbrief Today “Winde announces new Violence Prevention Unit” 16 February 2022.

generated to enable identification of exactly what crime is taking place, where and how. The focus on violence prevention would include addressing abuse of alcohol as it intersects with GBV. Although the Department of Health is the nodal point, the GBV Implementation Plan adopted by the Western Cape Provincial Cabinet is transversal in nature as the roles of each of the 13 departments in combatting GBV has been identified and documented.

64. The 2010 United Nations Handbook for Legislation on Violence Against Women notes that it is important to move past the criminalisation approach towards a multi-faceted approach, which places obligations on a range of actors, including social and health services and includes actions aimed at prevention.⁶⁵⁵ The Handbook prioritises prevention through the following recommendations:

Legislation should prioritize prevention of violence against women and should include provisions, . . . , on the following measures to prevent violence against women:

- awareness-raising activities regarding women's human rights, gender equality and the right of women to be free from violence;
- use of educational curricula to modify discriminatory social and cultural patterns of behaviour, as well as derogatory gender stereotypes; and
- sensitization of the media regarding violence against women.⁶⁵⁶

65. The United Nations Handbook highlights the importance of including preventive measures in legislation.⁶⁵⁷ Due to the diverse and wide ranging causes and complexity of domestic violence, the prevention thereof requires a multi-sectoral and whole-of-society approach.⁶⁵⁸ Most importantly, a collaborative and almost seamless provision of services is necessary to ensure that societal behaviour is impacted on or responded to in a manner that reduces violence. Evidence would show that in this instance the limited scope of efficacy of the criminal law lies in the certainty of retribution and not the length of the sentence. The benefit of an integrated approach in turn lies in reduction of waste and inefficiency, in turn saving costs.⁶⁵⁹

66. However, the 2021 CEDAW Committee report on South Africa found that:

42. Institutional weaknesses, limited resources, a lack of understanding of the root causes of domestic violence and a lack of coordination limit the effectiveness of gender-based violence prevention programmes.

⁶⁵⁵ 2010 United Nations Handbook for Legislation on Violence Against Women 14.

⁶⁵⁶ 2010 United Nations Handbook for Legislation on Violence Against Women 28.

⁶⁵⁷ 2010 United Nations Handbook for Legislation on Violence Against Women 28.

⁶⁵⁸ KPMG Report (2016) 89.

⁶⁵⁹ KPMG Report (2016) 90.

Departmental gender focal points and municipal gender units are under resourced and overburdened with other tasks.⁶⁶⁰

67. The collaborative, multi-departmental approach initiated in the Western Cape would seem to be aimed at ensuring that the root causes of GBVF, including domestic violence, are identified to ensure that solutions are designed collaboratively within pooled resources.

68. As part of its chapter on prevention and treatment of domestic violence, the United States Model State Code in addition to providing for the promulgation of standards for health-care facilities, practitioners, and personnel; specialised procedures and curricula concerning domestic and family violence in a similar manner as has been provided for in sections 18A and 18B of the Domestic Violence Amendment Act, mandates that information about risks and remedies be given to the parents of newborn and hospitalised children for early intervention. In addition to mandating hospitals to provide this information, it specifies that the information should include the effect of domestic violence on children and available services for prevention and treatment thereof.⁶⁶¹ It includes mandatory continuing education for law enforcement officers; judges and court personnel; state, county or city employees who work with domestic and family violence cases; for attorneys; and for school personnel.⁶⁶²

69. As mentioned in the comment, an option could be to consider the application of the Domestic violence Disclosure Scheme (DVDS) or “Clare’s Law” as it is colloquially known in the England and Wales. The DVDS gives the police the power to disclose information to a victim or potential victim of domestic violence about their partner’s or ex-partner’s history of abuse or violent offending.⁶⁶³ The Joint Committee on the Draft

⁶⁶⁰ CEDAW/C/ZAF/IR/1 Part E par 42.

⁶⁶¹ See Clause 507 The Model State Code: National Council of Juvenile and Family Court Judges Family Violence 43.

⁶⁶² See Clauses 509; 510; 511; 512 and 514.

⁶⁶³ United Kingdom Government Policy Paper Domestic Violence Disclosure Scheme factsheet (Updated 11 July 2022) regarding the Domestic Abuse Bill of 2020 Available at <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet#> para 1. The DVDS is the culmination of campaigning by the father of Clare Wood, a 36 year old woman who was murdered by her ex-boyfriend George Appleton. Prior to her death, she had reported him to the police for attempted rape and harassment. During the murder investigation it was revealed that he had an extension criminal history of violence against women pre-dating the relationship with Ms Wood, which had not been disclosed. The police will determine who it is more suitable to provide information too, that is, either the applicant or the victim or a person better suited to supporting the victim. See CPD Online College Knowledge base What is Clare’s Law? Available at <https://cpdonline.co.uk/knowledge->

Domestic Abuse Bill expressed the intention that this duty and the guidance on which the DVDS is based should be placed in law so that the consequences were clear and awareness is raised.⁶⁶⁴ Clare's Law was initially not mandated for in a law but a scheme providing for disclosure of information.⁶⁶⁵

70. The DVDS was implemented across all police forces in England and Wales in 2014.⁶⁶⁶ The Domestic Abuse Act 2021, which received Royal Assent on 29th April 2021,⁶⁶⁷ requires the Home Secretary to provide a uniform response through the issuing of guidance to chief officers of police regarding disclosing information by police forces to prevent domestic violence.⁶⁶⁸ A duty is therefore placed on the police to give effect to the guidance. The Act provides Clare's Law with statutory force, meaning that a person has a right to verify a partners offending history. It is no longer at the discretion of the police.⁶⁶⁹ The DVDS is made up of two parts, namely the "right to ask" and the "right to know".⁶⁷⁰ What this entails is that a person or relevant third party such as a family member can ask the police to see whether a current or ex-partner has a history of violence or abuse (right to ask). If there is record of such a history the police will exercise a discretion regarding the disclosure of this information (right to know).⁶⁷¹ The authority to disclose such information rests in the common law powers of the police to disclose

[base/safeguarding/what-is-clares-law/](https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet#) Last accessed on 30 November 2022.

⁶⁶⁴ United Kingdom Government Policy Paper Domestic Violence Disclosure Scheme factsheet (Updated 11 July 2022) regarding the Domestic Abuse Bill of 2020 Available at <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet#> para 1.

⁶⁶⁵ See CPD Online College Knowledge base What is Clare's Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

⁶⁶⁶ United Kingdom Government Policy Paper Domestic Violence Disclosure Scheme factsheet (Updated 11 July 2022) regarding the Domestic Abuse Bill of 2020 Available at <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet#> para 3.

⁶⁶⁷ See CPD Online College Knowledge base What is Clare's Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

⁶⁶⁸ Section 77 of the Domestic Abuse Act 2021; United Kingdom Government Policy Paper Domestic Violence Disclosure Scheme factsheet (Updated 11 July 2022) regarding the Domestic Abuse Bill of 2020 Available at <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet#> para 3.

⁶⁶⁹ See CPD Online College Knowledge base What is Clare's Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

⁶⁷⁰ CPD Online College Knowledge base What is Clare's Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

⁶⁷¹ United Kingdom Government Policy Paper Domestic Violence Disclosure Scheme factsheet (Updated 11 July 2022) regarding the Domestic Abuse Bill of 2020 Available at <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet#> para 3.

information aimed at preventing crime; and is done in accordance with data protection and human rights legislation. The disclosure must however be reasonable and proportionate and be based on a credible risk of violence or harm.⁶⁷²

71. The DVDS provides a clear framework for disclosure and thereby consistent application. An application may be done online or over the phone or in person at a police station. The online applications are linked to the webpage of the relevant local police. Linked to an application is the functionality to delete the search history to avert evidence of the application.⁶⁷³ The benefit of the DVDS is that it assists victims or potential victims of domestic violence with making informed choices of the risk that they face. The guidance provides that when a disclosure of historic abuse is made that it must be coupled with a robust safety plan. For this reason, any disclosure is done in person so that the police are able to assess if there is any immediate risk and at the same time requires the person to sign a confidentiality agreement in respect of the disclosed information.⁶⁷⁴ It is, however, reported that although the response time is given as “within 35 days”, a percentage varying from 21 to 61 percent, dependent on the locality, do not meet the criteria.⁶⁷⁵ The longer turn-around time is, however, ascribed to a surge in applications in 2020, which seem to correspond with the Covid-19 lockdown advisories.⁶⁷⁶

72. In order to ensure that the disclosure in terms of the DVDS is not contested as an infringement of human rights, there are several tests that need to be adhered to before

⁶⁷² United Kingdom Government Policy Paper Domestic Violence Disclosure Scheme factsheet (Updated 11 July 2022) regarding the Domestic Abuse Bill of 2020 Available at <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet#> para 3; CPD Online College Knowledge base What is Clare’s Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

⁶⁷³ See CPD Online College Knowledge base What is Clare’s Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

⁶⁷⁴ See CPD Online College Knowledge base What is Clare’s Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

⁶⁷⁵ See CPD Online College Knowledge base What is Clare’s Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

⁶⁷⁶ See CPD Online College Knowledge base What is Clare’s Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022. A UK Government factsheet reveals that in the year ending March 2020, 52% of the 8591 ‘right to know’ applications made in England and Wales were granted, resulting in disclosure and 37% of the 11556 ‘right to ask’ applications resulted in disclosure. See UK Government Domestic Violence Disclosure Scheme factsheet 8 Available at <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet>. Accessed on 8 March 2022.

a disclosure may be made; this includes that it is deemed necessary to protect the person from becoming a victim of crime; that there is a pressing need to make the disclosure; and that the interference with the perpetrator's rights is necessary and proportionate for the prevention of the commission of a crime.⁶⁷⁷ The merits of each case are therefore considered. Although an offender's listed convictions are reflected as private, a conviction for the following offences may be disclosed:

- Sections 4 (soliciting murder), 16 (threats to kill), 18 (wounding with intent to cause grievous bodily harm), 20 (malicious wounding), 21 (attempting to choke, suffocate or strangle in order to commit or assist in committing an indictable offence), 23 (maliciously administering poison etc. so as to endanger life or inflict grievous bodily harm), 28 (causing bodily injury by explosives), 29 (using explosives etc. with intent to do grievous bodily harm), 35 (injuring persons by furious driving), 38 (assault with intent to resist arrest), or 47 (assault occasioning actual bodily harm) of the Person Act 1861.
- Sections 1 (riot), 2 (violent disorder), 3 (affray), 4 (fear or provocation of violence), 4a (intentional harassment, alarm or distress), and 5 (harassment, alarm or distress) of the Public Order Act 1986.
- Sections 2 (offence of harassment), 2a (offence of stalking), 4 (putting people in fear of violence), or 4A (stalking involving fear of violence or serious alarm or distress) of the Protection from Harassment Act 1997.
- Sections 2 (causing explosion likely to endanger life or property), and 3 (attempt to cause explosion, or making or keeping explosives with intent to endanger life or property) of the Explosive Substances Act 1883.
- Sections 1 (cruelty to children), 16 (possession of firearm with intent to endanger life), 16A (possession of firearm with intent to cause fear of violence) of the Children and Young Persons Act 1933.
- Sections 7 (theft), 8 (robbery or assault with intent to rob), 9 (burglary with intent to inflict grievous bodily harm), 10 (aggravated burglary), and 21 (blackmail) of the Theft Act 1968.
- Section 1 (criminal damage including arson) of the Criminal Damage Act 1977.
- Section 6 (violence for securing entry) of the Criminal Law Act 1977.
- Section 1 (attempting to commit an offence) of the Criminal Attempts Act 1981.
- Sections 1 (offence of abduction of child by parent etc.) or 2 (offence of abduction of child by other persons) of the Child Abduction Act 1984.
- Sections 29 (racially or religiously aggravated assaults), 30 (racially or religiously aggravated criminal damage); 31 (racially or religiously aggravated public order offences); 31 (racially or religiously aggravated harassment) of the Crime and Disorder Act 1998.

⁶⁷⁷ United Kingdom Government Policy Paper Domestic Violence Disclosure Scheme factsheet (Updated 11 July 2022) regarding the Domestic Abuse Bill of 2020 Available at <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet#> para 6; See CPD Online College Knowledge base What is Clare's Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

- Section 5 (causing or allowing the death of a child or vulnerable adult) of the Domestic Violence, Crime and Victims Act 2004.
- Sections 1 (rape), 2 (assault by penetration); 3 (sexual assault), 4 (causing a person to engage in sexual activity without consent), 5 (rape of a child under 13), 8 (causing or inciting a child under 13 to engage in sexual activity), 9 (sexual activity with a child), 10 (causing or inciting a child to engage in sexual activity) of the Sexual Offences Act 2003.
- Section 4 (trafficking people for exploitation) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004.
- Section 1 (slavery, servitude, forced or compulsory labour) of the Modern Slavery Act 2015.
- Section 76 (controlling or coercive behaviour) of the Serious Crime Act.

73. As the DVDS was operational prior to the Domestic Abuse Act, only recently being provided with an empowering clause, the SAPS could in light of section 18 of the Domestic Violence Act in time consider initiating a similar procedure to test the impact thereof.

74. Consideration could be given to placing the names of persons convicted of domestic violence related offences on a register of domestic violence offences. There are, however, a number of national databases of offenders such as the National Register of Sex Offenders and the National Child Protection Register. It could be considered to be an additional tool to manage the risk posed by perpetrators of domestic violence. Past conduct could ostensibly be argued to act as a predictor of future harm. The purpose of using existing registers or aligning the information of these registers would, however, need to be considered. The operationalising of the electronic repository for domestic violence recording the lifespan of protection orders may provide a platform to couple convictions of offences of domestic violence. This would, however, arguably remain inaccessible to the general public, as is the case with other national registers of this nature.

75. The caution used by the police in the United Kingdom in disclosing private information is evidenced by the statistics, which show that just over half of the “right to know” applications applied for in England and Wales resulted in disclosure; and that 37% of the “right to ask” applications resulted in disclosure.⁶⁷⁸ Related to the DVDS is the Child Sex Offender Disclosure Scheme (CSODS), also known as Sarah’s Law.⁶⁷⁹ This

⁶⁷⁸ See CPD Online College Knowledge base What is Clare’s Law? Available at <https://cpdonline.co.uk/knowledge-base/safeguarding/what-is-clares-law/> Last accessed on 30 November 2022.

⁶⁷⁹ Metropolitan Police United Kingdom Sarah’s Law (Child Sex Offender Disclosure Scheme)

guidance allows a concerned person to make an application in respect of the risk a particular person presents to a particular child, to the police. The police, in turn will ascertain if there is information that needs to be shared with a particular person (not necessarily the person making the application) to ensure the safety of a child. The application in terms of Sarah's law is done online and provides an undertaking that the application will be checked within 24 hours and actioned "right away".⁶⁸⁰ Thereafter, a period of 10 days is given for a more in-depth interview. A person attending an in-depth interview needs to provide proof of identity and address; and proof of the relationship to the child or children in question.⁶⁸¹ Where a person chooses to remain anonymous, they will forfeit any further engagement with authorities, but the allegation or concern will be investigated.⁶⁸² Action may be taken if an application is made with ill intent. Before any information is shared with the person making the applicant, he or she will be required to complete a confidentiality agreement.⁶⁸³

Preliminary recommendations

7. The Commission notes the submission of the Commission for Gender Equality, with reference to the Criminal and Related Matters Amendment Act No. 12 of 2021, that the recently amended sentencing law regime applicable to domestic violence provides for harsher sentences for crimes involving GBV, and crimes against people with whom perpetrators are in a domestic relationship. The Commission agrees that any further amendment in this regard, before the impact of the recent amendments on implementation are gauged may serve to create unnecessary uncertainty in respect of the laying of charges, competent verdicts, and sentencing. It therefore does not support further amendments at this time.

Available at <https://www.met.police.uk/rqo/request/ri/request-information/sarahs-law-child-sex-offender-disclosure-scheme/> Accessed on 30 November 2022.

⁶⁸⁰ Metropolitan Police United Kingdom Sarah's Law (Child Sex Offender Disclosure Scheme) Available at <https://www.met.police.uk/rqo/request/ri/request-information/sarahs-law-child-sex-offender-disclosure-scheme/> Accessed on 30 November 2022.

⁶⁸¹ Metropolitan Police United Kingdom Sarah's Law (Child Sex Offender Disclosure Scheme) Available at <https://www.met.police.uk/rqo/request/ri/request-information/sarahs-law-child-sex-offender-disclosure-scheme/> Accessed on 30 November 2022.

⁶⁸² Metropolitan Police United Kingdom Sarah's Law (Child Sex Offender Disclosure Scheme) Available at <https://www.met.police.uk/rqo/request/ri/request-information/sarahs-law-child-sex-offender-disclosure-scheme/> Accessed on 30 November 2022.

⁶⁸³ Metropolitan Police United Kingdom Sarah's Law (Child Sex Offender Disclosure Scheme) Available at <https://www.met.police.uk/rqo/request/ri/request-information/sarahs-law-child-sex-offender-disclosure-scheme/> Accessed on 30 November 2022.

8. In terms of the sentencing process the Commission is of the view that detailed and victim specific Victim Impact Reports should be compiled with a focus on the extent of the domestic violence and the physical and psychological impact on the victim and family. As there may not be previous criminal convictions, it would be apposite to reference previous applications for protection orders, even where withdrawn and breaches thereof.

9. The Commission notes that substance abuse has been identified as a contributor to domestic violence and that both the Criminal Procedure Act and the recently amended Domestic Violence Act provides for referral for treatment and rehabilitation. As substance abuse is in turn arguably a response to other root causes the Commission sees value in the Department of Social Development developing or expanding on interventions aimed at social and normative change. The availability of programs aimed at cognitive behavioural change, restorative justice or conjoint or couple treatment may be preventative and responsive to violence in families. The empowering provisions in both the Criminal Procedure Act and Domestic Violence Act are arguably wide enough to include interventions which are not linked to substance abuse.

10. It is suggested that the role of the Department of Social Development, Department of Human Settlements, Water and Sanitation, and Department of Public Works in addressing the homelessness and housing instability post using sheltering services experienced by women and by women and children in abusive relationships and those subjected to family violence should be further explored.

11. The Commission is of the view that there is merit in the suggestions made by Mses Vetton and Bornman in respect of analysing the circumstances surrounding femicide or murder of a family in which the victim, or a family member, was in possession of a protection order obtained through the Domestic Violence Act at the time of their death (or had applied for one). It is of the preliminary view that the recommendation that such an event should automatically trigger review by a panel comprising, at a minimum, the South African Police Service and independent experts in domestic violence should be supported. The suggestion of the following procedure for such a panel is presented for consideration:

- All intimate femicides perpetrated by police officials must be immediately reported to either the provincial complaints coordinators of the SAPS Inspectorate, or the national office of the CSP⁶⁸⁴.
- Any other intimate femicide which occurs must be checked against SAPS 508(a), 508(b) and file of protection orders maintained by the police station in the jurisdiction where the killing occurred. Should the victim have been in possession of a protection order, or in the process of obtaining such an order, then this case must automatically be forwarded to the CSP.
- When a child is killed by a parent, their details must also be checked against this documentation to ascertain whether or not one of the parents was in possession of a protection order, or was in the process of applying for one. Where this is found, such cases must also be forwarded to the panel.

12. The Commission is further of the view that the SAPS could in light of section 18 of the Domestic Violence Act and the enactment of the online electronic repository in time consider issuing guidance along the lines of the Domestic Violence Disclosure Scheme. However history of violence against intimate partners may form part of the safety monitoring and risk assessment of a victim of domestic violence who has applied for a domestic violence safety monitoring notice. The Commission does not support including the names of domestic violence respondents or offenders on the National Register of Sex Offenders.

⁶⁸⁴ An abbreviation for the Civilian Secretariat for Police.

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ANNEXURE A: LIST OF RESPONDENTS

LIST OF RESPONDENTS TO ISSUE PAPER 42

1. Childline Mpumalanga (Lungile Debra Mashaba)
2. Childline Mpumalanga: Social Work and Helpline Manager (Belinda Sellers)
3. Commission for Gender Equality, (Dr Dennis Matotoka, Legal Services)
4. Corrie, Lesley Dr, social worker (private capacity)
5. Heath, Willem Adv SC
6. Ilitha Labantu, (Ms Ella Mangisa, Director)
7. Le Roux, Linda Adv, TTC Case Manager, Port Elizabeth
8. Legal Aid South Africa, (Dr Izette Knoetze-le Roux)
9. MOSAIC,(Adv Tarisai Mchuchu-MacMillan & Kerryn Rehse)
10. Papakyriakou, Beba (X M) Dr (PhD) (Psychology)
11. Racial Justice Project, South Africa Reading Group New York Law School, (Professor Penelope Andrews, Director)
12. Racial Justice Project Fellow New York Law School & Fines and Fees Justice Center (Rebecca Carey Lewis Steel)
13. Social Justice Coalition, (Ms Khensani Motileni, Head of Research and Policy)
14. Sonke Gender Justice, (Kayan Leung, Policy Development and Advocacy Manager)
15. South African Medical Research Council (Dr Leanne Ramsoomar-Hariparsaad, Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit)
16. South African Police Service, National Commissioner (Brigadier Marga van Rooyen)
17. Southern African Catholic Bishops' Conference, Parliamentary Liaison Office
18. Unchain our Children: Circle Chambers Advocates (Adv Amber Koekemoer)
19. Venter, Izelle Venter, Survivor
20. Vetten, Lisa and Bornman, Sanja
21. Women's Legal Centre (Adv Bronwyn Pithey)

ANNEXURE B: WORKSHOPS

Virtual Strategic Dialogue 2 February 2022: MS Teams

	NAME	ORGANISATION
1	Dr Isabel Magaya	Centre for Child Law, University of Pretoria
2	Ms Fathima Dildar	GBV NSP
3	Mr Fortunate Mongwai	Centre for Child Law, University of Pretoria
4	Dr Itumeleng Molefe	Forensic Pathologist, University of Cape Town
5	Dr Shaheda Omar	Teddy Bear Clinic
6	Anthea Nagoor	Director Counselling, Focus on the Family Africa
7	Ms Jakkie Wessels	Regional Court President, Limpopo Regional Division
8	Ms Gyan Dwarika	Department of Social Development: Manager: Social Work Policy: Child Exploitation.
9	Ms Bernadine Bachar	Saartjie Baartman Centre for Women & Children
10	Mrs Maya Prag	Senior Magistrate, Cape Town, Cluster A
11	Dr Leanne Ramsoomar-Hariparsaad	Public Health Researcher & Research Uptake Specialist, Gender and Health Research Unit, South African Medical Research Council
12	Nosihle Mkhize	TEARS Foundation
13	Dululu Hlatshaneni	Directorate: Social Cohesion & Equity in Education, Department of Basic Education
14	Ms Harsha Gihwala	Research Officer, Gender, Health & Justice Research Unit, Division of Forensic Medicine, Department of Pathology Faculty of Health Sciences, University of Cape Town
15	Charlene Roberson	TEARS Foundation
16	Cynthia Nyoni	Department of Social Development
	SALRC	
17	Adv Retha Meintjes SC	Commissioner
18	Ms Dellene Clark	Secretariat
19	Mr Mpolokeng Ledwaba	Secretariat

Virtual Strategic Dialogue 9 February 2022: MS Teams

	NAME	ORGANISATION
1	Professor Lillian Artz	Gender, Health & Justice Research Unit, Division of Forensic Medicine, Department of Pathology, Faculty of Health Sciences, University of Cape Town
2	Ms Keneilwe Zulu	Access Chapter 2
3	Ms Estelle Otto	Social Work Policy Developer: Social Crime Prevention & Victim Empowerment, Gauteng Department of Social Development
4	Ms Bronwyn Pithey	Women's Legal Centre
5	Ms Belinda Sellers	Social Work and Helpline Manager, Childline Mpumalanga
6	Ms Xola Filana	Social Worker: Partnerships and Finance, Department of Social Development
7	Ms Lisa Vetten	Faculty of Humanities, University of Johannesburg 'Gendered violence and Urban Transformation in India and South Africa' Study
8	Ms Shireen Hassan	DD: Probation, VEP & Substance Abuse, Johannesburg Metro Region, Department of Social Development
9	Dr Patricia Watson	Chief Director: Social Inclusion and Partnerships in Education, Department of Basic Education
10	Dr Sagie Naidoo	Clinical Manager (Medical): Clinical Forensic Services: eThekweni District, Department of Health
11	Ms Lungile Mashaba	Supervisor Enhlanzeni Mpumalanga, Childline
12	Adv Carina Coetzee	National Prosecuting Authority
13	Ms Tebogo Mashota	People Opposed to Women Abuse (POWA)
14	Ms Kerryyn Reese	MOSAIC
15	Ms Sanja Bornman	Gender Law & Policy Specialist
16	Adv Mooketsi M.C. Molaudi	National Prosecuting Authority
17	Ms Susan Maloka	Director of Gender: City of Tshwane
18	Dr Lesley Corrie	Social worker (private capacity)
19	Adv Anel Stellenberg	Senior State Advocate, Office of the Director of Public Prosecutions: Northern Cape, Kimberley
20	Ms Claudia Lopes	Human Rights Programme Manager: Heinrich Boll Stiftung
21	Adv Dawn Coleman-Malinga	Senior State Advocate, Sexual Offences and Community Affairs Unit, National Prosecuting Authority, Pietermaritzburg DPP
22	Ms Caroline Peters	Callas foundation
23	Mr Jeffrey Makhwilir	AD: Gender, Youth and Disability, Department of Social Development

24	Ms Mariam Magera	National Shelter Movement of SA
25	Ms Benita Nel	Director, Childline Mpumalanga
26	Ms Khayakazi Mtebi	
27	Adv Mzoxolo Rusi	Senior State Advocate, National Prosecuting Authority, SOCA Unit KZN
28	Ms Eve Machabi	Deputy Director: Gender, Youth and Disability Mainstreaming, Gauteng Department of Social Development
29	Ms MamoKete Mokoni	Gauteng, Department of Social Development
30	Ms Kegomoditswe Mophulane	Lawyers Against Abuse, Legal Officer, Orange Farm
31	Mr Portia Serote	Social worker, Access Chapter 2
	SALRC	
32	Adv Retha Meintjes SC	Commissioner
33	Ms Dellene Clark	Secretariat
34	Mr Mpolokeng Ledwaba	Secretariat

