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

The South African Law Reform Commission (the Commission) has approved the *Discussion Paper on Domestic Violence: the Criminal Law Response* for publication. The discussion paper is preceded by an issue paper. The focus of this investigation is on an aspect which 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 and the related criminal law response.

The Commission is of the preliminary view that it continues to be in the best interest of an adult survivor of domestic violence (who is not elderly or disabled) to be able to choose whether to engage a civil or criminal remedy, together or separately, or not at all.

The Commission is further of the preliminary view that to ensure that the remedies provided to survivors of domestic violence are truly survivor led and survivor focused, it would require a broader approach than engaging the legal system on its own. It would arguably include different layers of societal intervention, including personalised risk assessment. The discussion paper highlights the necessity of prevention or early intervention, particularly in respect of certain acts of domestic violence. It emphasises that this stance is supported by research that domestic violence is primarily a social problem and that femicide is predictable and preventable as it is seldom the first act of violence, but instead the final act in a process of chronic domestic violence.

The Commission is of the preliminary view that a whole-of-society approach focusing on societal and normative change of deep-rooted harmful patriarchal views regarding women, which perpetuates inter-generational domestic violence, is needed. This approach requires a collaboration between government and civil society in respect of awareness raising, training and

provision of remedies, in order to provide survivors of domestic violence with realisable avenues of exit from abusive relationships and to ensure the effective implementation of laws around domestic violence. This it believes is key to dismantling the structural drivers that lead to gender-based violence, which is core to achieving substantive equality.

While recognising the recent amendments to the sentencing regime, the Commission is of the provisional view that sentencing of domestic violence offenders should be properly informed by the impact on the victim of domestic violence through detailed victim impact statements, that appropriate consideration should be given to relevant aggravating factors; and that the possibility of alternatives to sentencing which include interventions for the offender, and where suitable both the victim and offender should be considered.

Respondents are requested to submit written comment or representations on the discussion paper to the Commission by no later than **30 October 2023**.

ISSUED BY THE SECRETARY, SA LAW REFORM COMMISSION, CENTURION

DATE:

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

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SUMMARY OF THE DISCUSSION PAPER

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

2. The need for a specific crime of domestic violence is being investigated against the backdrop of the recommendation contained in the 2017 Report of the High Level Panel on the Assessment of Key Legislation and The Acceleration of Fundamental Change (The High Level Panel),² and the finding in 2021 by the United Nations Committee on the Elimination of Discrimination against Women that South Africa was guilty of a systematic violation of rights under the Convention on the Elimination of Discrimination against Women (CEDAW) for knowingly omitting to, among other omissions, specifically criminalise domestic violence and femicide³ and implement ex officio prosecutions.⁴ (See page 20)

3. Although the Domestic Violence Act, as a civil remedy, has recently been reviewed, the amendments focus primarily on promoting the uptake and efficacy of the civil remedy provided for in this Act. Amidst the accelerated promulgation of the original Domestic Violence Act; and the Domestic Violence Amendment Act; and rising calls to criminalise domestic violence as a stand-alone offence, the Commission identified the need for further research with a view to possible law reform.⁵ (See page 21)

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

1 Presidential Summit against GBVF Declaration 2018.

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

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

4 CEDAW Committee Report Inquiry concerning South Africa 2021.

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

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

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

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

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

67) Furthermore the release of the reconfigured national crime statistics show that the South African Police Service is capable of disaggregating and reporting on individual crime categories underlying domestic violence. This means that the South African Police Service can collect and present domestic violence data in a way that enables better understanding of the nature and extent of the reported problem, and which could inform prevention and intervention strategies.⁶ The concern by the CEDAW Committee regarding disaggregation of data has therefore been addressed. (See page 69)

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

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

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

⁶ Lisa Vetton & Sanja Bornman, the Commission for Gender Equality per Dr Dennis Matotoka, Legal Services concur with Point 4.

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

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

12. The evidenced-based shift towards identifying and addressing drivers of domestic violence include interventions to address widespread alcohol and substance abuse, structural, societal and normative barriers. The Commission found it notable that the presence of firearms has been found to be a specific predictor of domestic abuse and specifically implicated in combined events of femicide and suicide.⁷ (See page 62 and 164)

13. The Commission agrees with the Commission for Gender Equality that non-compliance by the police should be addressed practically through disciplinary action and ongoing training, monitoring, and evaluation.⁸ It is of the view that engaging an automatic criminal law response, i.e. mandatory prosecution and criminalising functionaries, in order to address non-compliance, for not informing victims of available remedies or diverting them to apply for a protection order instead of or without registering a criminal complaint, would arguably result in the most negative outcome for victims of domestic violence. (See page 63)

14. In considering the context specific barriers that victims of domestic violence experience to accessing the criminal justice system and other remedies to addressing GBVF the

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

8 Commission for Gender Equality per Dr Dennis Matotoka, Legal Services. Supported by Unchain

Commission refers to the imperative found in CEDAW under articles 2(f) and 5(a) of CEDAW, that States parties must address the root causes of domestic violence and bring about normative change by dismantling stereotypes and cultural norms perpetuating violence against women. Furthermore that awareness raising needs to be broadly targeted, together with mandatory and recurrent capacity-building for the judiciary, law enforcement officers and forensic medical and health-care personnel to eliminate gender bias and stereotypes; ensure the strict application of criminal law provisions, the collection and preservation of evidence and the issuance and monitoring of protection orders in domestic violence cases and to assess the impact of such measures.⁹ The United Nations Economic and Social Council Commission on the Status of Women in its Sixty-fifth session reiterates the need for normative change.¹⁰ (See page 115)

15. The Commission points out that barriers to dealing with GBVF matters efficiently and effectively include a lack of skills on how to deal with GBVF cases at police stations; and the turnaround time of DNA evidence and ballistic reports from the forensic laboratory.¹¹ Other barriers are structural, with the location of police stations playing an important role in reporting, case retention, referrals and convictions – in other words access to justice. Victims are not only hindered from reporting, but from sustaining court visits particularly where cases are postponed.¹² Socio-economic factors seem to underpin not only the prevalence of domestic violence but redress thereof.¹³ For example the threat of a criminal conviction and imprisonment almost always means the simultaneous cessation of financial support to a family. When already facing poverty the very difficult choice is then between food and physical safety. (See page 55) The Commission therefore recognises the significant and concerted strides that have been made across all sectors to ensure that GBVF, including domestic violence, is dealt with effectively and efficiently. It recognises too that the multi-varied interplay of socio-economic, normative and relational complexities often make the law an ineffective tool to address these complexities. In recognising that progress is underway to address some of these barriers the Commission supports the Commission for Gender Equality's recommendations and does not make additional recommendations in this regard. (See page 122)

9 our children, Advocate Amber Koekemoer, Circle Chambers Advocates.
CEDAW Committee Report Inquiry concerning South Africa 2021 par 92.

10 UNESCO Commission on the Status of Women Sixty-fifth session 6.

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

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

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

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

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

18. While the legislative framework has been significantly changed to provide recourse through the criminal and civil law, a whole-of-society approach focussing on societal and normative change of deep-rooted harmful patriarchal views regarding women which perpetuates inter-generational domestic violence, is needed. The Commission believes that the Department of Health and the Department of Social Development are mandated to play a more meaningful role in not only addressing the inter-generational trauma of GBV in domestic relationships across the life-cycle of its citizens, but in early detection of warning signs. A collaboration between government and civil society in respect of awareness raising, training and provision of remedies that provide victims of domestic violence with realisable avenues of exit from abusive relationships are key to the effective implementation of laws around domestic violence. It is also key to dismantling the structural drivers that lead to GBV, which is core to achieving substantive equality. All functionaries, as defined in the amended Domestic Violence Act should be trained in applying universal screening of markers of domestic violence. The systems approach which is being embarked on by the police should arguably include tangible changes as documented in the Khayelitsha report and in other areas as the context determines. (See page 112 & 139)

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

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

Preliminary recommendations

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

the introduction of a category of offences in the Domestic Violence Act in duplication of the existing criminal law. (See page 74)

4. The Commission seeks comment on whether spurious civil or criminal claims of domestic violence following advice by legal practitioners needs attention. (See page 74)
5. The Commission is of the preliminary view that the law as it stands allows for differing levels of redress through a civil or criminal process for stalking, emotional harm and strangulation. The need for adequate recognition of the risk and severity, particularly of strangulation and emotional harm, would point towards the need for broad societal awareness raising; training for law enforcement and officials within the criminal justice system, health and social services; focussed risk identification and a swift response. (See page 88)
6. The Commission recognises the significant and concerted strides that have been made across all sectors to ensure that GBVF, including domestic violence, is dealt with effectively and efficiently. It recognises too that the multi-varied interplay of socio-economic, normative and relational complexities often make the law an ineffective tool to address these complexities.

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

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

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

substance abuse is in turn arguably a response to other root causes, the Commission sees value in the Department of Social Development developing or expanding on interventions aimed at social and normative change. The availability of programs aimed at cognitive behavioural change, restorative justice or conjoint or couple treatment may be preventative and responsive to violence in families. The empowering provisions in both the Criminal Procedure Act and Domestic Violence Act are arguably wide enough to include interventions which are not linked to substance abuse. (See page 165)

10. It is suggested that the role of the Department of Social Development, Department of Human Settlements, Water and Sanitation, and Department of Public Works in addressing the homelessness and housing instability post using sheltering services experienced by women and by women and children in abusive relationships and those subjected to family violence should be further explored. (See page 165)
11. The Commission is of the view that there is merit in the suggestions made by Mses Vetton and Bornman in respect of analysing the circumstances surrounding femicide or murder of a family in which the victim, or a family member, was in possession of a protection order obtained through the Domestic Violence Act at the time of their death (or had applied for one). It is of the preliminary view that the recommendation that such an event should automatically trigger review by a panel comprising, at a minimum, the South African Police Service (SAPS) and independent experts in domestic violence should be supported. The suggestion of the following procedure for such a panel is presented for consideration:
 - All intimate femicides perpetrated by police officials must be immediately reported to either the provincial complaints coordinators of the SAPS Inspectorate, or the national office of the CSP.¹⁴
 - Any other intimate femicide which occurs must be checked against SAPS 508(a), 508(b) and file of protection orders maintained by the police station in the jurisdiction where the killing occurred. Should the victim have been in possession of a protection order, or in the process of obtaining such an order, then this case must automatically be forwarded to the CSP.
 - When a child is killed by a parent, their details must also be checked against this documentation to ascertain whether or not one of the parents was in possession of a protection order, or was in the process of applying for one. Where this is found, such

14 An abbreviation for the Civilian Secretariat for Police.

cases must also be forwarded to the panel. (See page 165)

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