

REPUBLIC OF SOUTH AFRICA

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# DOMESTIC VIOLENCE AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill  
and prior notice of its introduction published in Government Gazette No. 43595 of  
7 August 2020)*  
*(The English text is the official text of the Bill)*

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(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 20—2020]

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**GENERAL EXPLANATORY NOTE:**

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

                         Words underlined with a solid line indicate insertions in existing enactments.

# BILL

To amend the Domestic Violence Act, 1998, so as to—

- amend and insert certain definitions;
- further provide for the manner in which acts of domestic violence and matters related thereto, must be dealt with by certain functionaries, persons and Government departments;
- further regulate obtaining of protection orders in response to acts of domestic violence;
- delete and amend provisions of certain laws; and
- provide for matters connected therewith.

**P**ARLIAMENT of the Republic of South Africa enacts, as follows:—

## Substitution of Arrangement of Sections of Act 116 of 1998

1. The following Arrangement of Sections is hereby inserted in the Domestic Violence Act, 1998 (Act No. 116 of 1998) (hereafter referred to as the principal Act): 5

### “ARRANGEMENT OF SECTIONS

#### *Sections*

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**Amendment of section 1 of Act 116 of 1998, as amended by section 10 of Act 31 of 2008** 20

2. Section 1 of the principal Act is hereby amended—

- (a) by the deletion of the definition of "arm";
- (b) by the insertion before the definition of "clerk of the court" of the following definition:
- " **'child'** means a person under the age of 18 years;" 25
- (c) by the insertion after the definition of "clerk of the court" of the following definition:
- " **'coercive behaviour'** means any abusive conduct or acts of force, intimidation or undue pressure intended to cause a complainant or a related person to act, not to act, or be subjected to certain acts against his or her will;" 30
- (d) by the insertion after the definition of "complainant" of the following definition:
- " **'controlling behaviour'** means causing the complainant or a related person to be dependent on or subordinate to the respondent by— 35
- (a) isolating him or her from sources of support;
- (b) exploiting his or her resources for personal gain;
- (c) depriving him or her of the means needed for independence, resistance or escape; or
- (d) regulating his or her everyday behaviour;" 40
- (e) by the substitution for the definition of "damage to property" of the following definition:
- " **'damage to property'** means the wilful damaging or destruction of property, including those belonging to a complainant or **[in which the complainant has a vested interest]** a related person which causes harm to a complainant;" 45
- (f) by the deletion of the definition of "dangerous weapon";
- (g) by the insertion before the definition of "domestic relationship" of the following definitions:
- " **'Director-General'** means the Director-General: Justice and Constitutional Development; 50
- 'disability'** means a physical, mental, intellectual or sensory impairment which prevents a person having such an impairment from operating in an environment developed for persons without such an impairment;"
- (h) by the substitution for the definition of "domestic relationship" of the 55 following definition:

- “**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);
  - (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, premises or property within the preceding year;”;
- (i) by the substitution for the definition of “domestic violence” of the following definition:
- “**domestic violence**” means—
- (a) physical abuse;
  - (b) sexual abuse;
  - (c) emotional, verbal **[and]** or psychological abuse;
  - (d) economic abuse;
  - (e) intimidation;
  - (f) harassment;
  - (g) **[stalking]** spiritual abuse;
  - (h) damage to property;
  - (hA) elder abuse;
  - (hB) **coercive behaviour;**
  - (hC) **controlling behaviour;**
  - (hD) exposing or subjecting children to behaviour listed in (a) to (hC);
- (i) entry into the complainant’s or a related person’s—
- (i) permanent or temporary residence without his or her consent, where the parties do not share the same residence;  
or
  - (ii) workplace or place of study, without his or her consent, where the parties do not share the same workplace or place of study; or
- (j) any other **[controlling or]** abusive behaviour **[towards a complainant]**, where such behaviour harms, or **[may cause imminent]** inspires the reasonable belief that harm may be caused to[, the safety, health or wellbeing of] the complainant or a related person;”;
- (j) by the substitution for the definition of “economic abuse” of the following definition:
- “**economic abuse**” includes—
- (a) the **[unreasonable]** deprivation of economic or financial resources to which a complainant or a related person is entitled under law or which the complainant or a related person requires out of necessity, including household necessities for the complainant or a related person, and mortgage bond repayments or payment of rent in respect of the shared residence or accommodation; or
  - (b) the **[unreasonable]** disposal of household effects or other property in which the complainant has an interest;”;
- (k) by the insertion after the definition of “economic abuse” of the following definitions:
- “**educator**” means any person, including a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at all public and independent schools as defined in the South African

Schools Act, 1996 (Act No. 84 of 1996), all public and private colleges and all public and private further education and training institutions established, declared or registered in terms of the Further Education and Training Colleges Act, 2006 (Act No. 16 of 2006), and all public and private higher education institutions defined in the Higher Education Act, 1997 (Act No. 101 of 1997);

**‘elder abuse’** means conduct or the lack of appropriate action, occurring within a domestic relationship, which causes harm or distress or is likely to cause harm or distress to an older person as defined in the Older Persons Act, 2006 (Act No. 13 of 2006), and includes social isolation or neglect;

**‘electronic communications’** means electronic communications as defined in section 1 of the Electronic Communications Act, 2005;

**‘Electronic Communications Act, 2005’** means the Electronic Communications Act, 2005 (Act No. 36 of 2005);

**‘electronic communications identity number’** means a technical identification label which represents the origin or destination of electronic communications traffic, as a rule clearly identified by a logical or virtual identity number or address assigned to a customer of an electronic communications service provider (such as a telephone number, cellular phone number, electronic mail address with or without a corresponding internet protocol address, web address with or without a corresponding internet protocol address or other subscriber number);

**‘electronic communications network’** means an “electronic communications network” as defined in section 1 of the Electronic Communications Act, 2005, and includes a computer system;

**‘electronic communications service’** means any service which consists wholly or mainly of the conveyance by any means of electronic communications over an electronic communications network, but excludes broadcasting services as defined in section 1 of the Electronic Communications Act, 2005;

**‘electronic communications service provider’** means an entity or a person who is licensed or exempted from being licensed in terms of Chapter 3 of the Electronic Communications Act, 2005, to provide an electronic communications service;”;

- (l) by the substitution for the definition of “emergency monetary relief” of the following definition:

**‘emergency monetary relief’** means compensation for monetary losses suffered by a complainant before or at the time of the issue of a protection order as a result of the domestic violence, including—

- (a) loss of earnings;
- (b) medical, optical, **[and]** dental and related expenses;
- (c) relocation and accommodation expenses; **[or]**
- (d) household necessities;
- (e) educational expenses; or
- (f) psychosocial services and counselling;”;

- (m) by the substitution for the definition of “emotional, verbal and psychological abuse” of the following definition:

**‘emotional, verbal **[and]** or psychological abuse’** means **[a pattern of]** degrading or humiliating conduct towards a complainant or a related person, including—

- (a) **[repeated]** insults, ridicule or name calling;
- (b) **[repeated]** threats to cause emotional pain; **[or]**
- (c) the **[repeated]** exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s or a related person’s privacy, liberty, integrity or security; or
- (d) inducing fear;”;

- (n) by the insertion after the definition of “emotional, verbal and psychological abuse” of the following definition:

**‘functionary’**, for purposes of section 2A, means 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 by the Minister by notice in the *Gazette*;”;

- (o) by the substitution for the definition of “harassment” of the following definition:
- “**‘harassment’** means directly or indirectly engaging in **[a pattern of]** conduct that **[induces the fear of]** the respondent knows or ought to know— 5
- (a) causes harm or inspires the reasonable belief that harm may be caused to [a] the complainant or a related person by unreasonably [including]—
- [(a)] (i) **[repeatedly]** following, watching, pursuing or accosting the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be; 10
- [(b)] (ii) **[repeatedly making telephone calls or inducing another person to make telephone calls to]** engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means whether or not conversation ensues; or 15
- [(c)] (iii) **[repeatedly]** sending, delivering or causing the delivery of letters, [telegrams,] packages, facsimiles, electronic mail, texts, photos, videos, recordings or other objects to the complainant or a related person, or leaving them where they may be found by, given to, or brought to the attention of, the complainant or a related person; or 20
- (b) amounts to sexual harassment of the complainant or a related person;”; 25
- (p) by the insertion of the following definition after the definition of “harassment”:
- “**‘harm’** means any **mental, psychological, physical or economic harm;”;** 30
- (q) by the substitution for the definition of “intimidation” of the following definition:
- “**‘intimidation’** means uttering or conveying a threat to, or causing a complainant or a related person to receive a threat, which induces fear of imminent harm;”; 35
- (r) by the insertion of the following definition after the definition of “member of the South African Police Service”:
- “**‘Minister’** means the Cabinet member responsible for the administration of justice;”;
- (s) by the substitution for the definition of “physical abuse” of the following definition: 40
- “**‘physical abuse’** means any act or threatened act of physical violence towards a complainant or a related person or, in the case of a complainant who is a child, includes abuse as defined in section 1 of the Children’s Act, 2005 (Act No. 38 of 2005);”; 45
- (t) by the insertion of the following definition after the definition of “protection order”:
- “**‘related person’** means any member of the family or household of a complainant, or any other person in a close relationship with the complainant;”; 50
- (u) by the substitution for the definition of “sexual abuse” of the following definition:
- “**‘sexual abuse’** means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant or a related person, whether or not such conduct constitutes a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) or, in the case of a complainant who is a child, constitutes sexual abuse as contemplated in the Children’s Act, 2005;”;
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- (v) by the insertion of the following definition after the definition of “sexual abuse”:  
 “**‘sexual harassment’** means any—
- (a) unwelcome sexual attention from a person in a domestic relationship with the complainant who knows or ought reasonably to know that such attention is unwelcome; 5
  - (b) unwelcome explicit or implicit behaviour, suggestions, gestures, messages or remarks of a sexual nature towards the complainant or a related person that have the effect of offending, intimidating or humiliating the complainant in circumstances, which a reasonable person having regard to the circumstances would have anticipated that the complainant would be offended, intimidated or humiliated; 10
  - (c) implied or expressed promise of reward to the complainant for complying with a sexually oriented request; or 15
  - (d) implied or expressed threat of reprisal or actual reprisal made to the complainant for refusal to comply with a sexually oriented request;”;
- (w) by the insertion after the definition of “sheriff” of the following definition:  
 “**‘spiritual abuse’** means— 20
- (a) ridiculing or insulting the complainant’s religious or spiritual beliefs;
  - (b) preventing the complainant from practising his or her religious or spiritual beliefs; or
  - (c) using the complainant’s religious or spiritual beliefs to control, manipulate or shame him or her, 25  
 including using religious texts or beliefs as a pretext to justify, minimize or rationalize abusive behaviour;”;
- (x) by the deletion of the definition of “stalking”; and
- (y) by the addition after the definition of ‘this Act’ of the following definition: 30  
 “**‘weapon’** means—
- (a) any airgun, ammunition, imitation firearm, muzzle loading firearm, firearm or handgun as defined in section 1 of the Firearms Control Act, 2000 (Act No. 60 of 2000); or
  - (b) any object, other than that which is referred to in paragraph (a), which is likely to inflict grievous bodily harm or a dangerous wound, if it were used to commit an assault.”. 35

### Insertion of sections 2A and 2B in Act 116 of 1998

3. The following sections are hereby inserted in the principal Act after section 2:

#### “Obligations of functionaries relating to domestic violence 40

- 2A.** (1) A functionary, who in the course of the performance of their duties or the exercise of their functions in relation to any person—
- (a) 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 complainant as contemplated in section 1, must comply with subsection (2); or 45
  - (b) becomes aware of the fact that an adult person, other than an adult person with a disability or an older person as contemplated in paragraph (a), is a complainant as contemplated in section 1, must comply with subsection (3). 50
- (2) Where the complainant is a person contemplated in subsection (1)(a), the functionary—
- (a) must—
    - (i) complete a report in the prescribed form setting out the reasons for such knowledge, belief or suspicion; and 55
    - (ii) in the prescribed manner submit the report to—
      - (aa) a social worker; and
      - (bb) the South African Police Service; and

- (b) may, after conducting, and evaluation of, a risk assessment as prescribed in terms of section 18B, provide or refer the complainant for further services as prescribed in section 18B.
- (3) Where the complainant is an adult person as contemplated in paragraph (b), the functionary—
- (a) must—
- (i) complete a report in the prescribed form setting out the reasons for such knowledge; and
  - (ii) in the prescribed manner submit the report to—
    - (aa) a social worker; or
    - (bb) the South African Police Service;
- (b) must, if it is reasonably possible to do so—
- (i) provide the complainant with a prescribed list containing the names and contact particulars of accessible shelters and public health establishments;
  - (ii) hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and
  - (iii) explain to the complainant the content of such notice, including the remedies at the complainant's disposal in terms of this Act and the right to lodge a criminal complaint, if applicable; and
- (c) may, after conducting, and evaluation of, a risk assessment as prescribed in terms of section 18B, provide or refer the complainant for further services as may be prescribed in terms of section 18B.
- (4) A functionary referred to in subsection (1)—
- (a) who makes the report in good faith, is not liable to civil, criminal or disciplinary action on the basis of the report, despite any law, policy or code of conduct prohibiting the disclosure of personal information; and
- (b) is entitled to have his or her identity kept confidential, unless the interests of justice require otherwise.
- (5) A functionary who fails to comply with subsection (1), is guilty of an offence.

### **“Obligation to report domestic violence and to provide information”**

**2B.** (1) In circumstances other than those contemplated in section 2A(1), an adult person who—

- (a) has 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; or
- (b) has knowledge that an act of domestic violence has been committed against an adult in a domestic relationship,
- must report such knowledge as soon as possible to a social worker or the South African Police Service.
- (2) The report referred to in subsection (1), must be—
- (a) in the prescribed form and must set out the reasons for such knowledge, belief or suspicion; and
- (b) submitted in the prescribed manner to a social worker or the South African Police Service.
- (3) A person referred to in subsection (1)—
- (a) who makes the report in good faith, is not liable to civil, criminal or disciplinary action on the basis of the report, despite any law, policy or code of conduct prohibiting the disclosure of personal information; and
- (b) is entitled to have his or her identity kept confidential, unless the interests of justice require otherwise.
- (4) A person who fails to comply with subsection (1), is guilty of an offence.

**Substitution of section 3 of Act 116 of 1998**

4. The following section is hereby substituted for section 3 of the principal Act:

**“Arrest by peace officer without warrant**

- 3.** (1) A peace officer may, at the scene of an incident of domestic violence, without a warrant, arrest any **[respondent] person [at the scene of an incident of domestic violence whom he or she]** who such peace officer reasonably suspects of having committed **[an offence containing an element of violence against a complainant]**—
- (a) an act of domestic violence which constitutes an offence in terms of any law; or
- (b) an offence referred to in section 17(1)(a).
- (2) A peace officer must arrest a person who is reasonably suspected of having committed an act of domestic violence where physical violence is involved.
- (3) A peace officer contemplated in subsection (1) or (2), who is not a member of the South African Police Service, must—
- (a) where necessary, make arrangements for the complainant to obtain medical attention;
- (b) where a protection order has not been issued against the person who has been arrested for committing an act of domestic violence as contemplated in subsection (1)(a) or (2), or where there is no pending application for a protection order against that person—
- (i) provide the complainant with a prescribed list containing the names and contact particulars of accessible shelters and public health establishments;
- (ii) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant’s choice; and
- (iii) if it is reasonably possible to do so, explain to the complainant the content of such notice, including the remedies at the complainant’s disposal in terms of this Act and the right to lodge a criminal complaint, if applicable; and
- (c) provide such further assistance as prescribed in terms of section 18B.”.

**Insertion of section 3A in Act 116 of 1998**

5. The following section is hereby inserted in the principal Act after section 3:

**“Entering of private dwelling for purposes of obtaining evidence**

- 3A.** (1) If a member of the South African Police Service—
- (a) receives a report that an offence containing an element of physical violence has allegedly been committed during an incident of domestic violence; and
- (b) reasonably suspects that a person who may furnish information regarding that alleged offence is in any private dwelling, that member may, notwithstanding the proviso to section 26 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), without a warrant, enter those premises for the purposes of interrogating that person and obtaining a statement from him or her.
- (2) Any member referred to in subsection (1)—
- (a) must audibly demand admission to the dwelling and notify of the purpose for which the member seeks to enter that dwelling; and
- (b) may, if an occupier of the dwelling does not provide admission to the dwelling, use such force as may be reasonably necessary to overcome any resistance against entry to the dwelling, including the breaking of any door or window of that dwelling.”.

### Substitution of section 4 of Act 116 of 1998

6. The following section is hereby substituted for section 4 of the principal Act:

#### “Application for protection order

4. (1) Any complainant may, in the prescribed manner, apply to the court for a protection order. 5

(1A) The prescribed application may be submitted to the clerk of the court remotely by way of a secure online submission or in person.

(1B) The clerk of the court must upload all electronic and hard copies of the applications onto the integrated electronic repository established in terms of section 6A of this Act. 10

(2) If the complainant or a person referred to in subsection (3) is not represented by a legal representative, the clerk of the court must inform the complainant or person, in the prescribed manner of—

(a) the relief available in terms of this Act; and  
(b) the right to also lodge a criminal complaint against the respondent, if a criminal offence has been committed by the respondent. 15

(3) (a) Notwithstanding the provisions of any other law, the application for a protection order may, subject to paragraph (b), be brought on behalf of the complainant by [any other] another person[, including a counsellor, health service provider, member of the South African Police Service, social worker or teacher,] who has a material interest in the wellbeing of the complainant [: Provided that the application must be brought with the written consent of the complainant, except in circumstances where the complainant is— 20

(a) a minor; 25  
(b) mentally retarded;  
(c) unconscious; or  
(d) person whom the court is satisfied is unable to provide the required consent].

(b) An application referred to in paragraph (a) must be brought with the written consent of the complainant, except in circumstances where the complainant is a person who, in the opinion of the court, is unable to provide the required consent. 30

(4) Notwithstanding the provisions of any other law, any [minor] child, or any person on behalf of a [minor] child, may apply to the court for a protection order without the assistance of a parent, guardian or any other person. 35

(5) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day or may be submitted online as prescribed, if the court [is satisfied] has a reasonable belief that the complainant is suffering or may suffer [undue hardship] harm if the application is not dealt with immediately. 40

(6) Supporting affidavits by persons who have knowledge of the matter concerned may accompany the application.

(7) The application and affidavits must be lodged with the clerk of the court who [shall forthwith] must immediately submit the application and affidavits to the court.”. 45

### Substitution of section 5 of Act 116 of 1998, as amended by section 19 of Act 55 of 2003

7. The following section is hereby substituted for section 5 of the principal Act: 50

#### “Consideration of application and issuing of interim protection order

5. (1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 4(7) and may, for that purpose, consider such additional evidence as it deems fit, including oral 55

evidence or evidence by affidavit, which **[shall]** must form part of the record of the proceedings.

(1A) Where circumstances permit, a court may when considering an application referred to in subsection (1), cause an investigation to be carried out—

(a) **[and]** where a Family Advocate is available, **[a court may]**, in the circumstances as may be prescribed in the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), **[when considering an application contemplated in subsection (1), cause an investigation to be carried out]** by a Family Advocate contemplated in the Mediation in Certain Divorce Matters Act, 1987, in whose area of jurisdiction that court is, with regard to the welfare of any **[minor or dependent]** child affected by the proceedings in question, whereupon the provisions of that Act apply with the changes required by the context; or

(b) by a designated social worker as contemplated in section 47 of the Children's Act, 2005, if it appears to that court that a child involved in or affected by proceedings in question is in need of care and protection, whereupon the provisions of that Act apply with the changes required by the context.

(2) If the court is satisfied that there is *prima facie* evidence that—

(a) the respondent is committing, or has committed an act of domestic violence; and

(b) **[undue hardship]** harm is being or may be suffered by the complainant or a related person as a result of such domestic violence if a protection order is not issued immediately,

the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings contemplated in subsection (1), issue an interim protection order against the respondent, in the prescribed manner.

(3) (a) **[An]** Upon the issuing of an interim protection order [must] the clerk of the court must immediately notify the complainant and the court must direct that copies of—

(i) the application and affidavits referred to in section 4(7);

(ii) the record of any evidence noted in terms of subsection (1); and

(iii) the interim protection order issued in terms of subsection (2) be served on the respondent [in the prescribed manner and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued].

(b) **[A copy of the application referred to in section 4 (1) and the record of any evidence noted in terms of]** The documents referred to in subsection (3) must be served [on the respondent together with the interim protection order] in the prescribed manner by the clerk of the court, sheriff or peace officer identified by the court—

(i) by hand, at the physical address for service specified in the application; or

(ii) electronically, at the address or number specified in the application, provided that where the complainant and respondent share the same residence, service must be effected by hand.

(c) An interim protection order must call on the respondent to show cause on the return date specified in the order why the interim protection order, should not be made final.

(d) A copy of the application, together with the interim protection order, must be—

(i) captured by the clerk of the court in the integrated electronic repository of protection orders;

(ii) accessible as prescribed within the criminal justice system; and

(iii) sent to the applicant electronically or by hand once service has been effected on the respondent.

(4) If the court does not issue an interim protection order in terms of subsection (2), the clerk of the court must immediately notify the complainant and the court must direct the clerk of the court, sheriff or a

peace officer identified by the court to cause certified copies of the application concerned and any supporting affidavits to be served on the respondent in the prescribed manner, together with a prescribed notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued. 5

(5) The return dates referred to in subsections (3)[(a)](c) and (4) may not be less than 10 days after service has been effected upon the respondent; **Provided that the** but a return date referred to in subsection (3)[(a)](c) may be anticipated by the respondent upon not less than 24 hours' written notice to the complainant and the court. 10

(6) An interim protection order [**shall have no**] is of force and effect **[until it has been served on]** from the time the existence and content of the order have been brought to the attention of the respondent.

(7) Upon service or upon receipt of a return of service of an interim protection order, the clerk of the court, sheriff or peace officer identified by the court must [forthwith] immediately cause— 15

(a) a certified copy of the interim protection order; and  
(b) the original warrant of arrest contemplated in section 8(1)(a), to be served on the complainant in the prescribed manner and upload the documents referred to in paragraphs (a) and (b) on the integrated electronic repository of protection orders in the prescribed manner. 20

(8) An interim protection order, if issued in terms of this section, remains in force until it is set aside by a competent court.”.

#### **Insertion of sections 5A, 5B and 5C in Act 116 of 1998**

8. The following sections are hereby inserted in the principal Act after section 5: 25

##### **“Attendance of witnesses**

**5A.** (1) The court may, in the prescribed manner and at any stage of proceedings under this Act, cause to be subpoenaed any person as a witness at those proceedings or to provide any book, document, object or thing, if the evidence of that person or book, document, object or thing appears to the court essential to the just decision of the case. 30

(2) (a) A person who is subpoenaed as provided for in subsection (1) must attend the proceedings and remain in attendance at the proceedings until excused by the court.

(b) A person who— 35  
(i) is in attendance at any proceedings under this Act, though not subpoenaed as a witness; and  
(ii) is warned by the court to remain in attendance at the proceedings, must remain in attendance until excused by the court.

(3) Any person who is subpoenaed in terms of subsection (1) or warned in terms of subsection (2) to attend proceedings and who fails to— 40

(a) attend or to remain in attendance;  
(b) appear at the place and on the date and at the time to which the proceedings in question may be adjourned; 45  
(c) remain in attendance at those proceedings as so adjourned; or  
(d) produce any book, document, object or thing specified in the subpoena,  
is guilty of an offence.

##### **Electronic communications service provider to furnish particulars to court** 50

**5B.** (1) If an application for a protection order is made in terms of section 4 and it is necessary to determine whether an electronic communication, which was used to commit an act of domestic violence, was disclosed by the respondent, the court may— 55

(a) adjourn the proceedings to any time and date on the terms and conditions which the court deems appropriate; and

- (b) issue a direction in the prescribed form, directing an electronic communications service provider, that is believed to be able to furnish such particulars, to furnish the court in the prescribed manner by means of an affidavit in the prescribed form with—
- (i) the electronic communications identity number from where the electronic communication originated; 5
  - (ii) the name, surname, identity number and address of the person to whom the electronic communications identity number has been assigned;
  - (iii) any information which indicates that the electronic communication was or was not sent from the electronic communications identity number of the person to the electronic communications identity number of the complainant; 10
  - (iv) any information that is available to an electronic communications service provider that may be of assistance to the court to identify the person who disclosed the electronic communication or the electronic communications service provider, that provides a service to that person; 15
  - (v) any information that is available to an electronic communications service provider which may be of assistance to the court to identify the electronic communications service provider whose service is used to host or was or is used to disclose the electronic communication in question; or 20
  - (vi) an assessment whether or not the electronic communications service provider is in a position to— 25
    - (aa) remove the electronic communication or a link to the electronic communication; or
    - (bb) disable access to such electronic communication or a link to such electronic communication.
- (2) If the court issues a direction in terms of subsection (1) the court must direct that the direction be served on the electronic communications service provider in the prescribed manner: Provided that, if the court is satisfied that the direction cannot be served in the prescribed manner, the court may make an order allowing service to be effected in the form and manner specified in that order. 30
- (3) (a) The information referred to in subsection (1)(b) must be provided to the court within five ordinary court days from the time that the direction is served on an electronic communications service provider. 35
- (b) An electronic communications service provider on which a direction is served, may in the prescribed manner by means of an affidavit in the prescribed form apply to the court for— 40
- (i) an extension of the period of five ordinary court days referred to in paragraph (a) for a further period of five ordinary court days on the grounds that the information cannot be provided timeously; or
  - (ii) the cancellation of the direction on the grounds that— 45
    - (aa) it does not provide an electronic communications service to the complainant or the respondent;
    - (bb) the requested information is not available in the records of the electronic communications service provider; or
    - (cc) its service is not used to host, or was or is not used to disclose the electronic communication in question. 50
- (4) After receipt of an application in terms of subsection (3)(b), the court—
- (a) must consider the application;
  - (b) may, in the prescribed manner, request such additional evidence by way of an affidavit from the electronic communications service provider as it deems fit; 55
  - (c) must give a decision in respect thereof; and
  - (d) must inform the electronic communications service provider in the prescribed form and in the prescribed manner of the outcome of the application. 60
- (5) (a) The court may, on receipt of an affidavit from an electronic communications service provider which contains the information re-

ferred to in subsection (1)(b), consider the issuing of an interim protection order in terms of section 5(2) against the respondent on the date to which the proceedings have been adjourned.

(b) Any information furnished to the court in terms of subsection (1)(b) forms part of the evidence that a court may consider in terms of section 5(1). 5

(6) (a) If the court issues an interim protection order, the court must at the same time, in the prescribed form and manner, issue an order to the electronic communications service provider whose electronic communications service is used to host or disclose the electronic communication which was used to commit an act of domestic violence, to remove or disable access to the electronic communication. 10

(b) An electronic communications service provider who is ordered to remove or disable access to an electronic communication in terms of paragraph (a), may, within 14 days after the order has been served on it in terms of paragraph (a), in the prescribed form and manner, apply to the court for the setting aside or amendment of the order referred to in paragraph (a). 15

(c) The court must as soon as is reasonably possible consider an application submitted to it in terms of paragraph (b) and may for that purpose, in the prescribed form and manner, request such additional evidence by way of an affidavit from the electronic communications service provider as it deems fit, which must form part of the record of the proceedings. 20

(d) The court may, if good cause has been shown for the variation or setting aside of the order, issue an order to this effect and in the prescribed form and manner inform the electronic communications service provider of the outcome of the application. 25

(7) An electronic communications service provider must, within 48 hours after providing the information referred to in subsection (1)(b) to the court, by means of an electronic communication, inform the respondent of the— 30

- (a) information that is to be provided to the court;
- (b) reference number of the direction; and
- (c) name and address of the court. 35

(8) (a) The Director-General must, in consultation with the Director-General: Communications and Digital Technologies, compile and maintain a list of electronic communications service providers that can provide the courts with the information referred to in subsection (1)(b). 40

(b) The list referred to in paragraph (a) must contain the following particulars of each such electronic communications service provider: 40

- (i) The name, physical and postal addresses;
- (ii) the electronic mail address;
- (iii) the telephone and facsimile numbers; and
- (iv) the names of persons who are responsible for providing the information referred to in subsection (1)(b). 45

(c) An electronic communications service provider must, in the prescribed manner and without undue delay, bring any change of any of the particulars referred to in paragraph (a) to the attention of the Director-General. 50

(d) The Director-General must, in the prescribed manner and without undue delay, make the list referred to in paragraph (a) and any subsequent amendments thereto available to all courts.

(9) The Cabinet member responsible for the administration of justice must, by notice in the *Gazette*, prescribe reasonable tariffs of compensation payable to electronic communications service providers for— 55

- (a) providing the information referred to in subsection (1)(b);
- (b) providing the information to the respondent as contemplated in subsection (7); and
- (c) removing or disabling access to the electronic communications which were used to commit an act of domestic violence as contemplated in subsection 6(a). 60

(10) (a) The complainant is liable for the costs related to the furnishing of the information and the removing or disabling access to the electronic communications, referred to in subsection (9).

- (b) The court may, at any time hold an inquiry into—
  - (i) the means of the complainant; and
  - (ii) any other circumstances which, in the opinion of the court, should be taken into consideration,

to determine the ability of the complainant to pay the costs referred to in subsection (9).

(c) At the conclusion of the inquiry referred to in paragraph (b), the court may make such order as the court deems fit relating to the payment of the costs referred to in subsection (9), including an order directing the State, subject to section 15, to pay such costs within available resources, in the prescribed manner.

(d) The court may, if it has ordered the State to pay the costs referred to in paragraph (c), direct who must refund the costs so paid by the State in the prescribed manner.

(11) Any electronic communications service or employee of an electronic communications service provider who—

(a) fails to furnish the required information within five ordinary court days from the time that the direction is served on such electronic communications service provider to a court in terms of subsection (3)(a) or such extended period allowed by the court in terms of subsection (3)(b);

(b) makes a false statement in an affidavit referred to in subsection (1)(b), (3)(b), (6)(b) or (c), in a material respect;

(c) fails to comply with an order to remove or disable access to the electronic communications in terms of subsection (5)(c) or any variation thereof in terms of subsection (6)(d);

(d) fails to comply with subsection (7), is guilty of an offence.

(12) For purposes of this section—

(a) **“disclose”**, in respect of an electronic communication, means to—
 

- (i) send the data message to a person who is the intended recipient of the electronic communication or any other person;

- (ii) store the data message on an electronic communications network, where the data message can be viewed, copied or downloaded; or

- (iii) send or otherwise make available to a person, a link to the data message that has been stored on an electronic communications network, where the data message can be viewed, copied or downloaded; and

(b) **“host”** means to store an electronic communication on an electronic communications network that is used to provide an electronic communications service, where it can be viewed, copied or downloaded.

**Existing orders and reciprocal orders**

**5C.** (1) The court must before it issues a protection order referred to in section 5(2) or 6(1), establish whether there is any other order against the complainant or respondent, which was previously issued by a court and may have a bearing on the application before the court.

(2) Where existing orders are in place, the court—

(a) must record those orders on the court file;

(b) must, where it issues a protection order, or imposes any condition or makes any order which it is competent to impose or make under section 7, ensure that the protection order does not contradict any such existing orders; and

(c) may, where it is satisfied that urgent relief against an act of domestic violence is necessary, notwithstanding any other order, issue a protection order or impose any condition or make any order which

it is competent to impose or make under section 7, and order that they remain in force for a limited period as it may determine, in order to afford the complainant an opportunity to apply for the amendment, variation or setting aside of such order.”.

**Substitution of section 6 of Act 116 of 1998**

5

9. The following section is hereby substituted for section 6 of the principal Act:

**“Issuing of final protection order**

6. (1) If the respondent does not appear on a return date contemplated in section 5(3) or [4](5), and if the court is satisfied that—

- (a) proper service has been effected on the respondent; and 10
- (b) the application contains *prima facie* evidence that the respondent has committed or is committing an act of domestic violence, the court must issue a final protection order in the prescribed form.

(1A) If the complainant appears on the return date contemplated in section 5(4), but the respondent does not appear, the court may issue a final protection order in the prescribed form after hearing the matter and— 15

- (a) considering any evidence previously received in terms of section 5(1); and
- (b) considering such further affidavits or oral evidence as it may direct, which must form part of the record of the proceedings. 20

(2) If the respondent appears on the return date contemplated in section 5(3) or (5) in order to oppose the issuing of a final protection order, or in 5(4), in order to oppose the issuing of a protection order, the court must proceed to hear the matter and— 25

- (a) consider any evidence previously received in terms of section 5(1); **[and]**
- (b) consider such further affidavits or oral evidence as it may direct, which **[shall]** must form part of the record of the proceedings; and
- (c) if there are disputes of fact in the versions before it, the court may extend the return date for the hearing of oral evidence. 30

(2A) If the respondent appears on the return date contemplated in section 5(3) or (5), but the complainant does not appear, the court must extend the interim protection order and the return date and the clerk of the court must notify the complainant of the extended date: Provided that the court may discharge the interim order if the complainant does not appear on the extended date. 35

(2B) If neither the complainant nor respondent appears on the return date contemplated in section 5(3) or (5), and if the court is satisfied that— 40

- (a) proper service has been effected on the respondent; and
- (b) the application contains *prima facie* evidence that the respondent has committed or is committing an act of domestic violence, the court may—
  - (i) extend the interim protection order and the return date for the hearing of oral evidence; 45
  - (ii) set a new return date where no interim order is in place, and the clerk of the court must notify the parties of the extended date; or
  - (iii) discharge the matter. 50

(2C) If neither the complainant nor the respondent appears on a return date contemplated in section 5(4), the court may discharge the matter.

(3) The court may, on its own accord or **[on]** at the request of the complainant **[, if it is of the opinion that it is just or desirable to do so,]** order that in the examination of witnesses, including the complainant or a related person, a respondent who is not represented by a legal representative— 55

- (a) is not entitled to cross-examine directly a person who is in a domestic relationship with the respondent; and

(b) [shall] must put any question to such a witness by stating the question to the court, and the court is to repeat the question accurately to the respondent.

(4) The court must, after a hearing as contemplated in subsection (2), issue a final protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence. 5

(5) [Upon] On [the] issuing [of] a final protection order the [clerk of the] court must [forthwith in the prescribed manner cause] direct that— 10

(a) the original of such order [to] must be served on the respondent; and

(b) a certified copy of such order, and the original warrant of arrest contemplated in section 8(1)(a), [to] must be served on the complainant,

in the prescribed manner by the clerk of the court, sheriff or peace officer identified by the court. 15

(6) (a) The clerk of the court must [forthwith] immediately, in the prescribed manner, forward certified copies of any protection order and of the warrant of arrest contemplated in section 8(1)(a) to the police station of the complainant's choice. 20

(b) A copy of the warrant, together with the final protection order, must be—

(i) captured by the clerk of the court in an integrated electronic repository of protection orders; and

(ii) accessible as prescribed within the criminal justice system. 25

(7) Subject to the provisions of sections 5C(2)(c) and 7(7), a final protection order issued in terms of this section has effect and remains in force until it is set aside, and the execution of such order [shall] is not [be] automatically suspended upon the noting of an appeal.”.

#### Insertion of section 6A in Act 116 of 1998 30

10. The following section is hereby inserted in the principal Act after section 6:

#### **“Establishment of an integrated electronic repository for domestic violence protection orders and related matters**

**6A.** (1) An integrated electronic repository for domestic violence protection orders referred to in sections 5 and 6 must in accordance with this Act, be established and maintained by the Minister. 35

(2) The Minister must designate a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to administer the integrated electronic repository.

(3) Access to the integrated electronic repository may, in the prescribed manner, be granted to officials in the criminal justice system for the purposes of complying with any obligation under this Act.”. 40

#### Amendment of section 7 of Act 116 of 1998

11. Section 7 of the principal Act is hereby amended—

(a) by the substitution for subsections (1) and (2) of the following subsections: 45

“(1) The court may, by means of a protection order referred to in section 5 or 6, prohibit the respondent from—

(a) committing or attempting to commit any act of domestic violence;

(b) enlisting the help of another person to commit any such act;

(c) entering a residence shared by the complainant and the respondent: 50  
Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;

(d) entering a specified part of such a shared residence;

(e) entering the complainant's residence;

(f) entering the complainant's [place of employment] or a related 55  
person's workplace or place of studies;

- (g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in **[subparagraph]** paragraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or
- (h) committing any other act as specified in the protection order, 5  
including the distribution of any specified communication, whether electronically or otherwise, on social media or elsewhere.

(2) The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or wellbeing of the complainant, including— 10

- (a) an order—
- (i) to seize any **[arm or dangerous]** weapon in the possession or under the control of the respondent, as contemplated in section 9; and
  - (ii) that a peace officer must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property; or
- (b) the making of a **recommendation** that the complainant should approach a relevant police station to investigate the matter with a view to the possible institution of a criminal prosecution against the respondent.”; 20

(b) by the insertion of the following subsection after subsection (4):

“(4A) The court may conduct an enquiry in respect of the respondent in terms of section 35 of the Prevention and Treatment for Substance Abuse Act, 2008 (Act No. 70 of 2008), and commit the respondent to a treatment centre for substance abuse.”; 25

(c) by the substitution for subsection (5) of the following subsection:

“(5) (a) The physical, home and work address of the complainant or a related person must be omitted from the protection order, unless the nature of the terms of the order necessitates the inclusion of such address. 30

(b) The court may issue any directions to ensure that the complainant’s or a related person’s physical, home and work address is not disclosed in any manner which may endanger the safety, health or wellbeing of the complainant or related person.

(c) Where the complainant or related person is a child, the complainant’s or related person’s physical, home and work addresses must not be disclosed until a children’s court inquiry into the matter has been held.”; 35  
 and

(d) by the substitution for subsection (7) of the following subsection:

“(7) (a) The court may not refuse— 40

- (i) to issue a protection order; or
- (ii) to impose any condition or make any order which it is competent to impose or make under this section,

merely on the grounds that other legal remedies are available to the complainant. 45

(b) If the court is of the opinion that any provision of a protection order deals with a matter that should, in the interests of justice, be dealt with further in terms of any other relevant law, including the Maintenance Act, 1998 (Act No. 99 of 1998), the court must order that such a provision **[shall be]** is in force for such limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law.”. 50

#### **Amendment of section 8 of Act 116 of 1998**

**12.** Section 8 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsections: 55

“(1) Whenever a court issues a protection order, including an interim protection order, the court must make an order—

(a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and

- (b) suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.”; and
- (b) by the substitution for subsections (4) and (5) of the following subsections:
- “(4) (a) A complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service. 5
- (b) If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant is suffering or may suffer [imminent] harm as a result of the alleged breach of the protection order by the respondent, the member must [forthwith] immediately arrest the respondent for allegedly committing the offence referred to in section 17(1)(a). 10
- (c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), [he or she] the member must [forthwith] immediately hand a written notice, in the prescribed form, to the respondent which— 15
- (i) specifies the name, the residential and work address and the occupation or status of the respondent; 20
- (ii) calls upon the respondent to appear before a court, and on the date and at the time, specified in the notice, on a charge of committing the offence referred to in section 17(1)(a); and
- (iii) contains a certificate signed by the member concerned to the effect that [he or she] the member handed the original notice to the respondent and that [he or she] the member explained the import thereof to the respondent. 25
- (d) The member must [forthwith] immediately forward a duplicate original of a notice referred to in paragraph (c) to the clerk of the court concerned, and the mere production in the court of such a duplicate original [shall be] is prima facie proof that the original thereof was handed to the respondent specified therein. 30
- (5) In considering whether or not the complainant is suffering harm or may suffer [imminent] harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account— 35
- (a) the risk to the safety, health or wellbeing of the complainant or related person;
- (b) the seriousness of the conduct comprising an alleged breach of the protection order; [and]
- (c) the length of time since the alleged breach occurred; and 40
- (d) the nature and extent of the harm previously suffered in the domestic relationship by the complainant or a related person.” 45

### Substitution of section 9 of Act 116 of 1998

13. The following section is hereby substituted for section 9 of the principal Act:

#### “Seizure of [arms and dangerous] weapons 45

9. (1) The court must order a member of the South African Police Service to seize any [arm or dangerous] weapon in the possession or under the control of a respondent as specified in that order, regardless of the requirements of the respondent’s employment to possess such weapon, if the court is satisfied on the evidence placed before it, including any affidavits supporting an application referred to in section 4 (1), that— 50
- (a) the respondent has threatened or expressed the intention to kill or injure himself or herself, [or] any person in [a] the domestic relationship or a related person, whether or not by means of such [arm or dangerous] weapon; or 55
- (b) possession of such [arm or dangerous] weapon is not in the best interests of the respondent or any other person in a domestic relationship or a related person, as a result of the respondent’s—

- (i) state of mind or mental condition;
- (ii) inclination to violence; or
- (iii) use of or dependence on intoxicating liquor or drugs.

(2) Any **[arm]** weapon contemplated in paragraph (a) of the definition of “weapon”, seized in terms of subsection (1) must be **[handed over to the holder of an office in the]** kept by the South African Police Service **[as contemplated in section 11(2)(b) of the Arms and Ammunition Act, 1969 (Act 75 of 1969),]** and the court must direct the clerk of the court to refer a copy of the record of the evidence concerned to the **[National Commissioner of the South African Police Service]** relevant station commander for consideration in terms of section **[11] 102** of the **[Arms and Ammunition Act, 1969] Firearms Control Act, 2000.**

(3) Any **[dangerous]** weapon contemplated in paragraph (b) of the definition of “weapon” seized in terms of subsection (1)—

- (a) must be given a distinctive identification mark and retained in police custody for such period of time as the court may determine; and
- (b) **[shall]** may only be returned to the respondent or, if the respondent is not the owner of the **[dangerous]** weapon, to the owner thereof, by order of the court and on such conditions as the court may determine:

Provided that—

- (i) if, in the opinion of the court, the value of the **[dangerous]** weapon so seized is below **[R200]** the amount determined by the Minister in the Gazette from time to time; [or]
- (ii) if the return of the **[dangerous]** weapon has not been ordered within 12 months after it had been so seized; or
- (iii) if the court is satisfied that it is in the interest of the safety of any person concerned,

the court may order that the **[dangerous]** weapon be forfeited to the State.

(4) (a) When a final protection order has been issued against the respondent in terms of section 6, the clerk of the court must, in the prescribed manner, inform the National Commissioner of the South African Police Service thereof.

(b) The National Commissioner of the South African Police Service must, on receipt of the information contemplated in paragraph (a)—

- (i) determine whether the respondent holds a licence, permit, competency certificate or other authorisation in terms of the Firearms Control Act, 2000, for any firearm; and
- (ii) in terms of section 102 of the Firearms Control Act, 2000, determine whether the person is unfit to possess a firearm.”.

#### Amendment of section 10 of Act 116 of 1998

14. Section 10 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:

“(1) (a) A complainant or a respondent may, upon written notice to the other party and the court concerned, apply for the variation or setting aside of a protection order referred to in section 6 in the prescribed manner.

(b) The other party must, if they oppose the application, within 10 days of receiving the notice referred to in paragraph (a), give written notice to the other party and the court setting out grounds and facts on which the application is opposed.

(2) If the court is satisfied that circumstances have changed materially since the granting of the original protection order and that good cause has been shown for the variation or setting aside of the protection order, it may issue an order to this effect: Provided that the court **[shall]** may not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.”.

**Amendment of section 11 of Act 116 of 1998**

15. Section 11 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) (a) No person **[shall]** may publish in any manner any information which might, directly or indirectly, reveal the identity of any party to the proceedings. 5
- (b) The court, if it is satisfied that it is in the interests of justice, may direct that any further information relating to proceedings held in terms of this Act **[shall]** may not be published: Provided that no direction in terms of this subsection applies in respect of the publication of a *bona fide* law report which does not mention the names or reveal the identities of the parties to the proceedings or of any witness at such proceedings.”. 10

**Amendment of section 12 of Act 116 of 1998**

16. Section 12 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections:

- “(1) Any court within the area in which— 15
- (a) the complainant permanently or temporarily resides, carries on business or is employed;
- (b) the respondent permanently or temporarily resides, carries on business or is employed; or
- (c) the cause of action arose, 20
- has jurisdiction to grant a protection order as contemplated in this Act.
- (2) No specific minimum period is required in relation to subsection (1)(a), or (b).”.

**Amendment of section 13 of Act 116 of 1998**

17. Section 13 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 25

- “(1) (a) Service of any document in terms of this Act must **[forthwith]** be effected immediately on the person affected by it at his or her residence or place of business, employment or study in the prescribed manner by the clerk of the court, the sheriff or a peace officer, or as the court may direct. 30
- (b) If a document cannot be served as contemplated in paragraph (a), service must be effected by electronic mail, facsimile, short messaging service or other known social media platform of the person who must be served: Provided that proof of service effected in that manner must be provided to the court.
- (c) If service cannot be effected as contemplated in paragraphs (a) and (b), the clerk of the court must obtain directions from the magistrate on the manner of service.” 35

**Substitution of section 15 of Act 116 of 1998**

18. The following section is hereby substituted for section 15 of the principal Act:

**“[Costs] Orders as to costs of service and directions” 40**

15. (1) The court may **[only]**, having regard to the conduct of the parties as far as it may be relevant, make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably.
- (2) Despite the provisions of subsection (1), the court may make an order as to costs against any party in respect of the— 45
- (a) service of any process or documents;
- (b) obtaining the information contemplated in section 5B(1)(b); or
- (c) removal or disabling of Access to Electronic Communications contemplated in section 5B(6).” 50

**Substitution of section 16 of Act 116 of 1998**

19. The following section is hereby substituted for section 16 of the principal Act:

**“Appeal and review**

16. The provisions in respect of appeal and review contemplated in the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and the [Supreme Court Act, 1959 (Act No. 59 of 1959)] Superior Courts Act, 2013 (Act No. 10 of 2013), apply to any proceedings in terms of this Act.” 5

**Amendment of section 17 of Act 116 of 1998**

20. The following section is hereby substituted for section 17 of the principal Act:

**“Offences 10**

17. (1) Notwithstanding the provisions of any other law, any person who—

(a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;

(b) contravenes the provisions of section 11(2)(a); 15

(c) fails to comply with any direction in terms of the provisions of section 11(2)(b); or

(d) in an affidavit referred to in section 8(4)(a), wilfully makes a false statement in a material respect, 20

is guilty of an offence and liable on conviction—

(i) in the case of an offence referred to in paragraph (a)—

(aa) if a first offender, to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment[,]; or

(bb) if a second or subsequent offender, to imprisonment for a period not exceeding 10 years; and 25

(ii) in the case of an offence contemplated in paragraph (b), (c), or (d)—

(aa) if a first offender, to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment; or 30

(bb) if a second or subsequent offender, to a fine or imprisonment for a period not exceeding four years or to both such fine and such imprisonment.

(2) Any person who is convicted of an offence referred to in section 5A(3), is liable on conviction— 35

(a) in the case of a first offender, to a fine or imprisonment for a period not exceeding three months; or

(b) in the case of a second or subsequent offender, to a fine or imprisonment for a period not exceeding six months. 40

(3) Any electronic communications service provider or employee of an electronic communications service provider, who is convicted of an offence referred to in section 5B(11)(a), (b), (c) or (d), is liable on conviction, in the case of—

(i) an electronic communications service provider, to a fine not exceeding R10 000; or 45

(ii) an employee of an electronic communications service provider to a fine or imprisonment for a period not exceeding six months or to both a fine and such imprisonment.

(4) A functionary who is convicted of an offence referred to in section 2A(5), is liable on conviction to a fine or to imprisonment for a period not exceeding three months or to both a fine and such imprisonment. 50

(5) A person who is convicted of an offence referred to in section 2B(4), is liable on conviction to a fine or to imprisonment for a period not exceeding three months or to both a fine and such imprisonment.”. 55

**Amendment of section 18 of Act 116 of 1998, as amended by section 36 of Act 1 of 2011**

21. Section 18 of the principal Act is hereby amended—

- (a) by the substitution for subsections (1) and (2) of the following subsections:
- “(1) No prosecutor [**shall**] may—
- (a) refuse to institute a prosecution; or
- (b) withdraw a charge,
- in respect of a contravention of section 17(1)(a) or in respect of any offence against a person in a domestic relationship—
- (i) involving the infliction of grievous bodily harm or a dangerous wound against the complainant or a related person; or
- (ii) where the complainant or a related person is threatened with a weapon,
- unless [**he or she has been**] authorised thereto, whether in general or in any specific case, by a Director of Public Prosecutions as contemplated in section 13(1)(a) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), or a senior member of the prosecuting authority designated thereto in writing by such a Director.
- (2) The National Director of Public Prosecutions referred to in section 10 of the National Prosecuting Authority Act, 1998, in consultation with the Minister [**of Justice**] and after consultation with the Directors of Public Prosecutions, must determine prosecution policy and issue policy directives regarding any offence arising from an incident of domestic violence.”; and
- (b) by the substitution for paragraph (a) of subsection (4) of the following paragraph:
- “(a) Failure by a member of the South African Police Service to comply with an obligation imposed in terms of this Act or the national instructions referred to in subsection (3), constitutes misconduct as contemplated in the South African Police Service Act, 1995, and the Secretariat, established in terms of section 4(1) of the Civilian Secretariat for Police Service Act, [**2010**] 2011 (Act No. 2 of 2011), must [**forthwith**] be informed immediately of any such failure reported to the South African Police Service.”.

**Insertion of sections 18A and 18B in Act 116 of 1998**

22. The following sections are hereby inserted in the principal Act after section 18:

**“Directives for clerks of court**

- 18A.** (1) The Director-General must issue directives with which clerks of the court must comply in the execution of their functions in terms of this Act, and any directives so issued must be published in the *Gazette*.
- (2) The Minister must submit any directives issued in terms of subsection (1) to Parliament before those directives take effect.
- (3) The directives referred to in this section must provide that adequate disciplinary steps will be taken against a clerk of the court who fails to comply with any directive.
- (4) Any directive issued under this section may be amended or withdrawn in like manner.

**Directives by Departments of Health, Social Development, Basic Education, Higher Education and Training and Communications and Digital Technologies**

- 18B.** (1) The Directors-General: Health, Social Development, Basic Education, Higher Education and Training and Communications and Digital Technologies must—
- (a) in consultation with the Ministers of Health, Social Development, Basic Education, Higher Education, Science and Innovation as well as Communications and Digital Technologies; and

- (b) after consultation with the Director-General, National Director of Public Prosecutions and National Commissioner of the South African Police Service, publish in the *Gazette* directives regarding matters which are reasonably necessary or expedient to be provided for and which are to be followed by functionaries and other relevant persons when dealing with domestic violence cases, in order to achieve the objects of this Act. 5
- (2) Without limiting the scope of the directives contemplated in subsection (1), the directives must—
- (a) prescribe services to be provided to a complainant who is a child, a person with a disability or an older person; 10
- (b) prescribe the manner in which a functionary must deal with a complainant who is a child, a person with a disability or an older person, in order to protect them against further acts of domestic violence; 15
- (c) prescribe services to be provided to a complainant who is an adult person; 20
- (d) provide for a public education and communication initiative to educate the public on the provisions of this Act, the obligations of the relevant functionaries, including the South African Police Service, in respect of domestic violence incidents and institutions where complaints may be lodged against a functionary or a member of the South African Police Service; 25
- (e) provide for the designation of accredited shelters;
- (f) prescribe standards and minimum conditions for the provision of services in accredited shelters; and
- (g) prescribe the manner in which a risk assessment must be conducted in respect of a complainant to provide or refer the complainant for further services.”.

**Substitution of section 19 of Act 116 of 1998** 30

23. The following section is hereby substituted for section 19 of the principal Act:

**“Regulations**

- 19.** (1) The Minister [**of Justice**] may make regulations regarding—
- (a) any form required to be prescribed in terms of this Act; 35
- [(b) any matter required to be prescribed in terms of this Act; and**
- (c) any other matter which the Minister deems necessary or expedient to be prescribed in order to achieve the objects of this Act.**
- (2) **Any regulation made under subsection (1)—**
- (a) **must be submitted to Parliament prior to publication thereof in the *Gazette*;** 40
- (b) **which may result in expenditure for the State, must be made in consultation with the Minister of Finance; and**
- (c) **may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.]** 45
- (b) financial assistance to be provided by the State—
- (i) to a complainant or respondent who does not have the means to pay for fees of any service in terms of this Act; and 50
- (ii) to a witness who attends any proceedings in terms of this Act;
- (c) the granting of legal aid at State expense in appropriate cases in consultation with Legal Aid South Africa to a child to assist him or her with an application for a protection order in terms of this Act; 55
- (d) any matter required to be prescribed in terms of this Act; and
- (e) any other matter which the Minister deems necessary or expedient to be prescribed in order to achieve the objects of this Act.
- (2) Any regulation made under subsection (1)—

- (a) must be submitted to Parliament prior to publication thereof in the *Gazette*;
- (b) which may result in expenditure for the State, must be made in consultation with the Cabinet member responsible for finance; and
- (c) may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and on conviction is liable to a fine or to imprisonment for a period not exceeding one year.” 5

**Substitution of section 20 of Act 116 of 1998**

24. The following section is hereby substituted for section 20 of the principal Act: 10

**“Amendment of laws**

20. The laws mentioned in the Schedule are amended to the extent indicated in the third column of the Schedule.”.

**Short title and commencement**

25. This Act is called the Domestic Violence Amendment Act, 2020, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 15

## SCHEDULE

## LAWS AMENDED

(Section 20)

No. and year of law	Short title	Extent of repeal or amendment
Act No. 51 of 1977	Criminal Procedure Act, 1977	Section 40 of the Criminal Procedure Act, 1977, is hereby amended by— <i>(a)</i> the substitution for paragraph <i>(q)</i> of subsection (1) of the following paragraph: “ <i>(q)</i> who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes— <i>(i)</i> an offence in respect of which violence is an element [.] ; or <i>(ii)</i> an offence, other than the offence referred to in subparagraph <i>(i)</i> ; or”; and <i>(b)</i> by the addition to subsection (1) of the following paragraph: “ <i>(r)</i> who is reasonably suspected of having contravened section 17(1)(a) of the Domestic Violence Act, 1998.”.
Act No. 60 of 2000	Firearms Control Act, 2000	Schedule 2 to the Firearms Control Act, 2000, is hereby amended by the substitution for paragraph <i>(e)</i> of Item 7 of the following paragraph: “ <i>(e)</i> in terms of [section 18(1)(a) of] the Domestic Violence Act, 1998 (Act No. 116 of 1998) or the Protection from Harassment Act, 2011 (Act No. 17 of 2011).”.
Act No. 17 of 2011	Protection from Harassment Act, 2011	The Protection from Harassment Act, 2011, is hereby amended— <i>(a)</i> by the substitution for subsection (2) of section 1 of the following subsection: “(2) This Act does not prevent a person who may apply for relief against harassment [or stalking] in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998), from applying for relief in terms of this Act.”; and <i>(b)</i> by the substitution for paragraph <i>(a)</i> of subsection (5) of section 1 of the following paragraph: “ <i>(a)</i> Provided that the complainant is not in possession of or not in the process of applying for a protection order against harassment [or stalking] as provided for in the Domestic Violence Act, 1998 (Act No. 116 of 1998), the court may not refuse— <i>(i)</i> to issue a protection order; or <i>(ii)</i> to impose any condition or make any order, which it is competent to impose or make under this section, merely on the grounds that other legal remedies are available to the complainant.”.
Act No. 10 of 2013	Superior Courts Act, 2013	The Superior Courts Act, 2013, is hereby amended by the substitution for subsection (1) of section 47 of the following subsection: “[Notwithstanding any other law] Except for an application made in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998), no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be.”.

## MEMORANDUM ON THE OBJECTS OF THE DOMESTIC VIOLENCE AMENDMENT BILL, 2020

### 1. PURPOSE OF BILL

The Bill seeks to amend the provisions of the Domestic Violence Act, 1998 (Act No. 116 of 1998) (the Act), in order to address practical challenges, gaps and anomalies which have manifested themselves since the Act was put into operation in 1999. The amendments also seek to enhance the application of the Act in order to protect victims of gender-based violence and other vulnerable persons against domestic violence. Numerous amendments discussed below aim to align the Act with the Protection from Harassment Act, 2011 (Act No. 17 of 2011) (the Harassment Act, 2011).

### 2. OBJECTS OF BILL

2.1 **Clause 1** of the Bill inserts an “Arrangement of Sections” in the Act.

2.2 **Clause 2** of the Bill deletes, amends and inserts various definitions in section 1 of the Act to further facilitate the interpretation of the Act.

2.3 **Clause 3** of the Bill inserts sections 2A and 2B in the Act.

2.3.1 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 by the Minister by notice in the *Gazette*), to deal in the following manner with the victims of domestic violence:

(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 complainant as contemplated in section 1, the functionary—

- must report the reasons for such knowledge, believe or suspicion to a social worker and the South African Police Service; and
- may, after conducting, and evaluation of, a risk assessment as prescribed in terms of section 18B, provide or refer the complainant for further services as prescribed in section 18B.

(b) Where a functionary becomes aware of the fact that an adult person, other than an adult person with a disability or an older person, is a complainant as contemplated in section 1, the functionary—

- must report the reasons for such knowledge to a social worker or the South African Police Service;
- must if it is reasonably possible to do so—
  - provide the complainant with a prescribed list containing the names and contact particulars of accessible shelters and public health establishments;
  - hand a notice containing information as prescribed to the complainant in the official language of the complainant’s choice; and
  - explain to the complainant the content of such notice, including the remedies at the complainant’s disposal in terms of this Act and the right to lodge a criminal complaint, if applicable; and
- may, after conducting, and evaluation of, a risk assessment as prescribed in terms of section 18B, provide or refer the complainant for further services as may be prescribed in terms of section 18B.

2.3.2 The proposed section 2B imposes an obligation on persons, other than a functionary contemplated in section 2A, to report his or her

knowledge or a reasonable belief or suspicion that an act of domestic violence has been committed against a person to a section 55A worker or the South African Police Service.

- 2.3.3 Sections 2A and 2B further provide that a functionary or person—
- (a) who makes a report, as contemplated in those sections, in good faith, is not liable to civil, criminal or disciplinary action on the basis of the report, despite any law, policy or code of conduct prohibiting the disclosure of personal information; and
  - (b) is entitled to have his or her identity kept confidential, unless the interests of justice require otherwise.

2.4 **Clause 4** of the Bill amends section 3, which provides that a peace officer may at the scene of an incident of domestic violence 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) A discretion is afforded to a peace officer to arrest any person at the scene of an incident of domestic violence, 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
  - an offence referred to in section 17(1)(a) (which criminalises a contravention of any prohibition, condition, obligation or order of a protection order).
- (b) A peace officer must arrest a person who is reasonably suspected of having committed an act of domestic violence where physical violence is involved.
- (c) A peace officer contemplated in paragraphs (a) and (b) above, who is not a member of the South African Police Service, must—
  - where necessary, make arrangements for the complainant to obtain medical attention;
  - where a protection order has not been issued against the person who has been arrested for committing an act of domestic violence, or where there is no pending application for a protection order against that person—
    - provide the complainant with a prescribed list containing the names and contact particulars of accessible shelters and public health establishments;
    - if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant’s choice; and
    - if it is reasonably possible to do so, explain to the complainant the contents of such notice, including the remedies at the complainant’s disposal in terms of the Act, and the right to lodge a criminal complaint, if applicable; and
  - provide such further assistance as prescribed in terms of section 18B.

2.5 In terms of section 26 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), a police official who in the investigation of an alleged offence reasonably suspects that a person who may furnish information with reference to any such offence, is on any premises, such police official may without a warrant enter such premises for the purpose of interrogating such a person and obtaining a statement from such a person. However, section 26 also provides that such a police official is prohibited from entering any private dwelling without the consent of the occupier thereof. This restriction severely hampers the powers of the South African Police Service to effectively protect a complainant, since they cannot enter the shared residence without the consent of the occupier, who may be the person who has committed an act of domestic violence against the complainant who is in need of life-saving treatment. **Clause 5** inserts a new section 3A in the Act, which provides:

- (a) That, a member of the South African Police Service, who—
- receives a report that an offence containing an element of physical violence has allegedly been committed during an incident of domestic violence; and
  - reasonably suspects that a person who may furnish information regarding that alleged offence is in any private dwelling,
- may, notwithstanding section 26 of the Criminal Procedure Act, 1977, without a warrant, enter those premises for the purposes of interrogating that person and obtaining a statement from him or her.
- (b) The member—
- must before entering those premises, audibly demand admission to the dwelling and notify the purpose for which the member seeks to enter that dwelling; and
  - may, if an occupier of the dwelling does not provide admission to the dwelling, use such force as may be reasonably necessary to overcome any resistance against entry to the dwelling, including the breaking of any door or window of that dwelling.

2.6 **Clause 6** effects the following amendments to section 4, which deals with applications for protection orders:

- (a) In addition to making an application for a protection order in person, such an application may also be submitted to the clerk of the court remotely by way of a secure online submission (subsections (1A) and (5));
- (b) all applications for protection orders must be uploaded onto the integrated electronic repository, established in terms of section 6A (subsection (1B));
- (c) a person who makes an application on behalf of an adult complainant, who is not represented by a legal representative must also be informed of the relief available in terms of the Act and the right to also lodge a criminal complaint against the respondent, if applicable (subsection (2));
- (d) technical amendments are effected to subsection (3), to clarify the category of persons who are entitled to apply for protection orders on behalf of adult persons;
- (e) the reference to “minor” is substituted for the reference of “child” (subsection (4)); and
- (f) technical amendments are effected to provide that an application for a protection order may be brought outside ordinary court hours if the court has a reasonable belief that the complainant is suffering or may suffer harm if the application is not dealt with immediately and that such an application must immediately be submitted to the court by the clerk of the court (subsections (5) and (6)).

2.7 **Clause 7** effects the following amendments to section 5 of the Act, which deals with the consideration of applications for, and the issuing of, interim protection orders by the court:

- 2.7.1 In terms of section 5(1A) a court may, when considering an application for a protection order, cause an investigation to be carried out by a Family Advocate, where available, in the circumstances as prescribed in the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), with regard to the welfare of any minor or dependent child affected by the proceedings in question. The subsection is amended to provide that a court may also, when considering an application for a protection order, cause an investigation to be carried out as contemplated in section 47 of the Children’s Act, 2005 (Act No. 30 of 2005). Section 47 of the Children’s Act, 2005, provides that, if it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as is contemplated in section 150, the court must order that the question whether the child is in need of care and protection be referred to a

designated social worker for an investigation contemplated in section 155(2) of that Act.

- 2.7.2 In terms of section 5(3), upon the issuing of an interim protection order by the court, the clerk of the court must immediately notify the complainant and the court must direct that copies of the application, affidavits, record of any evidence and the interim protection order be served on the respondent to show cause on the return date specified in the order why the interim protection order, should not be made final. This provision is amended to provide that those documents must be served on the respondent in the prescribed manner, by the clerk of the court, sheriff or peace officer identified by the court either by hand or electronically. Similar amendments are effected to subsections (4) and (7) to provide for electronic service of documents.
- 2.7.3 In terms of section 5(6), an interim protection order has no force and effect until it has been served on the respondent. The provision is amended to provide that an interim protection order is of force and effect from the time the existence and contents thereof have been brought to the attention of the respondent.

2.8 **Clause 8** inserts new sections 5A, 5B and 5C in the Act.

- 2.8.1 Section 5A provides that a person may be subpoenaed as a witness at the court proceedings or to provide any book, document, object or thing, if the evidence of that person or a book, document, object or thing appears to the court to be essential to the just decision of the case. A person so subpoenaed must attend the proceedings and remain in attendance at the proceedings, and a person who is in attendance at any proceedings under this Act, though not subpoenaed as a witness, and who is warned by the court to remain in attendance at the proceedings, must remain in attendance at the proceedings, unless excused by the court. It is an offence for a person so subpoenaed to fail to attend or remain in attendance, or to fail to appear at the place and on the date and at the time to which the proceedings in question may be adjourned, or to fail to remain in attendance at those proceedings as so adjourned, or to fail to produce any book, document, object or thing specified in the subpoena.
- 2.8.2 Section 5B imposes obligations on electronic communications service providers to provide assistance to a court in respect of electronic communications which were used to commit an act of domestic violence. The section provides for the following:
- (a) Where an application for a protection order is made in terms of section 4 and it is necessary to determine whether an electronic communication, which was used to commit an act of domestic violence, was disclosed by the respondent, the court may adjourn the proceedings to any time and date on the terms and conditions which the court deems appropriate and issue a direction in the prescribed form, directing an electronic communications service provider, that is believed to be able to furnish such particulars, to furnish the court in the prescribed manner by means of an affidavit in the prescribed form with—
- the electronic communications identity number from where the electronic communication originated and particulars of the person to whom the electronic communications identity number has been assigned;
  - any information which indicates that the electronic communication was or was not sent from the electronic communications identity number of the person to the electronic communications identity number of the complainant;

- any information that is available to an electronic communications service provider that may be of assistance to the court to identify the person who disclosed the electronic communications or the electronic communications service provider, that provides a service to that person;
  - any information that is available to an electronic communications service provider which may be of assistance to the court to identify the electronic communications service provider whose service is used to host or was or is used to disclose the electronic communications in question; or
  - an assessment whether or not the electronic communications service provider is in a position to remove the electronic communications or a link to the electronic communications or to disable access to such electronic communications or a link to such electronic communications.
- (b) A direction contemplated in paragraph (a) must be served on the electronic communications service provider in the prescribed manner. However, if the court is satisfied that the direction cannot be served in the prescribed manner, the court may make an order allowing service to be effected in the form and manner specified in that order.
- (c) The information referred to in paragraph (a) must be provided to the court within five ordinary court days from the time that the direction is served on an electronic communications service provider. An electronic communications service provider may, however, apply to the court for an extension of the period of five ordinary court days for a further period of five ordinary court days on the grounds that the information cannot be provided timeously or the cancellation of the direction on the grounds that—
- it does not provide an electronic communications service to the complainant or the respondent;
  - the requested information is not available in the records of the electronic communications service provider; or
  - its service is not used to host or was or is not used to disclose the electronic communication in question.
- (d) The court may, on receipt of an affidavit from an electronic communications service provider which contains the information referred to in paragraph (a), consider the issuing of an interim protection order in terms of section 5(2) against the respondent on the date to which the proceedings have been adjourned. The information furnished to the court in terms of paragraph (a) forms part of the evidence that a court may consider in terms of section 5(1).
- (e) If the court issues an interim protection order, the court must at the same time, in the prescribed form and manner, issue an order to the electronic communications service provider whose electronic communications service is used to host or disclose the electronic communications whereby an act of domestic violence was committed, to remove or disable access to the electronic communications. An electronic communications service provider who is ordered to remove or disable access an electronic communication in terms of paragraph (a), may, apply to the court for the setting aside or amendment of the order referred to in paragraph (a).
- (f) The Director-General: Justice and Constitutional Development must compile and maintain a list of electronic communications service providers that can provide the courts with the information referred to in paragraph (a), which must be made available to all courts.

- (g) The Cabinet member responsible for the administration of justice must, by notice in the *Gazette*, also prescribe reasonable tariffs of compensation payable to electronic communications service providers for, among others, providing the information referred to in paragraph (a) and for removing or disabling access to the electronic communications which was used to commit an act of domestic violence as contemplated in paragraph (e).

2.8.3 In terms of section 5C, a court must before it issues a protection order referred to in section 5(2) or 6(1), establish whether there is any other order against the complainant or respondent, which was previously issued by a court and may have a bearing on the application before such court. Where any such order is in place, the court must record such an order on the court file and where it issues a protection order, or impose any condition or make any order which it is competent to impose or make under section 7, ensure that the protection order does not contradict such an existing order. Where a court is satisfied that urgent relief against an act of domestic violence is necessary, it may notwithstanding any other order, issue a protection order or impose any condition or make any order which it is competent to impose or make under section 7 and order that they remain in force for a limited period as it may determine in order to afford the complainant an opportunity to apply for the amendment, variation or setting aside of such an order.

2.9 **Clause 9** effects the following amendments to section 6 of the Act, which deals with the issuing of a final protection order:

- (a) The word “final” is inserted in the heading and various subsections, before the word “protection order”;
- (b) subsections (1A), (2A), (2B) and (2C) are inserted in the provision to further regulate instances where the complainant or the respondent or both parties do not appear on the return date to which the proceedings have been adjourned to for considering the issuing of a final protection order; and
- (c) provision is further made that a copy of the warrant, together with the final protection order, must be captured in the integrated electronic repository of protection orders to ensure that such documents are accessible within the criminal justice system.

2.10 **Clause 10** inserts a new section 6A in the Act, which provides for the establishment of an integrated electronic repository for domestic violence protection orders and further regulates access thereto. The aim of this facility is to facilitate accessibility of orders by functionaries in the criminal justice system.

2.11 **Clause 11** effects the following amendments to section 7, which provides for the court’s powers in respect of protection orders:

- (a) Subsection (1) is amended to provide that a court may by means of a protection order prohibit a respondent from also—
  - attempting to commit an act of domestic violence (subsection (1)(a));
  - entering the complainant’s or a related person’s workplace or place of studies (subsection (1)(f)); and
  - distributing certain electronic communications (subsection (1)(h)).
- (b) Subsection (2) provides that a court may impose additional conditions to protect the complainant, such as seizing any weapon and that a peace officer must accompany the complainant to collect personal property. This subsection is amended to provide that the court may also recommend to the complainant to approach a relevant police station to investigate the matter with a view to the possible institution of a criminal prosecution against the respondent.

- (c) Subsection (4A) is inserted in the section to enable the court to conduct an enquiry in terms of section 35 of the Prevention and Treatment for Substance Abuse Act, 2008 (Act No. 70 of 2008), and in deserving cases, to commit the respondent to a treatment centre for substance abuse.
- (d) Subsection (5) is amended by the addition of paragraph (c), which provides that, where the complainant or related person is a child, the complainant's or related person's physical, home and work addresses must not be disclosed until a children's court inquiry into the matter has been held.

2.12 Section 8 deals with the issuing of a warrant of arrest upon the issuing of a protection order and the arrest of a respondent who contravenes any prohibition, condition, obligation or order imposed in terms of section 7.

**Clause 12** effects the following amendments to section 8:

- (a) A technical amendment is effected to subsection (1) to also include a reference to an interim protection order.
- (b) Where a respondent contravenes a protection order, the complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service. Subsection (4)(b) empowers a police official to "forthwith" arrest a respondent on the strength of a warrant issued under this section if it appears to the police official that there are reasonable grounds to suspect that the complainant may suffer "imminent" harm as a result of the breach of the protection order by the respondent. The words "forthwith" and "imminent" in the context of subsections (4) and (5), gave rise to various interpretation problems. To address these interpretation issues, the word "forthwith" is substituted with the word "immediately" and the word "imminent" is deleted wherever it appears in subsections (4) and (5).
- (c) Subsection (5), sets out the requirements that a police official must take into account when determining whether a complainant may suffer harm, and includes the risk to the safety, health or well-being of the complainant, the seriousness of the conduct and the length of time since the alleged breach of the protection order. The subsection is amended to provide that the police officer must also consider —
  - the risk to the safety, health or wellbeing of a related person; and
  - the nature and extent of the harm previously suffered in the domestic relationship by the complainant or a related person.

2.13 Section 9 of the Act deals with the seizure of arms and dangerous weapons.

**Clause 13** effects the following amendments to this section:

- (a) The distinction between "arms" and "dangerous weapons" is done away with and conjunctively dealt with under the definition of "weapon" which is defined in section 1 as any airgun, ammunition, imitation firearm, muzzle loading firearm, firearm or handgun as defined in section 1 of the Firearms Control Act, 2000 (Act No. 60 of 2000) or any other object which is likely to inflict grievous bodily harm or a dangerous wound, if it were used to commit an assault. The definitions of "dangerous weapon" and "arm", are consequentially deleted in section 1.
- (b) Subsection (1) is amended to provide that a court may order a member of the South African Police Service to seize any weapon, regardless of the requirements of the respondent's employment to possess such weapon, if the respondent has threatened or expressed the intention to kill or injure himself or herself, any person in the domestic relationship or a related person, or that possession of such weapon is not in the best interests of the respondent or any other person in a domestic relationship, as a result of the respondent's state of mind or mental condition, inclination to violence or use of or dependence on intoxicating liquor or drugs.

- (c) Subsection (2) is amended by the substitution for the reference to the repealed Arms and Ammunition Act, 1969 (Act No. 75 of 1969) of the Firearms Control Act, 2000, and to provide that a copy of the record of evidence relating the proceedings for an application for an interim protection order must now be submitted to the relevant station commander for consideration in terms of section 102 of the Firearms Control Act, 2000, to determine whether the person is unfit to possess a firearm.
- (d) Subsection (3) is amended to provide that the court may order that the weapon be forfeited to the State, if the value of such a weapon seized is below an amount determined by the Minister in the *Gazette*.
- (e) Subsection (4) is inserted to provide that when a final protection order has been issued against the respondent, the clerk of the court must, in the prescribed manner, inform the National Commissioner of the South African Police Service thereof. The National Commissioner of the South African Police Service must, on receipt of the information determine whether the respondent holds a licence, permit, competency certificate or other authorisation in terms of the Firearms Control Act, 2000, for any firearm and further determine whether the person is unfit to possess a firearm.

2.14 **Clause 14** effects the following amendments to section 10, which regulates the variation or setting aside of a protection order:

- (a) Subsection (1) provides that a complainant or a respondent may, upon written notice to the other party and the court concerned, apply for the variation or setting aside of a protection order. This subsection is amended to provide that a party must, if they oppose the application, within 10 days of receiving such notice, give written notice to the other party and the court setting out grounds and facts on which the application is opposed.
- (b) In terms of subsection (2), the court may, if it is satisfied that good cause has been shown for the variation or setting aside of a protection order, and where the application is made by a complainant, that the application is made freely and voluntarily, issue an order to this effect. The subsection is amended to provide that the court must further be satisfied that the circumstances have changed materially since the granting of the original protection order before such a protection order may be varied or set aside.

2.15 **Clause 15** effects technical amendments to section 11.

2.16 Section 12 regulates the jurisdiction of courts in respect of applications for domestic violence protection orders. **Clause 16** amends subsections (1) and (2) to clarify that a court within the area in which the complainant or respondent permanently or temporarily resides, carries on business or is employed, has jurisdiction to grant a protection order.

2.17 Section 13 of the Act deals with service of documents for purposes of the Act. **Clause 17** amends 13(1), to provide that -

- (a) the service of documents is to be effected immediately on the person affected by it at his or her residence or place of business, employment or study in the prescribed manner by the clerk of the court, the sheriff or a peace officer, or as the court may direct;
- (b) if a document cannot be served as contemplated in paragraph (a), service must be effected by electronic mail, facsimile, short messaging service or other known social media platform; and
- (c) if service cannot be effected as contemplated in paragraphs (a) and (b), the clerk of the court must obtain directions from the magistrate on the manner of service.

2.18 **Clause 18** effects the following amendments to section 15 of the Act, which deals with cost orders:

- (a) The heading to section 15 is substituted for the heading “Orders as to costs of service and directions”;
- (b) the current provision is renumbered as subsection (1) and is amended to provide that the court may, having regard to the conduct of the parties as far as it may be relevant, make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably; and
- (c) a new subsection (2) is inserted to provide that notwithstanding the provisions of subsection (1), the court may make an order as to costs against any party in respect of the service of any process or documents and the obtaining of information contemplated in section 5B(1).

2.19 **Clause 19** amends section 16 by substituting the reference “Supreme Court Act, 1959” with that of “Superior Courts Act, 2013”.

2.20 **Clause 20** amends section 17 of the Act, to further provide for offences and penalties.

2.21 **Clause 21** amends section 18(1) to provide that a prosecutor may not refuse to institute a prosecution or withdraw a charge, in respect of a contravention of section 17(1)(a) or in respect of any offence against a person in a domestic relationship, if that contravention or offence—

- involving the infliction of grievous bodily harm or a dangerous wound against the complainant or a related person; or
- where the complainant or a related person is threatened with a weapon, unless that prosecutor is authorised thereto by the relevant Director of Public Prosecutions.

2.22 **Clause 22** inserts sections 18A and 18B in the Act.

1.22.2 Section 18A empowers the Director-General: Justice and Constitutional Development to issue directives with which clerks of the court must comply in the execution of their functions in terms of the Act. These directives must provide for disciplinary proceedings to be taken against a clerk of the court who fails to comply with those directives.

2.22.2 Section 18B provides for the issuing of directives by the Directors-General: Health, Social Development, Basic Education, Higher Education and Training as well as Communications and Digital Technologies to regulate matters which are reasonably necessary or expedient to be provided for and which are to be followed by functionaries, as contemplated in section 2A and other relevant persons when dealing with domestic violence cases, in order to achieve the objects of the Act. These directives must—

- prescribe services to be provided to a complainant who is a child, a person with a disability or an older person;
- prescribe the manner in which a functionary must deal with a complainant who is a child, a person with a disability or an older person, in order to protect them against further acts of domestic violence;
- prescribe services to be provided to a complainant who is an adult person;
- provide for a public education and communication initiative to educate the public on the provisions of the Act, the obligations of the relevant functionaries including the South African Police Services in respect of domestic violence incidents and institutions where complaints may be lodged against a functionary or a member of the South African Police Service;
- provide for the designation of accredited shelters;
- prescribe standards and minimum conditions for the provision of services in accredited shelters; and

- prescribe the manner in which a risk assessment must be conducted in respect of a complainant to provide or refer the complainant for further services.

2.23 Section 19 of the Act provides for the making of regulations by the Minister.

**Clause 23** amends section 19 to provide that the Minister may make regulations to provide, among others, for financial assistance to be provided by the State to, either a complainant or a respondent who does not have the means to pay for service fees and the granting of legal aid at the expense of the State in appropriate cases. Where the regulations may result in expenditure for the State, it must be made in consultation with the Cabinet member responsible for finance. Any regulations made in terms of section 19 must be submitted to Parliament prior to publication thereof in the *Gazette*.

3.24 **Clause 24** substitutes section 20, to provide for the amendment of other laws which deal with aspects relevant to domestic violence as set out in the Schedule to the Bill. In the Schedule to the Bill:

- (a) Section 40(1) of the Criminal Procedure Act, 1977, is amended to provide that a peace officer who reasonably suspects a person of having—
  - committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes an offence in respect of which violence is an element or any other offence; or
  - contravened section 17(1)(a) of the Domestic Violence Act, 1998, may arrest such person without a warrant.
- (b) The Firearms Control Act, 2000, is amended to include the offence in terms of section 17(1)(a) of the Domestic Violence Act, 1998, in item 7(e) of Schedule 2 of that Act. Schedule 2 is applicable to section 103 of that Act which deals with the powers of a court to declare a person to be unfit to possess a firearm.
- (c) The Protection from Harassment Act, 2011, is amended by the deletion, in sections 1(2) and 10(5)(a), of the word “stalking”.
- (d) Section 47 of the Superior Courts Act, 2013, is amended to provide that applications in terms of the Domestic Violence Act, 1998, may be made against a judge without the required consent by the head of a Superior Court, or in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be.

2.25 **Clause 25** deals with the short title and commencement of the Act.

### 3. BODIES, DEPARTMENTS AND PARTIES CONSULTED

A workshop for experts and relevant departments was held on 10 February 2020 to scrutinise a first draft of the Bill. Thereafter the augmented Bill was subjected to a consultation process at the end of February 2020. Comments were collated and changes were effected to the Bill to the extent needed. The JCPS Development Committee was consulted on the Bill on 25 June 2020 and gave its approval for the further processing of the Bill. Thereafter, on 13 and 14 July 2020 respectively, the Bill was presented to and received the support of the Justice, Crime Prevention and Security DG’s cluster and the Social Protection, Community and Human Development Technical Working Group Cluster for the further processing of the Bill. The SPCHD DG’s cluster gave its support of the Bill on 5 August 2020, confirming its TWG’s support given on 14 July 2020.

### 4. FINANCIAL IMPLICATIONS

- 4.1 Although section 6A which establishes an integrated electronic repository will have financial implications for the State, the integrated electronic repository will form part of the upgrading of the integrated criminal justice system. The financial implications associated therewith will form part of the existing budget allocated for this upgrade.

- 4.2 Clause 8 will have financial implications for the State. Clause 8, among others, requires the State to pay the electronic communications service providers the costs for providing the contact information of respondents in certain circumstances. It is not possible to quantify the number of matters in which the State will have to bear these costs. Clause 8 does, however, contain a provision in terms of which the court can make an order, directing the respondent to refund the State for the costs so incurred.
- 4.3 Clause 22 which provides for the issuing of directives for clerks of the court and for relevant officials in the Departments of Health, Social Development, Basic Education, Higher Education and Training and Communications and Digital Technologies will necessitate training. It is anticipated that this training will form part of existing departmental budgets allocated for training.
- 4.4 Clause 23 empowers the Minister to make certain regulations, among others, regarding financial assistance to be provided by the State to a complainant or respondent who does not have the means to pay for fees of any service of process or documents in terms of the Bill or to a witness who attends any proceedings in terms of the Bill. Regulations may also be made regarding the granting of legal aid at State expense in appropriate cases in consultation with Legal Aid South Africa to a child in order to assist such a child with an application for a protection order. Again, it is not possible to quantify the number of matters in which the State will have to bear these costs. Any regulation to be made which may result in expenditure for the State, must be made in consultation with the Cabinet member responsible for finance. These financial implications will be considered when regulations are prepared.

## 5. IMPLICATIONS FOR PROVINCES

There are no implications for the provinces.

## 6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 75 of the Constitution, since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The Constitution distinguishes between four categories of Bills as follows: Bills amending the Constitution (section 74); Ordinary Bills not affecting provinces (section 75); Ordinary Bills affecting provinces (section 76); and Money Bills (section 77). A Bill must be correctly classified or tagged; otherwise it would be constitutionally invalid.
- 6.3 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4<sup>1</sup> to the Constitution.
- 6.4 The crux of tagging has been explained by the courts, especially the Constitutional Court in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC). The Court, in its judgment, stated as follows:

“[58] What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill “in substantial measure fall within a functional area listed in schedule 4”. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine

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1. Functional areas of concurrent national and provincial legislative competence

legislative competence. This “involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about. (footnote omitted)

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.”.

- 6.5 In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that “any Bill whose provisions in substantial measure” affects the provinces must be classified to follow the section 76 procedure.
- 6.6 The Bill seeks to amend provisions of the Domestic Violence Act, 1998 dealing with the issuing of a protection order (either interim or final) against a respondent who commits an act of domestic violence against a person in a domestic relation or a related person, and the arrest of the respondent for any breach of the protection order. In the final analysis, it is our view that the subject matter of the Bill does not fall within any of the functional areas listed in Schedule 4 or Schedule 5 to the Constitution. Consequently, we are of the opinion that this Bill is an ordinary Bill not affecting provinces and that it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

## **7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL LEADERS**

The opinion is held that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.



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