



ISSUE PAPER 42
PROJECT 100
DOMESTIC VIOLENCE: THE CRIMINAL LAW
RESPONSE

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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 are —

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Mr Irvin Lawrence (Deputy Chairperson)
Prof Mfariseni Budeli-Nemakonde
Prof Wesahl Domingo
Prof Karthi Govender
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The project leader appointed by the Commission to this project is Prof Wesahl Domingo. The investigation is supported by Commissioner Adv Retha Meintjes (SC). The Commission elects 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 Commission's office is located in the Spooral Park Building, 2007 Lenchen Avenue South, Centurion, Gauteng. The researcher assigned to this investigation, who may be contacted for assistance, is Ms Dellene Clark.

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PREFACE

The aim of this issue paper is to serve as a basis for deliberations by the South African Law Reform Commission on the perceived need to review the criminal law response to violence perpetrated within domestic relationships. This issue paper was preceded by an in-house proposal paper.

The issues presented in this issue paper are raised to identify and demarcate the extent of the review needed. The comment of any person on an issue contained in the issue paper or in respect of a related issue which may need inclusion in the debate is sought. Such comment is integral to the outcome of this investigation.

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 Issue Paper to the Commission by no later than **28 February 2022**. Respondents are invited to draw matters related to the topic or which have not been addressed to the Commission’s attention. Any request for further information or administrative enquiries should be addressed to the Secretary of the Commission or the researcher assigned to this project.

SUMMARY OF THE ISSUE PAPER

1. In spite of existing measures, including the preventative element of the Domestic Violence Act, intimate partner violence remains a serious problem in South Africa, with the President referring to it, in the context of the COVID-19 pandemic, as the second pandemic.¹ The profound and detrimental impact of domestic violence on a socio-economic level is almost unquantifiable. This issue paper seeks to introduce the topic of the criminal law response to criminal behaviour perpetrated within a domestic relationship for legal debate. It aims to identify the manner in which the law currently responds to criminal behaviour perpetrated by people in a domestic relationship; whether this response is adequate or whether there is a need for law reform. Its purpose is to initiate and stimulate debate, to explore proposals for law reform and to serve as a basis for further in-depth deliberation.

2 In its current format the Domestic Violence Act aims “to provide for the issuing of protection orders with regard to domestic violence; and matters connected therewith”. As such the Domestic Violence Act provides a civil remedy, whereby a person in a domestic relationship can apply for a protection order against domestic violence, as defined in the Act. If the protection order is granted, it is issued together with a suspended warrant of arrest. The warrant of arrest is activated if the respondent breaches the protection order. This means that the only crime committed in terms of this Act is for a breach of the protection order (contempt of court) and not for a crime or act of “domestic violence”.

3. In the context of a domestic relationship as defined in the Domestic Violence Act a range of common law crimes may be committed. These crimes relate to physical abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; damage to property; and the catch all phrase of “any other controlling or abusive behaviour towards a complainant” within the context of a domestic relationship as defined in the Domestic Violence Act.² A range of statutory crimes may also be committed.

¹ Parliament of the Republic of South Africa, Summary and analysis of the Domestic Violence Amendment Bill, Research Unit (G Nesbitt) 24 August 2020 3.

² Paragraph (j) of the definition of ‘domestic violence’.

4. The focus of this investigation is on an aspect which has not formed part of the current review of gender-based law, namely the need for a specific domestic violence offence or offences. As the Domestic Violence Act is a civil remedy by nature, the initial review of this Act did not include the need for such a crime. The need for a crime of this nature has been raised in 2017 by the High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change³ and as recently as May 2021 by the United Nations Committee on the Elimination of Discrimination against Women.⁴

5. A number of comparative jurisdictions have sought to revise the manner in which family violence matters are dealt with. This includes holding “offenders of criminal behaviour committed in the context of domestic violence, accountable to the same extent as offenders of other similar criminal offences”.⁵

6. Some comparative jurisdictions have chosen to embark on an overhaul of the criminal law response to domestic violence. The need to address strangulation in the context of domestic violence has increasingly been flagged as a risk factor in fatal outcomes of domestic violence. The overlooking of the danger of strangling or the use of “trivial” charges may mean that particular attention needs to be given to training of the police, prosecutors, presiding officers and other functionaries including health care providers in order to recognise the seriousness of this behaviour, including the risk of murder (femicide).⁶ It may also point to the need to consider a new offence of strangulation to ensure that appropriate charges are laid, that appropriate sentencing is applied, or to highlight the behaviour which, in turn, may lead to better risk assessment with a view to preventing femicide.

7. The issue paper contains questions aimed at discovering the issues at hand and the extent of the need for law reform. The Commission specifically requests comment on the issue paper, particularly the questions which are posed in it.

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

⁴ Committee on the Elimination of Discrimination against Women Report of the Committee ‘Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ CEDAW/C/ZAF/IR/1 12 May 2021.

⁵ The Community Law Reform Committee of the Australian Capital Territory Report on Domestic Violence Report No 9 Canberra (1995) para 119 as referred to in the SALC Research Paper on Domestic Violence para 6.11.12.

⁶ Shabazz S Strangulation: The red flag of domestic violence that we never discuss (2019) Strangulation Training Institute available at <https://www.strangulationtraininginstitute.com/strangulation-the-red-flag-of-domestic-violence-that-we-never-discuss/> accessed on 6 November 2020.

8. Following the issue paper, the Commission will publish a discussion paper setting out preliminary recommendations and draft legislation, if necessary. The discussion paper will take the public response to the issue paper into account, and will test public opinion on the solutions identified by the Commission. On the strength of these responses 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 his consideration.

9. For ease of reference the questions found in the text of the issue paper are arranged below:

Questions

1. Do the existing substantive crimes adequately cover domestic violence?
2. If you believe that there should be a single offence of domestic violence, how should it be framed?
3. If you believe that additional substantive crimes, for instance strangulation/suffocation are needed, how should they be framed?
4. If you believe that there should not be additional substantive crimes, what additional legislative measures or other measures might be required to ensure that the act of strangulation or domestic violence is treated with the necessary caution?
5. What measures should be put in place or changed to remove barriers to accessing the criminal justice system for victims of domestic violence?
6. Should a victim of domestic violence have the choice of engaging a civil remedy rather than a criminal one to address domestic violence? Please explain your reasoning.
7. What additional sentencing or preventative measures might be required? For instance, should it be possible to forewarn a victim/potential victim of the potential danger a repeat offender of a domestic violence offence might hold and if so, how?

CHAPTER 1: OVERVIEW OF THE INVESTIGATION

A Introduction

1. In his 2020 State of the Nation Address President Ramaphosa identified the Domestic Violence Act, 116 of 1998 (the Domestic Violence Act), the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, the Criminal Procedure Act, 51 of 1977 and the Criminal Law Amendment Act 105 of 1997 (the “Minimum Sentences Act”) for legislative reform as part of the efforts to eradicate gender based violence and femicide in South Africa.⁷

2. This decision was preceded by the delivery on 1 August 2018 of a memorandum consisting of 24 policy demands to the Government of South Africa under the banner #TotalShutDown by a collective of womxn⁸ (both cisgender⁹ and transgender¹⁰ womxn) and gender non-conforming people. The 24 policy demands were an initial list of demands, symbolically representing the 24 years which had passed since the first democratic elections. A Declaration flowing from the Presidential Summit against Gender Based Violence and Femicide (GBV&F), which followed on the heel of the #TotalShutDown memorandum,¹¹ identified a need for law reform and amongst others recognised that:¹²

⁷ President Cyril Ramaphosa: 2020 State of the Nation Address. Available at <https://www.gov.za/speeches/president-cyril-ramaphosa-2020-state-nation-address-13-feb-2020-0000>. The three Bills are the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B16-2020]; the Criminal and Related Matters Amendment Bill [B17B-2020]; and the Domestic violence Amendment Bill [B20B-2020].

⁸ The word ‘womxn’ is used to replace the English word ‘woman’. While it serves to exclude the word ‘man’ it also at a more fundamental level serves to include diverse perspectives. Guy J ‘Women or ‘womxn’? Students adopt inclusive language CNN. Available at www.edition.cnn.com Accessed on 5 August 2021.

⁹ The word ‘cisgender’ refers to a person whose identity and gender corresponds with their birth sex. Bernard Fournier A What Does Gender Nonconforming Mean? 3 August 2021 Available at www.verywellmind.com Accessed on 5 August 2021.

¹⁰ The word ‘transgender’ refers to a person whose identity and gender does not correspond with their birth sex. Bernard Fournier A What Does Gender Nonconforming Mean? 3 August 2021 Available at www.verywellmind.com Accessed on 5 August 2021.

¹¹ Held in November 2018 in response to the #TotalShutDown Movement mobilizing nationally in response to the crisis levels of gender-based violence and femicide in South Africa.

¹² Presidential Summit Against Gender Based Violence and Femicide Declaration

- The implementation of the existing legal framework and its accompanying actions is not fully effective since survivors continue to experience high levels of secondary victimisation and inadequate responses from the criminal justice system;
- There is a need for the existing laws and policies applicable to GBV&F to be reviewed to ensure that they are more victim-centred and responsive and that the identified legislative gaps are addressed without delay.

3. The need for law reform was framed against the reality of the intersectional and multi-layered inequality and lived experience of violence by women and girls in most settings in South African society, which has, in spite of the existing law, created challenges to protecting victims and holding perpetrators to account.

4. The focus of this investigation is on an aspect which has not formed part of the current review; namely the need for a specific domestic violence offence or offences. As the Domestic Violence Act is a civil remedy by nature, the initial review of this Act did not include the need for such a crime. The need for a specific crime of domestic violence was raised in 2017 by the High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change¹³. It has again been raised as recently as May 2021 by the United Nations Committee on the Elimination of Discrimination against Women.¹⁴

5. The High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change concluded amongst others in its report that “the act of domestic violence itself is not prima facie a criminal offence”¹⁵ and that the Domestic Violence Act should be amended to achieve the recognition of domestic violence “as a crime in its own right”.¹⁶ This report, however, does not expand on the reason for this recommendation. The recommendation of the United Nations Committee on the Elimination of Discrimination against Women will be expanded on below.

(November 2018). Available at <https://www.justice.gov.za/vg/201903-GBV-SummitDeclarationBooklet.pdf>.

¹³ Report of the High Level Panel Recommendation 4.8a 338.

¹⁴ Committee on the Elimination of Discrimination against Women Report of the Committee ‘Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ CEDAW/C/ZAF/IR/1 12 May 2021.

¹⁵ Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (November 2017) 336.

¹⁶ Report of the High Level Panel Recommendation 4.8a 338.

B Background

6. The Domestic Violence Act was promulgated after an accelerated Parliamentary process in 1998 which saw the draft Bill contained in the (then) Law Commission's Discussion Paper tabled in Parliament before amendments proposed during the workshop process preceding the report could be ventilated and considered for inclusion.¹⁷ The Commission decided to conclude the investigation with the publication of the Research Paper on Domestic Violence (the Research Paper) as the need for a report had been overtaken by events. The Research Paper contains insights gained during the consultation phase held on the discussion paper. In the ordinary course of events these insights would have been ventilated and developed in the final recommendations contained in the report and accompanying draft legislation. As it was not possible to follow this route, the Research Paper provides a basis for further investigation into legal aspects relevant to domestic violence. The Research Paper, and subsequent preliminary research, both point to the need for additional aspects relating to domestic violence to be subjected to further legal research and possible law reform.

7. In summary the Domestic Violence Act aims "to provide for the issuing of protection orders with regard to domestic violence; and matters connected therewith". As such the Domestic Violence Act provides a civil remedy, whereby a person in a domestic relationship¹⁸ can apply for a protection order against domestic violence.¹⁹ If

¹⁷ Investigations on the Commission's program follow a three stage process before recommendations, which may include draft legislation, are tabled for consideration before the Minister of the department administering the particular area of the law. The three stage process entails the publication of an issue paper, discussion paper and report. The first two stages are followed by expert engagement and broad public consultation. The comment received from this consultation is, where relevant, used to inform, guide and develop the recommendations contained in the final report.

¹⁸ Defined in the Act as follows: "*domestic relationship*" means a relationship between a complainant and a respondent in any of the following ways:

- (a) they are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

the protection order is granted, it is issued together with a suspended warrant of arrest.²⁰ The warrant of arrest is activated if the respondent breaches the protection order. This means that the only crime committed in terms of this Act is for a breach of the protection order (contempt of court) and not for a crime of “domestic violence”.²¹

8. The Secretariat of the South African Law Reform Commission (the Commission) compiled a proposal paper on the need for a criminal offence of domestic violence in response to the growing call to criminalise domestic violence. On 9 December 2020 the Commission considered the recommendations contained in the proposal paper and approved the revival of Project 100: Domestic Violence for this purpose. It further appointed two Commissioners, Adv Meintjes and Prof Domingo as joint project leaders, who subsequently elected that Prof Domingo should act as the principal project leader with Adv Meintjes in a supportive role. The Commission decided not to seek the appointment of an advisory committee as the matters were found to be succinct and of such a nature that they could be discussed with relevant stakeholders by way of expert meetings.

-
- (d) they are family members related by consanguinity, affinity or adoption;
 - (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
 - (f) they share or recently shared the same residence;”

¹⁹ Defined in the Act as “domestic violence” means -

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (g) stalking;
- (h) damage to property;
- (i) entry into the complainant’s residence without consent, where the parties do not share the same residence; or
- (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant;

²⁰ Section 8 of the Act.

²¹ Section 17 of the Act.

C Methodology and purpose of the Issue Paper

9. This issue paper introduces the topic of the criminal law response to criminal behaviour perpetrated within a domestic relationship for legal debate. It aims 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. Its purpose is to initiate and stimulate debate, to explore proposals for law reform and to serve as a basis for further in-depth deliberation.

10. Following the issue paper, the Commission will publish a discussion paper setting out its preliminary recommendations, and draft legislation, if necessary. The discussion paper will take into account the public response to the issue paper, and will test public opinion on possible solutions identified by the Commission. On the strength of these responses 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 his consideration.

D Legislative and regulatory context

11. The National Strategic Plan on Gender Based Violence and Femicide 2020 – 2030 (the NSP) argues that the Constitution of the Republic of South Africa, 1996 sets the framework for an effective legislative response to gender based violence.²² It lists the founding principles of the Constitution as human dignity, the achievement of equality and the advancement of human rights and freedoms as well as non-racialism and non-sexism. In spite of a range of policies and laws in place to respond to GBV&F the NSP reflects that there is an “alarming lack of accountability for the perpetration of GBV&F by individuals, by the state and society overall”.²³ It lists the following policies and legislation which are currently in place to respond to GBV&F²⁴:

- “1. The National Crime Prevention Strategy (NCPS) 1996 establishes crimes of violence against women and children as a national priority.
2. The Criminal Law Amendment Act 105 of 1997 establishes mandatory minimum sentences for certain rapes.

²² National Strategic Plan on Gender Based Violence and Femicide 2020-2030 123.

²³ NSP 125.

²⁴ NSP 33.

3. The Criminal Procedure Second Amendment Act 85 of 1997 allows for bail conditions to be tightened in cases of those charged with rape.
4. The Domestic Violence Act 116 of 1998 sets out to offer options to victims of abuse through identifying certain obligations on law enforcement bodies and making provision for interim protection orders.
5. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 codified and broadened the definition of rape and other sexual offences and introduced new offences that relate to GBV, including using or exposing children to child pornography and pornography (both off- and online). It provides for the National Policy Framework on the Management of Sexual Offences Matters, 2012.
6. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 was passed to provide for effective prosecution and conviction of offenders.
7. The National Development Plan, the Integrated Social Crime Prevention Strategy (2011) and the White Paper on Safety and Security (2016) are key policies in shaping the NSP.”

12. The Constitution entrenches and protects a number of human rights inherent to all people in its Bill of Rights.²⁵ The Bill of Rights in turn affirms the right to equality, human dignity, life, freedom and security of the person. The NSP suggests that these rights underscore a national commitment to building a society that is free from all forms of violence and that respects, protects and fulfils the human rights principles of bodily integrity and autonomy.²⁶ Section 12 of the Constitution provides for the protection of the freedom and security of the person. Section 12(1)(c) is particularly relevant to this issue paper: “(c) to be free from all forms of violence from either public or private sources”, thereby enshrining the right to protection from inter personal violence.²⁷ The Research Paper reflects that “this section guarantees the right to freedom from domestic violence.”²⁸ Of particular importance to this issue paper is section 9 of the Constitution which provides that everyone (citizen or foreigner) is equal before the law and has the right to equal protection from the law. On a substantive level this means that a different standard may need to be applied in respect of the legal response to

²⁵ Unit for Gender Research Women & the Law in South Africa 1998 UNISA 227.

²⁶ NSP 123.

²⁷ The Sustainable Development Goals include a specific target to “eliminate all forms of violence against all women and girls in the public and private sphere”. Klugman states that criminalising violence against women codifies the rights of women to live free of violence. Further that symbolically the law demonstrates that such behaviour is unacceptable. Klugman J World Development Report (2017) Background Paper Governance and the Law *Gender based violence and the law* Georgetown University.

²⁸ SALC Research Paper on Domestic Violence para 4.9.1.

violence based on whether it is from a public or private source, in order to provide equal protection.

13. Section 39 of the Constitution which governs the interpretation of the Bill of Rights obliges a court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom and to consider international law. Foreign law may be considered. This means that international agreements to which South Africa is signatory and has ratified are binding.

14. The Constitution embraces the ethos of the African Charter on Human and People's Rights, which entered into force on 21 October 1986, particularly the protection of the rights of women and children in international declarations and conventions.²⁹ South Africa's accession to the African Charter on 9 July 1996 was accompanied by a declaration. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)³⁰ recalls that:

Women's rights have been recognised and guaranteed in all international human rights instruments, notably the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol, the African Charter on the Rights and Welfare of the Child, and all other international and regional conventions and covenants relating to the rights of women as being inalienable, interdependent and indivisible human rights.

15. It further strives to, among others, eliminate gender-based violence against women.³¹ Article 4 of the Protocol calls upon all States Parties to enact and enforce laws to prohibit all forms of violence against women;³² to adopt legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;³³ and

²⁹ Adopted 27 June 1981, OAU Doc.CAB/LEG/67/3 rev.5,21 I.L.M.58 (1982) Article 18.

³⁰ Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003. South Africa ratified the Maputo Protocol on 17 December 2004 subject to reservations and declarative interpretations. Mujuzi JD The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's reservations and interpretative declarations African Journals Online Law, Democracy & Development Available at ajol.info/index.php/idd/article/view/52893. Accessed on 17 September 2021.

³¹ Preamble to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

³² Article 4(2)(a).

³³ Article 4(2)(b).

to punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims.³⁴

16. South Africa ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) without reservation in December 1995. The preamble to the Optional Protocol to CEDAW reaffirms the principle of full and equal enjoyment by women of all human rights and fundamental freedoms coupled with effective action to prevent violations of these rights and freedoms.³⁵

17. In May 2021 the United Nations Committee on the Elimination of Discrimination against Women published an advance unedited version of its report following an inquiry lodged with it in 2013 by 11 organisations concerning South Africa under article 8 of the Optional Protocol to CEDAW.³⁶ The inquiry relates to allegations that “South Africa’s failure to prevent and protect women and girls from domestic violence constitutes grave and systematic violations of rights under the Convention.”³⁷ One of the listed pertinent areas of concern was “persistent stereotypes that legitimise domestic violence and discourage women from reporting it”.³⁸

18. Following a country visit by the United Nations Committee in 2019 the report documents that “[T]here is no specific offence of domestic violence. Acts constituting domestic violence are prohibited under general criminal law provisions on assault, harassment, rape and sexual assault”.³⁹ Furthermore, it noted that it is difficult to collect

³⁴ Article 4(2)(e).

³⁵ United Nations General Assembly Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women A/RES/54/4.

³⁶ Committee on the Elimination of Discrimination against Women Report of the Committee ‘Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ CEDAW/C/ZAF/IR/1 12 May 2021.

³⁷ Committee on the Elimination of Discrimination against Women Report of the Committee ‘Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ CEDAW/C/ZAF/IR/1 12 May 2021 Par 1.

³⁸ Committee on the Elimination of Discrimination against Women Report of the Committee ‘Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ CEDAW/C/ZAF/IR/1 12 May 2021 Par 3.

³⁹ Committee on the Elimination of Discrimination against Women Report of the Committee ‘Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ CEDAW/C/ZAF/IR/1 12 May 2021 Par 17.

data on domestic violence in the absence of a specific offence.⁴⁰ The Committee held that:

The failure to specifically criminalize all forms of domestic violence falls short of a clear message against this offence and is not commensurate with its extremely high prevalence in the State party.⁴¹

19. It further raised concerns around the lack of enforcement of the law by the police and lack of capacity-building and awareness-raising for the judiciary and police, which it found to be contributing to a culture of impunity.⁴² South Africa was found to be responsible for grave violations of rights under the Convention.⁴³ Of particular relevance to this investigation is the finding that South Africa had knowingly omitted to take a range of effective measures, including:

(ii) To specifically criminalize domestic violence and femicide, enforce and monitor civil remedies against perpetrators, repeal provisions that tolerate harmful practices giving rise to domestic violence, and prosecute *ex officio* domestic violence and rape.⁴⁴

20. Consequently the Committee recommended amongst others that:

...the State party:

⁴⁰ Committee on the Elimination of Discrimination against Women Report of the Committee 'Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' CEDAW/C/ZAF/IR/1 12 May 2021 Par 26.

⁴¹ Committee on the Elimination of Discrimination against Women Report of the Committee 'Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' CEDAW/C/ZAF/IR/1 12 May 2021 Par 94.

⁴² Committee on the Elimination of Discrimination against Women Report of the Committee 'Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' CEDAW/C/ZAF/IR/1 12 May 2021 Par 96 - 101.

⁴³ In the Research Paper reference is made to the United Nations Special Rapporteur on Violence against Women's first report dealing with domestic violence in 1994. The Preliminary Report submitted by the Special Rapporteur on Violence Against Women, its Causes and Consequences UN Document E/CN.4/1995/42, 22 (November 1994) 18 held that a state that does not act against crimes of violence against women is 'as guilty as the perpetrators'. States are placed under a positive duty to prevent, investigate and punish crimes associated with violence against women. SALC Research Paper on Domestic Violence para 4.5.1.

⁴⁴ Committee on the Elimination of Discrimination against Women Report of the Committee 'Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' CEDAW/C/ZAF/IR/1 12 May 2021 Par 116 (b)(ii).

(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;

21. For the purpose of this investigation the protection of the rights and freedoms found in the Constitution find application within a legislative framework which is specifically applicable to domestic violence and generally applicable to all gender-based violence. Legislation pertinent to this investigation is listed below:

- the Domestic Violence Act, 116 of 1998;
- the Criminal Procedure Act 51 of 1977;
- the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.

E Outline of the Issue Paper

22. Chapter one of the Issue Paper sets out the methodology and purpose of the investigation. The purpose of which is to succinctly determine whether a criminal offence of domestic violence or offences specific thereto are needed to augment the civil and criminal remedies available to combat the scourge of domestic violence in South Africa. This chapter further contains a brief exposition of the legislative and regulatory context in South Africa and highlights the recommendation contained in the High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change⁴⁵ and the United Nations Committee on the Elimination of Discrimination against Women⁴⁶ to enact a specific offence of domestic violence.

23 Chapter two provides a brief historical overview of the Commission's investigation which culminated in the Domestic Violence Act; gives a top-level synopsis of two of the gender-based violence laws recently approved by Parliament on 10 September 2021 i.e. the Domestic Violence Amendment Bill [B20-2020] and the Criminal and Related Matters Amendment Bill [B17-2020]; and considers the need for a crime of domestic violence or additional crimes such as strangulation or choking within

⁴⁵ Report of the High Level Panel Recommendation 4.8a 338.

⁴⁶ Committee on the Elimination of Discrimination against Women Report of the Committee 'Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' CEDAW/C/ZAF/IR/1 12 May 2021.

the context of domestic violence. It concludes with questions pertinent to framing the scope of this investigation.

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

A Introduction

1. Aside from acknowledging that certain acts would constitute crimes, the Commission's initial investigation focussed primarily on reviewing the (then) Prevention of Family Violence Act, 1993, and not the criminal justice response to domestic violence as this was the brief given to it. Consequently, the formulation of a new offence of domestic violence, or associated offences, other than for the breach of the protection order, was not considered.⁴⁷ The aim of this chapter is primarily to explore whether there is a need to create an offence of domestic violence or offences pertinent to domestic violence. In doing so, attention will be given to the adequacy of the current criminal law response and the rationale behind providing a civil law response to domestic violence.

B Domestic violence within the current and developing legislative context

2. In spite of existing measures, including the preventative element of the Domestic Violence Act, intimate partner violence remains a serious problem in South Africa, with the President referring to it, in the context of the COVID-19 pandemic, as the second pandemic.⁴⁸ The profound and detrimental impact of domestic violence on a socio-economic level is almost unquantifiable. A 2015 costing study estimated the cost of GBV&F in South Africa to be between R24 – 42 Billion per annum.⁴⁹ This does not include the social and economic cost of shaping and raising the next generation in such homes and the costs associated with the debilitating consequences that victims need to navigate thereafter. For children who are exposed or subjected to domestic

⁴⁷ SALC Research Paper on Domestic Violence para 6.11.19.

⁴⁸ Parliament of the Republic of South Africa, Summary and analysis of the Domestic Violence Amendment Bill, Research Unit (G Nesbitt) 24 August 2020 3.

⁴⁹ NSP 24.

violence, their perceptions of the roles of men and women are distorted and put them at risk of being either the perpetrators or the victims of the future.⁵⁰ It seems logical that if violence is to be addressed in broader society that violence prevention needs to start in the home and that a multi-sectoral approach is needed. The focus, however, in this paper is on the criminal law response to domestic violence.

3. South Africa's Domestic Violence Act is considered, on paper, to be among the most progressive laws in the world aimed at providing recourse to victims of interpersonal or domestic violence.⁵¹ However, for a law to be effective more is needed than "good" law on paper.⁵² Primary challenges with uptake, use and implementation of the remedies provided for by the Domestic Violence Act, were identified for revision. The legislature sought to address identified challenges with the response to domestic violence by making amendments to the Domestic Violence Act, the Criminal Procedure Act and the Minimum Sentences Act. For the sake of context the recommendations will briefly be discussed.

1 The Domestic Violence Amendment Bill [B20-2020]

4. The Domestic Violence Amendment Bill [B20-2020] which was tabled in Parliament in 2020, was unanimously agreed to by the National Assembly on 10 September 2021 and has been sent to the President for assent.⁵³ The Bill seeks to address practical challenges, gaps and anomalies which have manifested themselves since the Domestic Violence Act was put into operation in 1999 and which render women and children helpless to the violence they experience, often in the confines of their homes.⁵⁴ As stated above, the Domestic Violence Act provides a civil remedy. The Bill therefore seeks to address key challenges presented by the current Act to the

⁵⁰ Mazza D "Domestic violence: a concern for doctors" 60.

⁵¹ Parenzee P "A law isn't enough to stop domestic violence" (2018) Institute for Security Studies available at <https://issafrica.org/iss-today/a-law-isnt-enought-to-stop-domestic-violence> accessed on 10 November 2020.

⁵² Parenzee P "A law isn't enough to stop domestic violence" (2018) Institute for Security Studies available at <https://issafrica.org/iss-today/a-law-isnt-enought-to-stop-domestic-violence> accessed on 10 November 2020.

⁵³ Gerber J Parliament's adoption of GBV bills is a 'leap that is long overdue' 10 September 2021. Available at news24.com/news. Accessed on 10 September 2021. It will be operationalized once the regulations which are to be issued in terms of the Act are finalised.

⁵⁴ Briefing presentation by the Department of Justice and Constitutional Development to the Portfolio Committee on Justice and Correctional Services. Zoom 1 September 2020.

implementation and uptake of this civil remedy.⁵⁵ By way of summary the amendments to the Domestic Violence Act seek to:

- optimise collaboration between a range of government departments to streamline provision of services within existing mandates;
- simplify and clarify the roles of all relevant stakeholders by expressly including the services to be rendered;
- enhance the application of the Act to provide the maximum protection available through a civil process; and
- address identified gaps or shortcomings which impact on the optimal implementation of the Act; for example providing for remote online applications.⁵⁶

5. As the primary focus of the review of the Domestic Violence Act has been to address implementation challenges relating to the uptake of this civil remedy, the focus has squarely remained on providing an effective and efficient civil remedy with a clear pathway of services. A victim of domestic violence is not precluded from laying a criminal charge and applying for a protection order thereby activating parallel processes. In fact the Domestic Violence Act places an obligation on the police and the clerk of the court to advise the complainant, where the act of domestic violence constitutes an offence, of the right to lay a criminal charge.⁵⁷ However, such a criminal charge will not be for an offence of domestic violence but for any one of a range of offences in terms of the current criminal law.

6. Crimes which may be committed in respect of the Domestic Violence Act (in terms of the current Act and the proposed amendments in the Bill) relate to non-compliance of a protection order;⁵⁸ publication of any information which might identify the parties to the application of the protection order;⁵⁹ contravention of a court directive regarding information on the proceedings;⁶⁰ a wilful false statement in a material sense regarding the respondent's breach of the protection order;⁶¹ non-attendance or non-

⁵⁵ Briefing presentation by the Department of Justice and Constitutional Development to the Portfolio Committee on Justice and Correctional Services. Zoom 1 September 2020.

⁵⁶ Briefing presentation by the Department of Justice and Constitutional Development to the Portfolio Committee on Justice and Correctional Services. Zoom 1 September 2020.

⁵⁷ Section 2 and 4 of the Domestic Violence Act.

⁵⁸ Section 7 read with section 17 of the Domestic Violence Act.

⁵⁹ Section 11(2)(a) read with section 17 of the Domestic Violence Act.

⁶⁰ Section 11(2)(b) read with section 17 of the Domestic Violence Act.

⁶¹ Section 8(4)(a) read with section 17 of the Domestic Violence Act.

cooperation on the part of a witness;⁶² and non-compliance and related conduct by an electronic communications service provider of a direction by the court.⁶³ It is notable that section 2B of the Bill introduces a crime for not reporting that an act of domestic violence has been committed against a child, a person with a disability or an older person to a social worker or the South African Police Service. It is, however, argued that arrests should be for the crimes that are committed against the victim of domestic violence and not for “flouting the authority of the court.”⁶⁴ However, it is trite that if no crime is committed, the police will not have the authority to act.

7. With regard to the criminal law response, the Bill seeks to amend section 3 of the Domestic Violence Act which currently provides that a peace officer may at the scene of an incident of domestic violence and arrest a person without a warrant for an offence containing an element of violence against a complainant. In terms of the proposed amendments to the section a discretion is afforded to a peace officer who attends the scene of an incident of domestic violence, to arrest any person who such peace officer reasonably suspects of having committed an act of domestic violence which constitutes an offence in terms of any law, against any person who is in a domestic relationship with such person; or has breached a protection order.⁶⁵ It further amends this section by obliging a peace officer to arrest a person who is reasonably suspected of having committed an act of domestic violence where physical violence is involved. It is important to note the change in respect of the words “may at the scene” and “who attends the scene” of an incident of domestic violence. This empowers a peace officer to arrest an alleged perpetrator of domestic violence who has fled the scene or may be hiding nearby but who is no longer “at the scene” of the domestic violence. This was identified as a shortcoming in the Domestic Violence Act which hampered the police’s response.

⁶² Section 5A read with section 17 as amended by the Bill.

⁶³ Section 5B(11)(a), (b), (c) or (d), read with section 17 as amended by the Bill.

⁶⁴ South African Law Commission Domestic Violence (Project 100) Research Paper (1999) para 6.11.4.

⁶⁵ Section 17(1)(a) of the Domestic Violence Act.

2 The Criminal and Related Matters Amendment Bill [B17-2020]

8. Where the alleged perpetrator of domestic violence is arrested by a peace officer attending to the scene of domestic violence or where a victim of domestic violence lays a criminal charge, either in tandem with an application for a protection order or independently thereof, or as a result of a breach of a protection order, the mechanisms of the criminal justice system, which provide for arrest, bail, conviction and sentencing are activated.

9. The Criminal and Related Matters Amendment Bill [B17-2020]⁶⁶ seeks to provide protection to a victim of domestic violence by tightening up the bail provisions applicable to such matters. The proposed amendment to section 59 and section 59A of the Criminal Procedure Act 51 of 1977 provides 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.

10. The prohibition against bail is further extended in respect of police bail where it also provides for a catch-all clause in respect of any offence referred to in “any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused.”⁶⁷ These offences are over and above the serious offences listed in Part II or Part III of the Schedule to the Criminal Procedure Act. The offences listed in these Parts include kidnapping, murder, rape, sexual offences against a child or a person with a mental disability, theft or assault when a dangerous wound is inflicted. In addition to these amendments the Bill seeks to amend Part II of the Criminal Procedure Act by extending the offence of “assault, when a dangerous wound is inflicted” as follows:

“Assault —

- (a) when a dangerous wound is inflicted;
- (b) involving the infliction of grievous bodily harm; or
- (c) where a person is threatened —
 - (i) with grievous bodily harm; or

⁶⁶ The Bill was passed by the NCOP on 1 September 2021 and has been sent to the President for assent.

⁶⁷ Amendment to section 59 of the Criminal Procedure Act.

- (ii) with a fire-arm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013”.⁶⁸

11. The proposed amendments to section 60 of the Criminal Procedure Act, which regulates a bail application by an accused in court, requires that before the court reaches a decision in respect of a bail application it must consider “the view of the person against whom the offence in question was allegedly committed, regarding his or her safety”.⁶⁹ It must also consider factors such as the degree of violence used, threats of violence, any resentment harboured, and disposition of the accused to commit a domestic violence related offence or a history of doing so while released on bail, or placed under correctional supervision, day parole etc.⁷⁰ Where the prosecutor does not oppose bail in domestic violence related matters, the court may only release the accused if it is found to be in the interests of justice and the prosecutor has placed on record the reasons for not opposing the bail application.⁷¹ Furthermore, that the interests of justice “should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.”⁷²

12. In terms of the proposed substitution of subsection 60(11B) of the Criminal Procedure Act the accused or their legal adviser is compelled to inform the court if an interim or final protection order has been granted in terms of the Domestic Violence Act. If the court is satisfied that it is in the interests of justice to release the accused on bail and a protection order has not been issued in terms of the Domestic Violence Act then the court must, after holding an enquiry, issue a final protection order.⁷³

13. Furthermore, it is proposed that in addition to existing provisions that any bail that is granted should be cancelled where the accused breaches the protection order granted in terms of the Act, poses a threat to the safety of the person against whom the offence allegedly was committed or any other person or where the accused did not disclose the existence of a protection order.⁷⁴

⁶⁸ Amendment of Schedules 1, 2, 7 and 8.

⁶⁹ Amendment to section 60(2A)(b) of the Criminal Procedure Act.

⁷⁰ Amendment to subsection 60(4) and (5) of the Criminal Procedure Act.

⁷¹ Amendment to subsection 60(10) of the Criminal Procedure Act.

⁷² Amendment to subsection 60(12) of the Criminal Procedure Act.

⁷³ Amendment to subsection 60(12) of the Criminal Procedure Act.

⁷⁴ Amendment to section 68 of the Criminal Procedure Act.

14. Additional protective measures have been proposed to ensure that court proceedings are more manageable and less traumatising. For example, and by way of summary, section 158 of the Criminal Procedure Act is amended to provide for evidence by way of closed circuit television or similar electronic media, irrespective of whether the witness is outside of the country; section 161 of the Criminal Procedure Act is amended to allow for gesture language, demonstrations and non-verbal expression in the place of oral evidence where a person lacks hearing or the ability to speak or is under the age of 18 years and their ability to give oral evidence is inhibited; and section 170A of the Criminal Procedure Act is amended to allow for an intermediary to be appointed where appearing in court would expose the person to undue psychological, mental or emotional stress, trauma or suffering.

15. Section 299A of the Criminal Procedure Act is amended to provide the complainant or an immediate relative of the deceased with the right to make representations when the prisoner is considered to be placed on parole, day parole or under correctional supervision. This right is applicable following conviction and sentencing for any listed offence such as murder, rape or for any crime against a person in a domestic relationship where a sentence exceeding seven years imprisonment was imposed.

16. The Bill further seeks to amend the Criminal Law Amendment Act 105 of 1997 (the "Minimum Sentences Act") by specifically inserting offences committed in the context of a domestic relationship as defined in the Domestic Violence Act. The amendments will mean that a penalty of life imprisonment would apply to an accused that has brought about the death of a person with whom they were in a domestic relationship by way of physical or sexual abuse;⁷⁵ or where a person in a domestic relationship is raped. A person who is convicted of the offence of assault with intent to do grievous bodily harm as listed in Part III of Schedule 2 of the Criminal Law Amendment Act, where the victim is or was in a domestic relationship, is set to face a minimum sentence of 10 years imprisonment if a first offender, 15 years if a second offender and 20 years if a third or subsequent offender.

⁷⁵ Amendment to Part I of Schedule 2 of the Criminal Law Amendment Act, 1997.

C Domestic violence as a criminal offence

17. In addition to the recommendation by the High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change and the United Nations Committee on the Elimination of Discrimination against Women, during deliberations in Parliament on the Domestic Violence Amendment Bill calls were made 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.⁷⁶ The broad definition of “domestic violence” in the Domestic Violence Act includes certain criminal offences e.g. assault or rape under categories such as “physical abuse” and “sexual abuse”, both of which are independently defined in the Domestic Violence Act. It, however, also includes behaviour which may not constitute a crime, e.g. economic, emotional, verbal or psychological abuse, which in turn may be actionable through civil processes. No crime of “domestic violence” exists,

“instead its multiple forms are captured across a range of different categories of criminal offences such as assault (either common or with intent to cause grievous bodily harm), pointing a firearm, intimidation, rape or attempted murder (among other charges).”⁷⁷

1 Identification of offences within the domestic or inter-personal context

18. The criminal law applicable in South Africa is a blend of Roman-Dutch, English, German and uniquely South African elements, which are found in the common law and on the statute book.⁷⁸ Burchell reflects that the criminal law “defines certain forms of human conduct as crimes and provides for the punishment of those persons with criminal capacity who unlawfully, and with a guilty mind commit a crime.”⁷⁹ In the context of a domestic relationship as defined in the Domestic Violence Act a range of

⁷⁶ COSATU 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 of the Republic of South Africa, Summary and analysis of the Domestic Violence Amendment Bill, Research Unit (G Nesbitt) 24 August 2020 p10.

⁷⁷ Vetten L “Domestic violence in South Africa” available at <https://www.saferspaces.org.za/uploads/files/PolBrief71.pdf> as referenced in the Summary and analysis of the Domestic Violence Amendment Bill 3.

⁷⁸ Burchell J Principles of Criminal Law Fifth edition 2016 Juta 9.

⁷⁹ Burchell J Principles of Criminal Law Fifth edition 2016 Juta 3.

common law crimes may be committed, i.e. murder,⁸⁰ attempted murder,⁸¹ assault, assault with the intent to do grievous bodily harm,⁸² *crimen iniuria*, kidnapping, abduction, theft, robbery, fraud, malicious injury to property, arson, housebreaking, or extortion. These crimes correlate with physical abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; damage to property; and the catch all phrase of “any other controlling or abusive behaviour towards a complainant”.⁸³ A range of statutory crimes may also be committed, i.e.

- rape,⁸⁴
- compelled rape,⁸⁵
- sexual assault,⁸⁶
- compelled sexual assault,⁸⁷
- compelled self-sexual assault,⁸⁸
- compelling or causing a person 18 years or older to witness a sexual offence, sexual act or self-masturbation,⁸⁹
- exposure or display of or causing the exposure or display of genital organs, anus or female breasts to persons 18 years or older (flashing);⁹⁰
- exposure or display of or causing exposure or display of child pornography to persons 18 years or older;⁹¹
- incest;⁹²
- acts of consensual sexual penetration with certain children (statutory rape);⁹³
- acts of consensual sexual violation with certain children (statutory sexual assault);⁹⁴
- sexual exploitation of children;⁹⁵
- sexual grooming of children;⁹⁶
- exposure or display of child pornography or pornography to a child;⁹⁷

⁸⁰ As the majority of the victims of murder within the context of gender-based violence, including domestic violence are women and girls, the term femicide is frequently used to reflect the gendered nature of the murder.

⁸¹ This may include intentional HIV infection through sexual intercourse.

⁸³ Paragraph (j) of the definition of ‘domestic violence’.

⁸⁴ Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁸⁵ Section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁸⁶ Section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁸⁷ Section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁸⁸ Section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁸⁹ Section 8 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹⁰ Section 9 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹¹ Section 10 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹² Section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹³ Section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹⁴ Section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹⁵ Section 17 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹⁶ Section 18 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹⁷ Section 19 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

- using a child or benefitting from child pornography;⁹⁸
- compelling or causing a child to witness a sexual offence, sexual act or self-masturbation;⁹⁹
- exposing or displaying or causing the exposure or display of genital organs, anus or female breasts to a child;¹⁰⁰
- sexual exploitation of a mentally disabled person;¹⁰¹
- promoting sexual grooming of a person who is mentally disabled;¹⁰²
- Exposing or displaying or causing the exposure or display of child pornography or pornography to a person who is mentally disabled;¹⁰³
- Using or benefitting from a person who is mentally disabled.¹⁰⁴
- Obligation to report a sexual offence against a child or person who is mentally disabled.¹⁰⁵
- Attempt, conspiracy, incitement or inducing another person to commit a sexual offence.¹⁰⁶
- Abuse, deliberate neglect or abandonment of a child;¹⁰⁷
- Failure to provide a child with adequate food, clothing, lodging, medical assistance in contravention of a legal duty to maintain the child;¹⁰⁸
- Non-reporting of commercial sexual exploitation of a child on premises by the owner, lessor, manager, tenant or occupier of said premises;¹⁰⁹
- Offences contained in the Films and Publications Act 1996;¹¹⁰

19. Parliament's Research Unit reports that for the first time the 2018/2019 and thereafter the 2019/2020 SAPS crime statistics indicates that domestic violence was a causative factor in the following reported crimes:¹¹¹

⁹⁸ Section 20 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁹⁹ Section 22 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

¹⁰⁰ Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

¹⁰¹ Section 23 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

¹⁰² Section 24 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

¹⁰³ Section 25 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

¹⁰⁴ Section 26 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

¹⁰⁵ Section 54 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

¹⁰⁶ Section 55 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

¹⁰⁷ Section 305(3) of the Children's Act 38 of 2005.

¹⁰⁸ Section 305(4) of the Children's Act 38 of 2005.

¹⁰⁹ Section 305(5) of the Children's Act 38 of 2005.

¹¹⁰ Section 24B. However the Cybercrimes Act 20 of 2019 once operationalised will repeal this section and replace it with an amendment to the Criminal Law (Sexual Offences and Related Matters) Amendment Act by the insertion of section 19A. For this reason the offences are not listed in any detail here, suffice to say that child pornography in all its forms is illegal.

¹¹¹ Summary and analysis of the Domestic Violence Amendment Bill 4 with reference to the SAPS Crime Statistics (Crime Situation in Republic of South Africa Twelve (12) Months (April to March 2019/2020).

| DOMESTIC VIOLENCE AS A CAUSATIVE FACTOR IN REPORTED CRIMES | 2018/19 | 2019/20 | %INCR |
|---|---------|---------|-------|
| Murder | 1 115 | 1 482 | 32.9% |
| Attempted Murder | 902 | 923 | 2.3% |
| Assault (Grievous Bodily Harm) | 19 687 | 21 344 | 8.4% |

20. Govender submits that domestic violence cases need to be disaggregated from assault, murder and other interpersonal crime statistics such as violence against women, children and men, in order to provide accurate statistics.¹¹² Obtaining data similar to that which is reflected in the table above in respect of all offences would be dependent on requiring that this information be captured in a disaggregated manner on the data system. The current data also does not reflect in how many instances the victims of the above crimes had been issued with protection orders against domestic violence or had laid charges with the police.

2 Barriers to accessing or engaging the criminal justice system

21. 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. This includes perceptions that domestic violence is a private matter, discouraging victims from laying criminal charges.¹¹³

22. It would seem that, subsequent to the enactment of the Domestic Violence Act, very little has changed normatively in terms of change of attitude by law enforcement towards domestic violence. In 1999, the Research Paper documented that in reality the police have a “tendency to relegate domestic violence to the private sphere”¹¹⁴ which

¹¹² Summary and analysis of the Domestic Violence Amendment Bill 4 with reference to the SAPS Crime Statistics (Crime Situation in Republic of South Africa Twelve (12) Months (April to March 2019/2020).

¹¹³ Para 49 and 50.

¹¹⁴ Para 49 and 50.

means that domestic violence is not treated the same as violence between people who are not related.

23. This is particularly problematic as the Police are often the first port of call when acts of violence in inter personal relationships occur. As such the police bear the “obligation to realise the Constitutional rights of women to safety and security and to have their bodily integrity respected and protected.”¹¹⁵ They, however, can only act within the confines of the law and in fairness the parties to a domestic dispute may be volatile and emotionally charged, making a text book response difficult at best. Often times it would seem victims are unwilling to lay a criminal charge and may subsequently withdraw the same if one is made. It is therefore unsurprising that when it comes to law enforcement research shows that the police are generally reluctant to intervene and seem to favour remedying domestic disputes through civil remedies.¹¹⁶ The Domestic Violence Act sets out in detail how the police should respond when cases are reported and requires SAPS to report annually to Parliament.¹¹⁷ As stated above, the Domestic Violence Act, once amended, will require mandatory arrest where there is physical violence¹¹⁸ However, where a protection order has been breached a member of the police still has a discretion based on stipulated criteria as to whether he or she will execute the warrant and arrest the respondent or will issue the respondent with a written notice to appear in court for the breach.¹¹⁹

24. It would further appear that the police not only give preference to referrals for protection orders but are known to refuse to accept criminal charges until a protection order has been granted.¹²⁰ The view given is that “the Act’s approach and underlying

¹¹⁵ Summary and analysis of the Domestic Violence Amendment Bill 8.

¹¹⁶ Clark “Cold comfort? A commentary on Prevention of Family Violence Act” 596; Govender D “Is domestic violence being policed in South Africa?” *Acta Criminologica: Southern African Journal of Criminology* 28(2)/2015 38.

¹¹⁷ Parenzee “A law isn’t enough to stop domestic violence” 2.

¹¹⁸ 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.

¹¹⁹ Section 8 of the Act; Clark Cold comfort? A commentary on Prevention of Family Violence Act 596.

¹²⁰ Committee on the Elimination of Discrimination against Women Report of the Committee ‘Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ CEDAW/C/ZAF/IR/1 12

philosophy (of dealing with family violence outside criminal courts)” undermines its overall value.¹²¹ It is also thought to relegate violence in the home or between family members as less serious than violence between persons who are unrelated.¹²² It is unclear in how many instances the existence of and referral to the use of an application for a protection order has effectively diverted attention away from arrest of abusers or the laying of criminal charges.¹²³

25. Clark¹²⁴ suggests that:

“reform of societal perceptions of, and approaches to, violence against women is crucial in the achievement of a proper restructuring of legal interventions for battered women . . .”

26. Clark questions whether providing a civil remedy only serves to decriminalise the problem.¹²⁵ She explains that the main basis for favouring criminal prosecution over a civil process is that this would take the matter “out of the hands of the victim so as to destroy the sacred public/private divide which has constituted a major barrier to the prosecution of such cases.” Her conclusion seems to favour a hybrid approach which caters for a civil and criminal approach and not an approach which prefers the one over the other.

27. Govender, in turn, submits that in order for the police to comply with the Constitutional mandate to police domestic violence they need to treat domestic violence crimes as violent crimes because of the violence and abuse involved.¹²⁶ Furthermore that to:

May 2021 par 49; SALC Research Paper on Domestic Violence para 5.8.1.

¹²¹ Committee on the Elimination of Discrimination against Women Report of the Committee ‘Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ CEDAW/C/ZAF/IR/1 12 May 2021 par 49; SALC Research Paper on Domestic Violence para 6.11.1.

¹²² Committee on the Elimination of Discrimination against Women Report of the Committee ‘Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women’ CEDAW/C/ZAF/IR/1 12 May 2021 par 49; SALC Research Paper on Domestic Violence para 6.11.1.

¹²³ Novitz T “Interdicts in the Magistrates’ Courts: An Analysis of the Content and Implementation of the Prevention of Family Violence Act”, Document Produced for the Law, Race and Gender Project at the University of Cape Town (September 1994) 44 as quoted in SALC Research Paper on Domestic Violence para 6.11.5.

¹²⁴ Clark B “Cold comfort? A commentary on Prevention of Family Violence Act” SAJHR (1996) Vol 12 Part 4 587.

¹²⁵ Clark “Cold comfort? A commentary on Prevention of Family Violence Act” 592.

¹²⁶ Govender D “Is domestic violence being policed in South Africa?” 33.

“reduce domestic violence cases, it is in the interest of SAPS to intervene more decisively and consistently in policing domestic violence cases”¹²⁷

28. The Research Paper further refers to the views of Novitz where she:

“asserts that the criminal law probably remains one of the most effective ways of addressing cases of family violence.”¹²⁸

29. Artz¹²⁹ documents that although the incident of domestic violence that is reported to the criminal justice system may be seemingly trivial, it should be seen against a context of years of abuse and can quickly degenerate into violent episodes. Artz emphasises that it is widely accepted that the intensity and brutality of domestic violence increases over time.¹³⁰ She notes that the act of seeking help may only serve to amplify the violence in what she calls the “boomerang effect”.¹³¹ Victims of domestic violence are often threatened with death or more violence if they initiate or proceed with criminal justice interventions including an application for a protection order.¹³² This would seem to indicate a need for the criminal justice system to differentiate between transgressions of the law perpetrated by family members or within a domestic context and those who are not.

30. While victims of domestic violence face systemic challenges it is only fair to note that some of the challenges are personal structural barriers, which result in victims withdrawing from processes they have initiated to apply for protection orders or by laying charges with the police. The Research Paper proposes that “[T]he consequences of criminal sanctions in domestic cases bear no relation to the future needs of the victim.”¹³³ These needs may include the need to find employment, housing and food. In other words at a very practical level, for a woman to exit a violent relationship, she needs to be presented with a means to survive. Some additional factors which may cause a victim of domestic violence not to lay or support the laying

¹²⁷ Govender D “Is domestic violence being policed in South Africa?” 43.

¹²⁸ Novitz “Interdicts in the Magistrates’ Courts” 26 as quoted in SALC Research Paper on Domestic Violence para 6.11.5.

¹²⁹ Artz L “Fear or failure? ISS SA Crime Quarterly No.37 September 2011 6.

¹³⁰ Artz “Fear or failure? Why victims of domestic violence retract from the criminal justice process” 8.

¹³¹ Artz “Fear or failure? Why victims of domestic violence retract from the criminal justice process” 6.

¹³² Artz “Fear or failure? Why victims of domestic violence retract from the criminal justice process” 6 - 7.

¹³³ SALC Research Paper on Domestic Violence para 6.11.9.

of a criminal charge include the fear of reprisals if the abuser is not detained or is released on bail; the financial impact caused by potential job loss on the part of the abuser if he is arrested and convicted and at a very basic level the lack of capacity to deal with the additional emotional or psychological strain of the anticipated hardship of navigating the criminal justice system. In the majority of cases the victim may merely wish for the violence to end and not necessarily for an end to the relationship.¹³⁴

31. An important or key component of assessing the risk for further violence which the victim faces is the victim herself.¹³⁵ Where a victim of domestic violence does initiate and proceed with the criminal justice process to interrupt the violence she has been exposed to, the risk she has taken to do so should be recognised. This may include reviewing whether a civil or criminal law approach is the better avenue to follow. Non-governmental organisations (NGOs) have also cautioned that a “no withdrawal” policy could put victims at risk.¹³⁶

32. Given the complexity of domestic violence cases and the reality they and those called upon to respond to such incidents face, it is argued that although an adult victim of family violence should be encouraged to lay a criminal charge, the autonomy of the victim should be respected.¹³⁷ Sections 2A and 2B of the Domestic Violence Amendment Bill reflect this sentiment. Mandatory reporting of adult victims of domestic violence who do not have a disability as defined or are not older persons is excluded.

33. One of the key amendments to the Domestic Violence Act is the introduction of a clear pathway of services in response to domestic violence. Currently the only links in the response chain are the police, the prosecuting authority and the court and related officials. In order to complete the chain, the proposed section 2A imposes the following obligations on functionaries (who are 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 deal in the following manner with the victims of domestic violence:

¹³⁴ SALC Research Paper on Domestic Violence para 6.11.7.

¹³⁵ SALC Research Paper on Domestic Violence para 6.11.7.

¹³⁶ Committee on the Elimination of Discrimination against Women Report of the Committee 'Inquiry concerning South Africa under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' CEDAW/C/ZAF/IR/1 12 May 2021 par 54.

¹³⁷ SALC Research Paper on Domestic Violence para 6.11.22.

- (a) Where a functionary becomes aware of the fact, or on reasonable grounds believes or suspects, that a child, a person with a disability or an older person is a victim of domestic violence, the functionary—
- must report the reasons for such knowledge, belief or suspicion to a social worker and the South African Police Service; and
 - may, after conducting, and evaluation of, a risk assessment refer the victim for further services.

34. The proposed section 2B further imposes an obligation on persons, other than a functionary, as defined in the Domestic Violence Act, to report their knowledge or a reasonable belief or suspicion that an act of domestic violence has been committed against a child, a person with a disability or an older person to a social worker or the South African Police Service.

35. Furthermore, the amendments seek to place 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 provide for a range of matters to ensure that a victim of domestic violence is provided with protection, assistance, information and services as required. This includes risk assessment and designation of accredited shelters.¹³⁸ The inclusion of the Department of Communications and Digital Technologies is critical to bring about normative change in society through education and awareness-raising.

36. The Research Paper refers to the recommendation contained in its underpinning Discussion Paper 70 that:

“the Department of Justice and the Department of Safety and Security initiate programmes aimed at ensuring that –

- (a) the criminality of domestic violence is recognised;
- (b) the criminal justice system holds offenders accountable for the criminal behaviour; and
- (c) procedures relating to police, prosecution and court practice take account of the special dynamics of domestic violence and the special vulnerability of the victim.”¹³⁹

37. This recommendation received widespread support from respondents.¹⁴⁰ In response to this recommendation the UWC Community Law Centre noted at the time

¹³⁸ Section 18B of the Domestic Violence Amendment Bill.

¹³⁹ SALC Research Paper on Domestic Violence para 6.11.13.

¹⁴⁰ SALC Research Paper on Domestic Violence para 6.11.17.

that “experience has shown that criminal prosecutions for domestic violence are not often instituted in South Africa, and that the existing substantive offences do not cover all the manifestations of such violence.”¹⁴¹

38. With a focus on “Justice, Safety and Protection”, pillar three of the NSP provides:

“3.1. All GBV survivors are able to access efficient and sensitive criminal justice that is quick, accessible, responsive and gender inclusive;
3.2. Strengthened capacity within the criminal justice system to address all impunity, effectively respond to femicide and facilitate justice for GBV survivors;
3.3. Amended legislation related to GBV areas that build on legislative reforms initiated under the Emergency Response Action Plan.”

39. The ineffectiveness of the criminal justice system in response to domestic violence is consistently raised in research. Meyersfeld submits that the unresponsiveness of the criminal justice system to domestic violence has often been blamed for perpetuating the norm that domestic violence is acceptable, and for contributing to the secondary traumatising of victims of domestic violence who have sought help.¹⁴² Altbeker, however, states that in his view the problem with the response to domestic violence is that it is premised on the notion that with some guidance from the legislature, the police can learn to use their authority to ease the pain, trauma and fear of victims in abusive relationships.¹⁴³ He submits that the powers of the police are very poor tools with which to effect the changes that families experiencing domestic violence need.¹⁴⁴ Their ability to respond adequately is also determined by the available resources e.g. number of responder’s vehicles and network of services. It is therefore necessary to consider the budget allocated to combating domestic violence, which includes ring-fencing budgeting for operational and infrastructure costs as well as collaboration and coordination between state role players and NGO’s.¹⁴⁵

¹⁴¹ SALC Research Paper on Domestic Violence para 6.11.14.

¹⁴² Meyersfeld B “Domestic Violence and International Law” (2011) 27 South African Journal on Human Rights 212.

¹⁴³ Altbeker A Policing domestic violence: The enthusiasm gap ISS SA Crime Quarterly No12 June 2005 18.

¹⁴⁴ Altbeker A Policing domestic violence: The enthusiasm gap ISS SA Crime Quarterly No12 June 2005 18.

¹⁴⁵ Parenzee “A law isn’t enough to stop domestic violence” 5.

3 Selected comparative approach

40. A number of comparative jurisdictions have sought to revise the manner in which family violence matters are dealt with. This includes holding “offenders of criminal behaviour committed in the context of domestic violence, accountable to the same extent as offenders of other similar criminal offences”.¹⁴⁶ Some comparative jurisdictions have embarked on an overhaul of the criminal law response to domestic violence. For example, the United Kingdom promulgated the Domestic Violence, Crime and Victims Act, 2005 on 15 November 2004 in a bid to change the civil and criminal law approach to matters related to domestic violence. Domestic violence is, however, not a stand-alone offence. The Act makes common assault an arrestable offence, makes restraining orders available on conviction or acquittal for any offence, makes provision for a surcharge, sets out the circumstances in which part of a trial on indictment in the Crown Court may be heard by a judge sitting without a jury, and introduces provisions to improve fine enforcement.¹⁴⁷ Part 3 of the UK Domestic Violence Act makes provisions about victims and witnesses of crime and anti-social behaviour and provides powers to enable the Criminal Injuries Compensation Authority to recover from offenders the money it has paid out in compensation to their victims.¹⁴⁸

41. In Canada, there is also no specific offence of domestic or family violence.¹⁴⁹ A range of offences relevant to responding to domestic violence are found in the Criminal Code. These offences can be categorised as follows:

- Offences related to the use of physical and sexual violence include assault (causing bodily harm, with a weapon and aggravated assault); kidnapping & forcible confinement; trafficking in persons; abduction of a young person; homicide - murder, attempted murder, infanticide and manslaughter; sexual assault (causing bodily harm, with a weapon and aggravated sexual assault); sexual offences against children and youth; child pornography.
- Offences related to the administration of justice include disobeying order of court; failure to comply with condition of undertaking; failure to comply with probation order; breach of recognizance (peace bond).

¹⁴⁶ The Community Law Reform Committee of the Australian Capital Territory Report on Domestic Violence Report No 9 Canberra (1995) para 119 as referred to in the SALC Research Paper on Domestic Violence para 6.11.12.

¹⁴⁷ Note on the United Kingdom Domestic Violence, Crime and Victims Act, 2005 available at <https://www.legislation.gov.uk/ukpga/2004/28/notes> accessed 17 November 2020.

¹⁴⁸ Note on the United Kingdom Domestic Violence, Crime and Victims Act, 2005 available at <https://www.legislation.gov.uk/ukpga/2004/28/notes> accessed 17 November 2020.

¹⁴⁹ 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.

- Offences related to some forms of psychological or emotional abuse within the family that involve using words or actions to control, isolate, intimidate or dehumanize someone such as criminal harassment (sometimes called "stalking"); uttering threats; making indecent and harassing phone calls; trespassing at night; mischief.
- Offences related to neglect within the family such as failure to provide necessities of life; abandoning child; criminal negligence (including negligence causing bodily harm and death).
- Offences related to financial abuse within the family such as theft; theft by person holding power of attorney; misappropriation of money held under direction; theft of, forgery of credit card; extortion; forgery; fraud.

42. The Criminal Code also contains a number of special provisions that serve to protect victims. When charges relating to family violence have been laid, criminal courts have a wide range of powers to release or detain an accused person.¹⁵⁰ They can provide for release conditions such as "no contact" until the trial or appeal.¹⁵¹ Even where no offence has been committed yet, where personal injury or damage is feared, courts can also order peace bonds or recognizances, which require an individual to agree to specific conditions to keep the peace (Section 810).

43. Special consideration is given to the harm that comes from family violence. Because of the nature of the harm, sentencing provisions of the Criminal Code make it an "aggravating factor" for sentencing purposes when the offence involves abuse of a spouse or common law partner, abuse of a person under the age of 18 or abuse of a position of trust or authority.¹⁵² Section 742.1 of the Criminal Code puts limits on the use of conditional sentences that would allow an offender to serve a sentence in the community.¹⁵³

44. However, in New South Wales, a domestic violence offence is defined as an offence against a person in a domestic relationship as follows:

(a) a personal violence offence,¹⁵⁴ or

¹⁵⁰ 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.

¹⁵¹ Section 515 of the Criminal Code.

¹⁵² Section 718.2 of the Criminal Code.

¹⁵³ 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.

¹⁵⁴ (a) an offence under, or mentioned in, section 19A, 24, 25, 26, 27, 28, 29, 30, 31, 33, 33A, 35, 35A, 37, 38, 39, 41, 43, 43A, 44, 45, 45A, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61KC, 61KD, 61KE, 61KF, 61L, 61M, 61N, 61O, 65A, 66A, 66B, 66C, 66D, 66DA, 66DB, 66DC, 66DD, 66DE, 66DF, 66EA, 73, 73A, 78A, 80A,

- (b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or
- (c) an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).

45. It includes an offence under the Criminal Code Act 1995 of the Commonwealth.¹⁵⁵ This means that if an offence is committed within the context of a domestic relationship it may be charged as a domestic violence offence and be convicted as such.

46. An overarching offence of domestic violence containing recognised crimes and behaviour which traditionally falls outside of the realm of the criminal law was not found. 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.

D Strangulation as a domestic violence offence

47. One example of a manifestation of domestic violence is strangulation or choking of a victim of domestic violence. While there is no specific offence of strangulation or choking in South African law, a domestic violence offender may be charged with a range of offences e.g. assault, assault with the intent to do grievous bodily harm, attempted murder or murder. Most commonly a charge of common assault would be used. However no indication is given on the person's criminal record that the common assault was perpetrated in the context of a domestic relationship or family context. This is important to note as the victim would be more prone and vulnerable to repetitive abuse. UN Women has recommended that legislation "should provide specific

80D, 86, 87, 91P, 91Q, 91R, 93G, 93GA, 110, 195, 196, 198, 199, 200, 562I (as in force before its substitution by the Crimes Amendment (Apprehended Violence) Act 2006) or 562ZG of the Crimes Act 1900, or

(b) an offence under section 13 or 14 of this Act, or

(b1) an offence under section 109, 111, 112, 113, 114, 115 or 308C of the Crimes Act 1900, but only if the serious indictable offence or indictable offence referred to in those sections is an offence referred to in paragraph (a) or (b), or

(c) an offence of attempting to commit an offence referred to in paragraph (a), (b) or (b1).

¹⁵⁵ Section 11 of the Crimes (Domestic and Personal Violence) Act 2007 No 80 [NSW].

penalties for strangulation, observing that many victims of domestic violence have experienced strangulation and that it is often a precursor to death.”¹⁵⁶

48. Internationally, the need to address strangulation in the context of domestic violence has increasingly been flagged as a risk factor in fatal outcomes of domestic violence. The most recent review of the law dealing with strangulation in a domestic setting has been conducted by the Law Commission of New Zealand in 2016.¹⁵⁷ The report recommended the amendment of the Crimes Act 1961 to make the strangling or suffocating of a person a crime. For the purpose of this paper the uptake of this offence will be dealt with briefly below.

49. Dr Mazza reflects that the on-going nature of the physical, emotional and sexual violence that occurs within some relationships causes significant morbidity and sometimes mortality.¹⁵⁸ As reflected in the 2019/2020 statistics above, a number of cases of domestic violence have a fatal outcome. The killing of a female person on the basis of gender identity, whether in an interpersonal relationship or not is broadly categorised as femicide.¹⁵⁹ Femicide is the most extreme form of gender based violence.¹⁶⁰ Intimate femicide in turn refers to the killing of a female by an intimate partner (current or former husband or boyfriend, same sex partner or a rejected would-be lover).¹⁶¹ A 2009 national femicide study found that intimate femicide is the leading cause of female murder representing more than half (56%) of all women killed.¹⁶²

50. Internationally there has been a rapid growth in understanding the role played by strangulation in family violence and the occurrence thereof prior to fatal events.¹⁶³ Strack & Gwinn state that it is known unequivocally that strangulation is one of the

¹⁵⁶ 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.

¹⁵⁷ Law Commission of New Zealand *Strangulation the case for a new offence* (Report 138) (March 2016).

¹⁵⁸ Mazza D “Domestic violence: a concern for doctors” (1999) *Modern Medicine of South Africa* 60.

¹⁵⁹ NSP 53.

¹⁶⁰ NSP 23.

¹⁶¹ NSP 54.

¹⁶² NSP 24.

¹⁶³ LCNZ “Strangulation the Case for a New Offence”.

most lethal forms of domestic violence.¹⁶⁴ In their words “[U]nconsciousness may occur within seconds and death within minutes.” Douglas and Fitzgerald¹⁶⁵ assert that:

“strangulation, defined as the obstruction of blood vessels and/or airflow in the neck leading to asphyxia, is now established as a predictive risk factor for future severe domestic violence and for homicide, and it is commonly alleged by women who have experienced domestic violence.”

51. Douglas and Fitzgerald emphasise the frequent long-term effects on the health of a victim who survives strangulation e.g. neurological and psychiatric symptoms such as loss of consciousness, paralysis, loss of sensation, vision changes, memory loss, anxiety and post-traumatic stress disorder.¹⁶⁶ Monahan, Purushotham & Biegon emphasise the serious negative health outcomes such as carotid artery dissection, stroke and seizures which may occur immediately or some time thereafter.¹⁶⁷

52. The New Zealand Law Commission states that strangulation is known to be very common, particularly between intimate partners. It further states that there are two key factors that distinguish strangulation from most other forms of family violence. The first factor is that it “is an important risk factor for a future fatal attack by the perpetrator” with such victims being seven times more likely to being murdered.¹⁶⁸ This risk is linked to the need for decision makers to be aware of this risk. The second factor is that strangulation “characteristically leaves few marks or signs, sometimes even when it has been life threatening.”¹⁶⁹ The consequence of this is that this behaviour may be underestimated and perpetrators are not held sufficiently accountable.

53. Where it has not resulted in a fatality, the New Zealand Law Commission found that typically strangulation was not prosecuted or was dealt with as a minor offence.¹⁷⁰ It argues that:

¹⁶⁴ Strack GB & Gwinn C On the edge of homicide Strangulation as a prelude American Bar Association Criminal Justice vol 26 No3 Fall 2011.

¹⁶⁵ Douglas H & Fitzgerald R Strangulation, Domestic Violence and the Legal Response (2014) Sydney Law Review Vol 36:231 232.

¹⁶⁶ Douglas & Fitzgerald “Strangulation, Domestic Violence and the Legal Response” 232.

¹⁶⁷ Monahan K, Purushotham A & Biegon A, Neurological implications of nonfatal strangulation and intimate partner violence (2018) Future Medicine. Published online: 22 August 2019/<https://doi.org/10.2217/fnl-2018-0031> accessed 6 November 2020.

¹⁶⁸ LCNZ “Strangulation the Case for a New Offence” 4.

¹⁶⁹ LCNZ “Strangulation the Case for a New Offence” 4.

¹⁷⁰ LCNZ “Strangulation the Case for a New Offence” 4.

It is principally this second factor (combined with an understanding of the first) that has led many jurisdictions to conclude that their criminal justice systems were failing adequately to prosecute and hold perpetrators accountable.¹⁷¹

54. It notes that specific offences with higher maximum penalties and with elements tailored to the harms and intentions characteristic of strangulation have been enacted in other jurisdictions, particularly in the United States and Australia.¹⁷² The New Zealand Law Commission found that there was “a gap in the current framework of offences which justified an amendment to the law to create an offence more suited to prosecuting strangulation.”¹⁷³

55. Following this recommendation by the New Zealand Law Commission a new offence of strangulation or suffocation came into force on 3 December 2018, carrying a maximum penalty of seven years imprisonment.¹⁷⁴ It is reported that in the two months following the enactment of this crime 416 people were charged with strangling or suffocating their partners (almost five each day).¹⁷⁵

56. A number of states in the United States of America have specific strangulation laws within a domestic context and others provide for general strangulation offences.¹⁷⁶ New South Wales, Queensland, Tasmania, the Australian Capital Territory and the Northern Territory make it an offence to choke, suffocate or strangle a person in circumstances with the intent to commit a separate indictable offence.¹⁷⁷

57. Canada established a working group to examine the feasibility of creating a distinct offence of strangulation as a general intent offence, and to assess whether existing provisions adequately address the seriousness and significance of this specific

¹⁷¹ LCNZ “Strangulation the Case for a New Offence” 4..

¹⁷² LCNZ “Strangulation the Case for a New Offence” 4.

¹⁷³ LCNZ “Strangulation the Case for a New Offence” 33.

¹⁷⁴ Law Commission New Zealand News “New strangulation offence” 21 June 2019 available at <https://www.lawcom.govt.nz/news/new-strangulation-offence> accessed on 6 November 2020.

¹⁷⁵ Law Commission New Zealand News “New strangulation offence” 21 June 2019 available at <https://www.lawcom.govt.nz/news/new-strangulation-offence> accessed on 6 November 2020.

¹⁷⁶ LCNZ “Strangulation The Case for a New Offence” 34; Douglas & Fitzgerald “Strangulation, Domestic Violence and the Legal Response” 237.

¹⁷⁷ LCNZ “Strangulation The Case for a New Offence” 36.

conduct.¹⁷⁸ It would, however, seem that the United Kingdom and Canada, while acknowledging that strangulation serves as a marker for increased risk of future violence, have opted not to enact a distinct offence. The Centre for Women’s Justice, the Domestic Abuse Commissioner, the Victim’s Commissioner and various domestic abuse charities have renewed calls for England and Wales to enact a free-standing offence of non-fatal strangulation or asphyxiation as they are of the view that these crimes are significantly under-charged across the United Kingdom.¹⁷⁹ In a recent study in the United Kingdom for the years 2000 to 2018 of women killed in inter-personal violence, it was found that six out of 10 had been strangled.¹⁸⁰

58. The overlooking of the danger of strangling or the use of “trivial” charges may mean that particular attention needs to be given to training of the police, prosecutors, presiding officers and other functionaries including health care providers in order to recognise the seriousness of this behaviour, including the real risk of murder (femicide).¹⁸¹ It may be timely to consider the need for a new offence of strangulation to ensure that appropriate charges are laid, appropriate sentencing is applied, to highlight the behaviour which, in turn, may lead to better risk assessment with a view to preventing femicide.

E Questions

1. Do the existing substantive crimes adequately cover domestic violence?
2. If you believe that there should be a single offence of domestic violence, how should it be framed?
3. If you believe that additional substantive crimes for instance

¹⁷⁸ Douglas & Fitzgerald “Strangulation, Domestic Violence and the Legal Response” 239.

¹⁷⁹ Written evidence by the Centre for Women’s Justice (DAB06) Submission to Domestic Abuse Bill Committee May 2020 available at publications.parliament.uk/pa/cm5801/cmpublic/DomesticAbuse/memo/DAB06.pdf.

¹⁸⁰ Yardley E “‘Rough sex’ doesn’t kill women, their abusers do” Blog available at <https://www.elizabethyardley.com/blog-1/rough-sex-doesnt-kill-women-their-abusers-do-my-new-research-revealing-the-realities-of-so-called-sex-...> Accessed on 20 November 2020.

¹⁸¹ Shabazz S Strangulation: The red flag of domestic violence that we never discuss (2019) Strangulation Training Institute available at <https://www.strangulationtraininginstitute.com/strangulation-the-red-flag-of-domestic-violence-that-we-never-discuss/> accessed on 6 November 2020.

strangulation/suffocation are needed, how should they be framed?

4. If you believe that there should not be additional substantive crimes, what additional legislative measures or other measures might be required to ensure that the act of strangulation or domestic violence is treated with the necessary caution?
5. What measures should be put in place or changed to remove barriers to accessing the criminal justice system for victims of domestic violence?
6. Should a victim of domestic violence have the choice of engaging a civil remedy rather than a criminal one to address domestic violence? Please explain your reasoning. Do the existing substantive crimes adequately cover domestic violence?
7. What additional sentencing or preventative measures might be required? For instance, should it be possible to forewarn a victim/potential victim of the potential danger a repeat offender of a domestic violence offence might hold and if so, how?

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