



**POLICY BRIEF**  
**The Domestic Violence Act Amendment Bill –**  
**Mandatory Reporting**

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This policy brief explains the changes to the law set out in the Domestic Violence Amendment Bill, 2020 which proposes to introduce mandatory reporting of domestic violence. Mandatory reporting means imposing a legal duty upon any person who becomes aware of an act of domestic violence to report it to the police or social services.

MOSAIC welcomes efforts to strengthen protection and access to justice for victims of domestic violence, but we do not support mandatory reporting. We are concerned that there is not a sufficient evidence base to support the efficacy of mandatory reporting in domestic violence response and prevention efforts. Furthermore, we are concerned that mandatory reporting may have the opposite of the intended effect, where those experiencing domestic violence are further isolated or placed in greater danger.

## KEY FINDINGS

- Mandatory reporting would impose a legal duty upon any person who becomes aware of an act of domestic violence to immediately make a report to police or social services; failure to make an immediate report is a criminal offence.
- Mandatory reporting criminalises the support network of a victim – such as friends, neighbours and counsellors – if they do not immediately report domestic violence, regardless of the wishes of the victim. It could also criminalize the victim.
- Meanwhile, the Domestic Violence Bill does not criminalize domestic violence itself. This creates an imbalance in the law where failure to report domestic violence attracts criminal liability whereas committing domestic violence does not.
- The Children’s Amendment Act 2007, The Criminal Law (Sexual Offences and related matters) Amendment Act 2007, and The Older Persons’ Act 2006 s26(1) already impose a duty to report abuse against persons who lack capacity and/or who are vulnerable, i.e. children, persons with disabilities and/or older persons.
- The criminal justice system has struggled to implement existing laws on mandatory reporting, such as criminal sanctions for failure to report abuse of older persons.
- There is insufficient empirical evidence to prove whether mandatory reporting benefits victims of domestic violence.
- Evidence suggests that mandatory reporting:
  - deprives patients/clients of confidentiality when seeking health services & psychosocial support;
  - reduces the autonomy of victims by taking the decision out of their hands; and
  - risks secondary victimization of victims and those who try to assist them.

## RECOMMENDATIONS

The Bill should:

- only include mandatory reporting for domestic violence offences relating to children, older persons and those with disabilities as is already set out in parallel existing legislation;
- provide a definition of a disabled person, which clarifies that mandatory reporting should only apply to those with intellectual or psychosocial abilities that increase their vulnerability and/or make it harder for them to speak out;
- not place a duty to report upon all citizens because this risks criminalization of victims of domestic violence and those who try to assist them;
- The Bill, should only place a duty to report on certain persons in positions of statutory responsibility including amongst others, legal practitioners, medical practitioners, traditional and religious leaders, psychologists and social workers, teachers and persons working in care facilities.
- Currently the Bill places onerous duties upon those who become aware of domestic violence to make a report. However, unlike other laws which introduce mandatory reporting such as the Children’s Amendment Act 2007,<sup>1</sup> the Domestic Violence Bill does not tell us what the police or social services are actually obliged to do when they receive a report of domestic violence. The Bill should clarify the obligations, once a report of domestic violence has been made, upon:
  - SAPS to investigate, and, if indicated, open a criminal case for the domestic violence matter<sup>2</sup> /or refer the matter to court for a protection order<sup>3</sup> ;
  - The Department of Social Development to investigate, and, if indicated, take further steps to protect the victim of domestic violence.

## INTRODUCTION

### Who is MOSAIC?

MOSAIC Training, Service and Healing Centre for Women (MOSAIC) works to prevent and reduce abuse and domestic violence by providing holistic, integrated services for the healing and empowerment of women to claim their rights. Established in 1993, we have been working with victims of domestic violence for 27 years in the Western Cape Province, and more recently in Gauteng and KwaZulu-Natal.

We are a community based non-governmental organisation that offers holistic and integrated programmes, aimed at preventing all forms of abuse and violence against women, providing high quality response services when incidences occur and supporting our clients through the process of healing and rebuilding their lives. We create an enabling environment through our holistic and integrated three pillar service model, which includes access to justice, support and healing, and empowerment and mentorship training.

### What is domestic violence?

Domestic violence is violence and abuse which occurs within the home, or within close familial or intimate relationships. Intimate partner violence is a form of domestic violence which occurs within romantic, sexual, marital and other forms of intimate relationship.<sup>4</sup>

Women are known to be more at risk than men from serious and fatal incidents of intimate partner violence.<sup>5</sup> In a study based in the Western Cape province of South Africa, up to 45% of women self-reported violence at the hands of their intimate partners.<sup>6</sup>

Domestic violence represents a significant cause of homicide in South Africa. In 2018/19, 1 071 people were murdered in domestic violence related deaths.<sup>7</sup> In an analysis of South African mortuary records in 2009, 50% of the women’s deaths in the sample occurred as a result of intimate partner femicide making it the leading cause of female murder.<sup>8</sup>

### The Domestic Violence Act – What is changing?

In 1998, South Africa introduced the Domestic Violence Act.<sup>9</sup> This legislation aims to protect victims of domestic violence by giving them the right to apply for a protection order and/or lodge a criminal complaint. Whilst this Act contains provisions which are beneficial to victims of domestic violence, there have been some significant barriers to its implementation, which have hindered victims from accessing the protection that it offers.<sup>10</sup> One particular challenge is that police officers frequently refer complainants of domestic violence to court to obtain a protection order, and do not advise them of their right to lodge a criminal complaint.<sup>11</sup>

In 2020, President Ramaphosa announced that the Act would be reviewed. Accordingly, the Domestic Violence Amendment Bill, 2020, has been published and presented to Parliament for consideration.<sup>12</sup> The Bill introduces many amendments which will increase access to justice for victims of domestic violence. However, the Bill also proposes to introduce a mandatory duty to report domestic violence.<sup>13</sup> If passed in its current form, we are concerned that this will negatively impact victims’ access to justice, increase secondary victimisation and further isolate victims. We also fear that mandatory reporting will introduce an imbalance in the law, where failure to report domestic violence will be subject to a criminal punishment, whereas domestic violence is not, in and of itself, a criminal offence.

If the proposed change comes into law, it will mean that anyone who has a reasonable belief, knowledge or suspicion of an act of domestic violence against an adult person in a domestic relationship, a child, a person with a disability or an older person must immediately make a report to a social worker or police official. Failure to make a report could lead to a fine or a prison sentence of up to five years. The remainder of this brief presents MOSAIC’s evidence-based argument

for the removal of mandatory reporting in the case of adult survivors of domestic violence.

### The evidence base regarding mandatory reporting of domestic violence

The World Health Organisation (WHO) recommends mandatory reporting of domestic violence but only in certain circumstances. It supports there being a legal duty upon health service providers to report child maltreatment and life threatening incidents to the police.<sup>14</sup> However, it highlights that this is only useful where there is a functioning legal and/or child protection system to act on a report.<sup>15</sup>

The WHO does not support mandatory reporting of intimate partner violence by health service providers to police,<sup>16</sup> suggesting that there is no evidence that this improves the police's response to intimate partner violence.<sup>17</sup> The WHO's guidance is that the decision of whether to report intimate partner violence should remain with the victim. Health service providers should offer to report the incident to appropriate authorities (including the police) on their behalf, but only do so if the victim consents to this and is aware of their rights.

There is insufficient evidence to demonstrate whether victims of intimate partner violence support mandatory reporting by health service providers. The WHO suggests that domestic violence victims do not support mandatory reporting, and feel that 'decisions regarding reporting should be up to them, and their safety and that of their children should be first priority.'<sup>18</sup> Subsequent reviews suggest that some women do support mandatory reporting, however, such findings are based on very limited empirical research. This severely limits the ability to generalise such findings to whether mandatory reporting is effective in protecting victims.<sup>19</sup> Evidence reviews also suggest that many of the health professionals interviewed had limited or no experience of mandatory reporting<sup>20</sup> which suggests that where mandatory reporting laws are in place, mandatory reporting tends to be under-utilized.

### Insights from other laws which impose mandatory reporting

Several existing South African laws impose a duty to report abuse. The Children's Amendment Act 2007 s110(1) imposes duties upon a wide range of professionals, staff and volunteers who work with children, to report suspected child abuse. We support this type of mandatory reporting because it relates to children, who may not be able to speak out for

themselves. Secondly, the obligation is placed on those working with children in an official capacity. This law does not criminalise parents or other carers who fail to report child abuse. Therefore the risk of secondary victimization, which is where a victim is re-traumatized by their experiences of the criminal justice process, is low.

**Any person** who knows that **sexual abuse** has been committed against **a child or mentally disabled person is obliged to report this**. This obligation is set out in The Criminal law (Sexual Offences and related matters) Amendment Act 2007 s64. Failure to report can lead to a prison sentence of up to five years. We support there being a legal duty to report sexual abuse of children by adults. However, initially this duty to report also applied to consensual sexual activity between teenagers. The Constitutional Court found that, rather than protecting adolescents, this provision was harmful to them.<sup>21</sup> It gave an example of two minors who were initially in consensual sexual contact with one another, but then one subsequently raped the other.<sup>22</sup> The victim might be afraid to report the rape for fear of being prosecuted for the consensual sexual contact.<sup>23</sup> Because of these risks, the court found that mandatory reporting of consensual sexual activity between teenagers was unconstitutional, and this provision was removed from the bill.<sup>24</sup> This example highlights how mandatory reporting can be problematic because it potentially criminalizes the victim's own behaviour, which might deter them from seeking assistance from the authorities.

Mandatory reporting can look better on paper than it is in reality. The Older Persons' Act 2006 s26(1) imposes a **duty to report upon any person who suspects that an older person has been abused or suffers from an abuse-related injury**. Whilst this provision is valuable in offering protection to vulnerable older people, there have been barriers to successful implementation. Research in 2018 found that the reporting procedures are 'cumbersome' and that, at that time, the value of mandatory reporting was limited by the fact that the register to track criminals who had committed crimes

against the elderly had not been established<sup>25</sup> and there were difficulties in enforcing criminal sanctions for those who have failed to report.<sup>26</sup> The power of mandatory reporting relies upon the state having the resources to track and prosecute those who fail to report. These challenges in implementation suggest that we need to look carefully at whether the risks of mandatory reporting for domestic violence outweigh the benefits.

### What are the potential benefits of mandatory reporting of domestic violence?

Mandatory reporting could assist victims of domestic violence who are too afraid or otherwise unable to speak out about their experiences of abuse. By imposing obligations upon any person who becomes aware of domestic violence, it stops neighbours, relatives, and professionals from being able to turn a blind eye, and confronts attitudes that domestic violence is a private matter of the home which is no one else's business. If successfully implemented, mandatory reporting of domestic violence could help end violent relationships by ensuring that perpetrators are identified by the police, prosecuted and brought to justice.

### What are the concerns in respect of mandatory reporting of domestic violence?

#### Secondary victimization

The proposed change to the law places a duty on any person who is aware of domestic violence to make a report. We are concerned that this may lead to secondary victimization of victims who feel unable to speak out. Say for example, a man is violent towards his wife and his children. If his wife does not report the abuse, she could be convicted and even imprisoned for failing to report the abuse against her children. This would criminalize her for her experience of abuse, even though she may have had legitimate reasons for staying silent. Fear of being prosecuted for failure to report

'The WHO does not support mandatory reporting of intimate partner violence by health service providers to police'

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'Mandatory reporting... potentially criminalizes the victim's own behaviour'

'Mandatory reporting might deter complainants from seeking help'

may also deter her from seeking critical services such as healthcare and psychosocial support.

Fear of prosecution could also prevent others such as neighbours and relatives from intervening to provide assistance to the complainant, or from providing witness testimony to support their case. Therefore, there is a risk that imposing a duty to report upon **any person** could be counter-productive. We would therefore recommend a more limited duty to report domestic violence, placed only on individuals in positions of responsibility.

**Fear of prosecution could prevent others such as neighbours and relatives from intervening to provide assistance to the complainant”**

#### **Failure to report domestic violence punished more severely than domestic violence itself**

Mandatory reporting would turn what is currently a civic duty to report domestic violence into a legal obligation, with a criminal penalty attached. This means that a person who fails to report domestic violence, even if they were acting in good faith, could face a criminal prosecution and sentence.

Meanwhile, the Domestic Violence Act does not make domestic violence itself a criminal offence. Instead, a perpetrator of domestic violence can only be prosecuted if their behaviour also amounts to a criminal offence such as assault, or if they breach a protection order. In practice, convictions for violence which occurs within the context of domestic relationships are rare.

**‘...mandatory reporting would create an unfair situation where individuals who fail to report domestic violence could be punished more harshly than perpetrators of domestic violence’**

Introducing mandatory reporting would create an unfair situation where individuals who fail to report domestic violence could be punished more harshly than perpetrators of domestic violence. In most cases, perpetrators of domestic violence, at worst, will be served with a protection order against them, which is a civil remedy. Unless they breach the order, they are unlikely to face criminal sanctions. By contrast, individuals who fail to report could face a criminal prosecution, and a prison sentence of up to five years.<sup>27</sup>

#### **Removal of choice from the victim**

Imposing a duty to report undermines a victim’s agency by removing the choice from them in respect of whether to report the abuse to the state. Taking away a person’s ability to act in their own interests, or exercise choice, is a characteristic feature of abusive relationships – indeed, this is recognized by legislators’ definition of controlling behaviour. Mandatory reporting denies adults control over key decisions that affect their lives. It implies that the victim’s assessment of their circumstances, as well as their choices, cannot be trusted and that others understand their situations and options better than they do. This is a perception shared with abusive partners who frequently justify their controlling behaviour

**‘Mandatory reporting interferes with the victim’s agency and autonomy’**

on the basis that they know what is best because the victim is incompetent. A great deal of counselling and other therapeutic work with victims seeks to build their ability to trust their judgement and capacity to act in their own interests. Mandatory reporting interferes with the victim’s agency and autonomy. Therefore, we say that mandatory reporting should only apply in circumstances where due to their personal vulnerabilities, the victim is hindered from speaking out themselves – i.e. older persons, children and those with intellectual or psycho-social disabilities.

#### **Confidentiality**

Health, counselling and other emotional and psychological support services are offered – and accepted - on the basis that they are confidential. Mandatory reporting provisions undermine this. Health and psychosocial support professionals, counsellors and other therapists would need to advise their clients at the outset that confidentiality is not guaranteed. If a person reveals experiences of domestic violence, the professional or counsellor would be obliged to report this, regardless of their client’s wishes. Mandatory reporting might therefore deter complainants from seeking help, or encourage them to withhold important information if they are not yet ready to report the abuse to the authorities. This could ultimately to further isolate them from support.

#### **Disabilities**

As the bill is currently drafted, if a person finds out that domestic abuse against a disabled person has taken place, there is an obligation to report. The bill does not distinguish between physical disabilities and intellectual and psychosocial disabilities. All disabilities do not result in the same limitations and nor are they of the same severity. Therefore, we recommend that the bill should clarify that there is an obligation to report where domestic abuse is committed against those with intellectual or psychosocial disabilities which increase their vulnerability and/or hinder their ability to speak out in respect of their experiences.

## **CONCLUSION**

We recognise that there should be a duty to report domestic violence against children, the elderly and adults with psychosocial and/or intellectual disabilities. We do not support mandatory reporting of domestic violence for victims who are adults with full mental capacity, especially as there is no reliable evidence base in support of this. We believe that mandatory reporting of adult victims increases the risk of secondary victimization, undermines their agency and may deter those who are not ready to report from seeking assistance from health and other support services.

We believe that this duty to report should be limited to certain individuals in positions of responsibility. We do not believe that there should be a duty to report domestic violence upon ordinary citizens. We feel that such a duty risks of criminalizing victims, and those who are there to support them, so that they are treated more harshly by the law than perpetrators of domestic violence.

Consequently, we recommend that the amended Domestic Violence Act should impose mandatory reporting of domestic violence, but only in certain limited circumstances. We believe that the law should impose a duty upon:

- Certain professionals including legal practitioners, medical practitioners, traditional and religious leaders, psychologists and social workers, teachers and persons working in care facilities, amongst others;
- Who, on “reasonable grounds”, concludes that domestic violence has been committed against a child, person with psycho-social or intellectual disabilities, or an older person (as defined by the Older Persons Act 2006);
- The report must be made to the provincial Department of Social Development or to a police official.



# ENDNOTES

- 1 Children's Amendment Act 2007 S110(4) sets out obligations upon police to ensure a child's safety after receiving a report; S110(5) sets out obligations on social services to conduct an investigation into the circumstances of the child.
- 2 Domestic Violence Act 1998 Section 2(b)
- 3 Domestic Violence Act 1998 Section 4
- 4 World Health Organisation 'Understanding and addressing violence against women - Intimate Partner Violence ' available at [https://www.who.int/reproductivehealth/publications/violence/rhr12\\_36/en/](https://www.who.int/reproductivehealth/publications/violence/rhr12_36/en/), accessed on 1 March 2020.
- 5 UNODC 'Global Study on Homicide Gender Related Killings of Women and Girls' (2018), available at [https://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18\\_Gender-related\\_killing\\_of\\_women\\_and\\_girls.pdf](https://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf) accessed on 5 August 2019.
- 6 Nomathamsanqa Masiko, & Selby Xinwa Gender based violence in South Africa, a brief review The Centre for the Study of Violence and Reconciliation (2016) 60
- 7 South African Police Service Annual Performance Plan 2018/19 available at [https://www.saps.gov.za/about/stratframework/strategic\\_plan/2018\\_2019/annual\\_performance\\_plan\\_2018\\_2019\\_updated.pdf](https://www.saps.gov.za/about/stratframework/strategic_plan/2018_2019/annual_performance_plan_2018_2019_updated.pdf) accessed on 5 March 2020 ;South African Police Service Police recorded crime statistics Crime situation in the Republic of South Africa 12 months April to March ((2018/19) available at [https://www.saps.gov.za/services/april\\_to\\_march2018\\_19\\_presentation.pdf](https://www.saps.gov.za/services/april_to_march2018_19_presentation.pdf), accessed on 19 September 2019. 25
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- 9 Domestic Violence Act 116 of 1998.
- 10 Penny Parenzee, Lillian Artz & Kelley Moulton 'Monitoring the implementation of the Domestic Violence Act : first research report, 2000-2001' (2001); Kelley Moulton Gatekeepers or Rights Keepers? Domestic Violence court clerks and the administration of justice in South Africa American University, (2010) ;Shanaaz Mathews & Naemah Abrahams Combining stories and numbers : an analysis of the impact of the Domestic Violence Act (no. 116 of 1998) on women Cape Town, Gender Advocacy Programme (2001) ;Lillian Artz & Diane Jefthas Reluctance, retaliation and repudiation: the attrition of domestic violence cases in eight magisterial districts Gender Health and Justice Research Unit, University of Cape Town ;Amanda Spies 'Continued State Liability for Police Inaction in Assisting Victims of Domestic Violence: A Reflection on the Implementation of South Africa's Domestic Violence Legislation' (2019) 63 Journal of African Law ;Doraval Govender 'Is domestic violence being policed in South Africa?' (2015) 28 Acta Criminologica
- 11 As they are obliged to under S2(b) DVA. Independent Complaints Directorate A study of the factors contributing to SAPS non-compliance with the Domestic Violence Act Pretoria (2010) 9; Yasmin Head of KZN Community Safety Hub and Liaison Bacus The South African Domestic Violence Act: Lessons from a decade of legislation and implementation (2008) The Parktonian Hotel, Braamfontein 13
- 12 Domestic Violence Amendment Bill (2020)
- 13 Ibid.2B
- 14 World Health Organisation Responding to intimate partner violence and sexual violence against women: WHO clinical and policy guidelines available at [https://apps.who.int/iris/bitstream/handle/10665/85240/9789241548595\\_eng.pdf;jsessionid=2BE05ACC6CE4E64A6446F3B2C71F8821?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/85240/9789241548595_eng.pdf;jsessionid=2BE05ACC6CE4E64A6446F3B2C71F8821?sequence=1), accessed on 20 July 2020. accessed on 20 July 2020. </DisplayText><record><rec-number>318</rec-number><foreign-keys><key app="EN" db-id="vxe2rdxjzxxeex0x1vswvlpt9etf22srff" timestamp="1595750769" guid="f1aef424-bb7e-47f1-a15b-fc6f058863ae">318</key></foreign-keys><ref-type name="Report">27</ref-type><contributors><authors><author>World Health Organisation</author></authors></contributors><titles><title>Responding to intimate partner violence and sexual violence against women: WHO clinical and policy guidelines</title></titles><dates></dates><urls><related-urls><url>[https://apps.who.int/iris/bitstream/handle/10665/85240/9789241548595\\_eng.pdf;jsessionid=2BE05ACC6CE4E64A6446F3B2C71F8821?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/85240/9789241548595_eng.pdf;jsessionid=2BE05ACC6CE4E64A6446F3B2C71F8821?sequence=1)</url></related-urls></urls><access-date>20 July 2020</access-date></record></Cite></EndNote> Policy Recommendation 38
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- 22 Ibid. Para 93
- 23 Ibid.
- 24 Ibid. Para 117
- 25 Carla Kotza 'Elder Abuse-The Current State of Research in South Africa' (2018) 6 Frontiers in Public Health
- 26 Ibid.
- 27 Domestic Violence Amendment Bill (2020) 2B