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**MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION
PROJECT 100: DOMESTIC VIOLENCE: THE CRIMINAL LAW RESPONSE**

On 8 December 2021, the Commission approved the *Issue Paper on Domestic Violence: The Criminal Law Response* for publication. This issue paper seeks to identify the manner in which the law currently responds to criminal behaviour perpetrated by people in a domestic relationship and to determine whether this response is adequate. Its purpose is to initiate and stimulate debate, explore proposals for law reform, and serve as a basis for further in-depth deliberation.

This investigation focuses on an aspect that has not formed part of the recent review of the legal response to gender-based violence, namely the need for a specific domestic violence offence or offences. As the Domestic Violence Act, 1998 by its nature provides a civil remedy, the review of this Act did not include addressing the need for a specific crime of domestic violence or a related crime(s). Although a range of common law and statutory crimes not specific to domestic violence may be committed by a person in a domestic relationship, the need to review the criminal response to domestic violence was raised in 2017 by the High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change, and as recently as May 2021 by the United Nations Committee on the Elimination of Discrimination against Women.

In addition, a number of comparative jurisdictions have sought to revise the manner in which domestic violence matters are dealt with, and some have chosen to embark on a complete overhaul of the criminal law response to domestic violence. For example, strangulation in the context of domestic violence has increasingly been flagged as a risk factor in fatal outcomes of domestic violence.

The issue paper contains questions which relate to pertinent issues raised therein. 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. Respondents are requested to submit written comments or representations on the issue paper to the Commission by no later than **28 February 2022**.

ISSUED BY THE SECRETARY, SA LAW REFORM COMMISSION, CENTURION

DATE:

A copy of the summary of the issue paper and the questions posed therein is attached. The contact person for enquiries in respect of the media statement is Ms D Clark: email DClark@justice.gov.za. The issue paper is freely available on <http://salawreform.justice.gov.za>.

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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

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.

defined in the Domestic Violence Act.² A range of statutory crimes may also be committed.

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

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

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.

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.

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?