

## **ANNEXURE B**

### **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. There is a need to enhance the application of the Act in order to protect victims of gender-based violence and femicide. In this process the concerns of the #TotalShutDown Movement have been taken into account. Numerous amendments discussed below arise from the alignment of the Act with the more recently enacted Protection from Harassment Act, 2011 (Act No. 17 of 2011) (the Harassment Act).

#### **2. OBJECTS OF BILL**

This Bill is one of a package of 3 legislative interventions which are intended to contribute to the fight against the scourge of gender-based violence and femicide. The two other Bills seek to amend the statutory provisions in the Criminal Procedure Act, 1977 and the Criminal Law Amendment Act, 1997, dealing with bail and sentencing, as well as the National Register for Sex Offenders (the NRSO) established by the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. The amendments proposed are, generally speaking, intended to ensure that offences which have a bearing on gender-based violence and femicide are regarded and treated as serious offences. Various acts of gender-based violence and femicide, among others, murder, attempted murder, assault, malicious damage to property, arson and crimen injuria are already criminal offences. “Gender-based violence” and “femicide”, however do not exist as stand-alone

offences in South African law. The need to cater for a broad range of acts along a spectrum ranging from verbal abuse to murder militates against a catch-all crime.

### 3. DISCUSSION OF BILL

3.1 **Clause 1** of the Bill inserts the "Arrangement of Sections" which is essentially an index to the Bill.

3.2 **Clause 2** of the Bill amends many of the numerous definitions contained in section 1 of the Act. It also inserts a few new definitions, some of which have been recommended in the consultation process. This is aimed at facilitating the interpretation of the Bill. The most significant changes in clause 1 are discussed below.

3.2.1 Missing from the Act is a definition of '**child**' which is now inserted in the Bill to mean a person under the age of 18 years. This definition aligns with that term as defined in the Children's Act, 2005 (Act No. 38 of 2005).

3.2.2 The definitions of '**coercive behaviour**' to mean any abusive conduct or acts of force, intimidation or undue pressure intended to cause a complainant or related person to act, not to act, or be subjected to certain acts against his or her will, and '**controlling behaviour**' to mean causing the complainant or a related person to be dependent on or subordinate to the respondent by isolating him or her from sources of support, exploiting his or her resources for personal gain, depriving him or her of the means needed for independence, resistance or escape; or regulating his or her everyday behaviour, have been inserted following the receipt of comment.

3.2.3 The definition of '**damage to property**' as it currently exists in the Act is amended to refer not only to the property belonging to the complainant but also to a person related to the complainant. It is a common occurrence that the respondent may damage or destroy the property of someone related to the complainant to frighten or punish the latter, and at the same time to escape being classified as a perpetrator of domestic violence.

3.2.4 A '**domestic relationship**' is defined in section 1 of the Act as a relationship between a complainant and a respondent in any of the following ways, *inter alia*: '(f) they share or recently shared the same residence'. This definition is amended in order to remove the qualification "recently" but to contain the period to the year preceding the application for the protection order. The effect of this amendment is that the uncertainty as to what "recently" entails is removed, but not in such a way that the time period is irrelevant.

3.2.5 An act of '**domestic violence**' is defined in the Act as including "stalking". The definition of stalking has been removed from this definition and has now been incorporated into the definition of "harassment". This aligns the Act with the Protection from Harassment Act and international best practice which considers stalking to be one of the acts which falls under the umbrella behaviour of harassment. The Bill also revises paragraph (i) which currently reads: "(i) entry into the complainant's residence without consent, where the parties do not share the same residence". It is proposed that the definition be extended to mean not only entry into the complainant's permanent or temporary residence without consent but also his or her workplace or place where the complainant studies and that of a related person without consent.

Paragraph (j) of the definition of domestic violence currently reads: "(j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to the safety, health or wellbeing of the complainant". It is proposed that the paragraph be amended to read: "(j) any other controlling or abusive behaviour, where such conduct harms, or inspires the reasonable belief that harm may be caused to the complainant or a related person". The proposal effectively covers the complainant and a related person in instances where the complainant reasonably believes that the conduct may cause either one or both of them harm. Therefore, it is sufficient that the complainant reasonably believes that harm may be caused to him or her. It is further proposed that the acts of spiritual abuse, elder abuse, coercive behaviour, controlling behaviour and exposing or subjecting children to acts of domestic violence be listed as acts of domestic violence. This is in line with comparative law and to address challenges currently experienced in interpreting this definition. The acts of spiritual abuse, elder abuse, coercive and controlling behaviour are defined and dealt with below.

3.2.6 In terms of the Act, '**economic abuse**' includes the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence and the unreasonable disposal of household effects or other property in which the complainant has an interest. There is a qualification that the deprivation of economic or financial resources or disposal of household effects or property must be "unreasonable", otherwise there is no economic abuse and therefore a protection order cannot be issued in that regard. The Bill proposes to amend the

definition by the removal of the requirement of "unreasonable", the effect of which is to make any deprivation or disposal an economic abuse, unless the deprivation or disposal is authorised by an order of court.

3.2.7 The definition of '**elder abuse**' is inserted means abusive behaviour in a domestic relationship against an older person as defined in the Older Persons Act, 2006 (Act 13 of 2006), and includes economic, emotional, physical or sexual abuse or coercive behaviour and controlling behaviour such as social isolation or neglect. The inclusion of this definition is necessitated by the reality that older persons living on their own or with children are increasingly being abused by family members either financially or physically. This definition further aligns with developments in international law.

3.2.8 The definition of '**emotional, verbal or psychological abuse**' is amended to remove the requirement that any degrading or humiliating conduct has to be "a pattern" or "repeated" conduct. By requiring "repeated" conduct of this nature, as the definition does at present, essentially means that a single incident of unacceptable conduct is excusable and cannot be prosecuted under the Act. Therefore, it is suggested that just a single incident of degrading or humiliating conduct should be sufficient to constitute emotional, verbal or psychological abuse in respect of which the complainant can obtain a protection order.

3.2.9 The definition of '**harassment**' is amended to align it with the term as is defined in the Harassment Act. The conduct of the respondent when engaging with the complainant no longer needs to be direct only but may be indirect as well, and the conduct does not need to be repeated in order to constitute harassment. Any single incident of engagement

by the respondent with the complainant as contemplated in the Bill is sufficient to constitute harassment. **'Stalking'**, as removed from under the definition of domestic violence, has been incorporated into this definition. It shares similar features with some aspects contained in the term 'harassment' as defined in the Harassment Act. Furthermore, it will no longer be a requirement that the conduct must "induce the fear of harm", but rather that the respondent knows or ought to know that the conduct causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person, in which event the complainant can apply for a protection order.

3.2.10 The Bill inserts a definition of **'harm'**, which means any mental, psychological, physical or economic harm. This is done to align it with the Harassment Act.

3.2.11 The definition of **'intimidation'** is amended in order to cover direct and indirect conduct intended to threaten the complainant or a related person which induces fear of imminent harm.

3.2.12 The definition of **'physical abuse'** is amended in order to include abuse of a child as contemplated in the Children's Act, 2005.

3.2.13 A definition of **'related person'** is inserted. The definition is the same as in the Harassment Act, the purpose of which is to address acts of domestic violence against a third person by an abuser aimed at causing distress to the victim.

3.2.14 The definition of **'sexual abuse'** is amended in order to include conduct directed towards a person related to the complainant. Such conduct may (or may not) be that which

constitutes a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007). Therefore, any conduct which abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant or a related person is sexual abuse even if it does constitute a sexual offence under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. In the case of a child complainant, conduct may (or may not) be that which constitutes sexual abuse as contemplated in the Children's Act, 2005.

3.2.15 The definitions of '**sexual harassment**' and '**weapon**' is inserted to align with the Harassment Act. The insertion of the definition of 'weapon' requires the current definition of 'arm' to be deleted.

3.2.16 The definition of '**spiritual abuse**' is included and means—

- (a) ridiculing or insulting the complainant's religious or spiritual beliefs;
- (b) preventing the complainant from practicing 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, including using religious texts or beliefs to minimize or rationalize abusive behaviour. Particularly in religious countries, such as South Africa, the invocation of a deity may cause victims of domestic violence to remain in abusive relationships and less likely to attempt to escape. This is in line with comparative jurisdictions.

3.2.17 The definition of '**stalking**' is deleted as stalking is now incorporated in the definition of '**harassment**'.

3.3 **Clause 3** of the Bill inserts sections 2A and 2B dealing with services for complainants relating to domestic violence and a duty to report the commission of acts of domestic violence respectively. Certain functionaries are required to provide certain services as set out in the section in relation to incidents of domestic violence. There is now an obligation on any person who has "knowledge, reasonable belief or suspicion" that an act of domestic violence has been committed against a child, person with a disability or an elderly person to report such knowledge, reasonable belief or suspicion immediately to a social worker or police official. However, any person who has "knowledge" and not merely a suspicion or belief that an act of domestic violence has been committed against an adult is obliged to report such knowledge to a social worker or police official. Failure to report in either instance constitutes an offence which carries a penalty of a fine or five years imprisonment, or both a fine and imprisonment.

3.4 **Clause 4** of the Bill amends section 3 of the Act which deals with the arrest of a person by a peace officer without a warrant. It provides that a peace officer may, without a warrant, arrest any respondent at the scene of an incident of domestic violence who the peace officer reasonably suspects of having committed an offence containing an element of violence against a person in a domestic relationship (as defined).

3.4.1 It is proposed that the expression "an offence containing an element of violence against a complainant" be replaced as follows-

- (a) an act of domestic violence against any person with whom such suspected person is in a domestic relationship; or
- (b) referred to in section 17(1)(a).

The effect of this proposal is to authorise a peace officer to arrest a person who has committed an offence against a person in a domestic relationship (as defined) or an offence referred to in section 17(1)(a), without a warrant. The purpose of the amendment is to limit the provision to the confines of a domestic relationship.

3.4.2 It is further proposed that the peace officer must arrest the person suspected of having committed an offence where physical violence is involved and where necessary, make arrangements that the victim receives medical attention.

3.5 **Clause 5** inserts a new section 3A in the Act. This proposed new section gives a member of the South African Police the power to enter any private dwelling in order to obtain from any person any information regarding an offence that has allegedly been committed during an incident of domestic violence. The provision empowers a member, without a warrant, to enter a private dwelling for the purposes of interrogating any person who may furnish any relevant information and obtaining a statement from him or her. However, the member must first audibly demand admission to the dwelling and notify the purpose for which the member seeks to enter the premises. If admission is refused, the member may use such force as is reasonably necessary to overcome any resistance against entry into the dwelling. Through comment received the South African Police welcomes the inclusion of this amendment.

3.6 **Clause 6** amends section 4 of the Act, which deals with applications for protection orders.

3.6.1 The new subsection (1A) enables the application to be submitted to the clerk of the court remotely by way of secure online submission. In turn, the clerk of the court must upload the application onto the integrated electronic repository as required by the new subsection (1B). Currently, section 4(2) provides that the clerk of the court must inform the complainant who is not legally represented of the relief available under the Act, and of the right also to lodge a criminal complaint against the respondent. The subsection is amended to require the clerk of the court to not only inform the complainant but also any person referred to in subsection (3), i.e. the person who has an interest in the wellbeing of the complainant. In terms of subsection (3) any person who has an interest in the wellbeing of the complainant may bring an application for a protection order on behalf of the complainant.

3.6.2 Section 4(3) requires that an application brought on behalf of another be brought with that person's written consent. However, such written consent is not required if the complainant is a minor, mentally retarded, unconscious or a person whom the court is satisfied is unable to provide the required consent. Not only is this terminology outdated but it excludes persons who may not be able to give consent. It is proposed in the Bill that the subsection be amended by the deletion of the closed list, with the effect that written consent is not required if the complainant is a person who, in the opinion of the court, is unable to provide the required consent. Furthermore, it is no longer required that the court must be satisfied, but must form an opinion that the complainant is unable to provide the written consent.

3.6.3 Section 4(5) makes provision for the bringing of an application for a protection order outside ordinary court hours or on a day which is not an ordinary court day if the

court is satisfied that the complainant may suffer undue hardship if the application is not dealt with immediately. The subsection is amended to provide that the application may be brought outside ordinary court hours or days or may be submitted online if the court has a reasonable belief that the complainant is suffering or may suffer harm if the application is not dealt with immediately. The effect of this amendment is to require the court to reasonably believe that harm (and no more undue hardship) may be suffered. The substitution of "harm" for "undue hardship" and the insertion of "a related person" are intended to align with the Harassment Act.

3.7 **Clause 7** amends section 5 of the Act, which deals with the consideration of applications for, and the issuing of, interim protection orders by the court.

3.7.1 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, with regard to the welfare of any minor or dependent child affected by the proceedings in question. In this instance the provisions of the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987) apply. It is suggested that this subsection be amended to include a provision that a court may, 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. In terms of section 47, '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). In this instance the provisions of the Children's Act, 2005 apply.

3.7.2 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. As per Judge Steyn in the KZN High Court judgment of **CMC Woodworking Machinery(Pty) Ltd and Pieter Odendaal Kitchens** “[C]hanges in the technology of communication have increased exponentially and it is therefore not unreasonable to expect the law to recognise such changes and accommodate it.” Electronic service may in many circumstances provide an effective, low cost means of effecting timeous service on a respondent. It is therefore proposed in the Bill that the subsection be amended to provide that the said 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. The current provision is silent on who must serve the interim protection order, and this is now specified. A similar amendment is proposed in section 5(4) and 5(7).

3.7.3 A provision is also suggested that the clerk of the court must capture an electronic copy of the application and the interim protection order on an integrated electronic repository of protection orders accessible to all relevant functionaries. The clerk is further enjoined to send it to the applicant electronically once it has been served on the respondent. This is to facilitate the accessibility of orders and to provide for instances where protection orders are lost or destroyed, or the complainant moves away from the area in which the domestic violence occurred. It is envisaged that any

police station will have direct access to this repository, enabling them to react in an appropriate manner.

3.7.4 In terms of section 5(6) an interim protection order shall have no force and effect until it has been served on the respondent. The Bill proposes that this subsection be amended to provide that an interim protection order is of force and effect from the time the existence and content thereof have been brought to the attention of the respondent.

3.8 **Clause 8** inserts three sections in the Act, namely section 5A, providing for attendance of witnesses at court, section 5B, providing for the furnishing of particulars to the court by electronic communications service providers, and section 5C, providing for a duty on the court to ascertain whether there are existing orders or reciprocal orders relevant to the matter at hand. The first two new sections align the provisions of the Act with the corresponding provisions in the Harassment Act.

3.8.1 The new section 5A provides that any 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 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. Contravention of or failure to comply with this subsection carries a penalty of a fine or imprisonment not exceeding three months.

3.8.2 The new section 5B regulates the furnishing of particulars by an electronic communications service provider.

3.8.2.1 In terms of subsection (1) if the court is satisfied that a protection order must be issued as a result of the harassment of the complainant or a related person that has occurred through the use of electronic communications or electronic mail over an electronic communications system of an electronic communications service provider, and the identity or address of the respondent is not known (this would among others address situations where the abuser uses a third party to commit acts of domestic violence against the complainant), the court has several options to consider. These include: (a) the adjournment of the proceedings to any time and date on the terms and conditions which the court deems appropriate; (b) the issuing of a direction in the prescribed form directing an electronic communications service provider to furnish the court, in the prescribed manner by means of an affidavit (that is under oath or by affirmation) in the prescribed form, with the following particulars: the electronic communications identity number from where the offending electronic communications or electronic mail originated, the name, surname, identity number and address of the respondent to whom the electronic communications identity number has been assigned; any information which indicates that electronic communications or electronic

mail were or were not sent from the electronic communications identity number of the respondent to the electronic communications identity number of the complainant, and any other information that is available to an electronic communications service provider which may be of assistance to the court to identify the respondent or the electronic communications service provider which provides a service to the respondent.

3.8.2.2 The required information must be given to the court in a prescribed manner within five days from the time of service of the direction on the electronic communications service provider. If the required information cannot be provided timeously, the electronic communications service provider can apply to the court in the prescribed manner for the extension of the five days period for a further period of five ordinary court days. Alternatively, the electronic communications service provider can ask for the cancellation of the direction if it does not provide an electronic communications service to either the respondent or complainant or related person, or the requested information is not available in its records. The court must consider the application, request additional evidence from the electronic communications service provider, make a decision and inform the electronic communications service provider in the prescribed form and in the prescribed manner of the outcome of the application.

3.8.2.3 The electronic communications service provider is, in terms of the proposed new section 5B(6), required to inform the respondent of the information that is to be provided to the court, the reference number of the direction and the name and address of the court. The proposed new section 5B(7) obliges the Director-General: Justice

and Constitutional Development, in consultation with the Director-General: Communications and the electronic communications service providers, to compile and maintain a list of electronic communications service providers that can provide the courts with the required information. The Minister may, after consultation with the electronic communications service providers, by notice in the *Gazette*, prescribe reasonable tariffs of compensation payable to electronic communications service providers for providing the requested information. This list has already been populated for the purposes of the Harassment Act.

3.8.3 The new section 5C regulates the duty of the court in respect of existing orders or reciprocal orders. In terms of the new provision the court is now required to establish before issuing and confirming a protection order whether any orders relevant to the application are in place either in favour of or against the complainant and that those orders are recorded on the court file so that any new orders issued do not contradict the existing orders.

3.9 **Clause 9** amends section 6 of the Act, which regulates the issuing of a final protection order.

3.9.1 The section is amended, among others, by—

- (a) inserting the word "final" in the heading to highlight that the section deals with "final" protection orders as opposed to section 5 which deals with "interim" protection orders;

- (b) requiring the court to determine whether the clerk of the court, sheriff or a peace officer identified by the court, must serve the final protection order on the respondent.

3.9.2 The Bill proposes the insertion of new subsections (1A), (2A) and (2B) to regulate instances where either the complainant or both parties do not appear in court on the return date to either consider or confirm the issuing of a final protection order. The Act currently allows for the court to proceed with hearing the matter where the respondent does not appear. The amendment seeks to empower the court to issue a final order after hearing the matter and considering the evidence previously received and further affidavits that may have been filed. In instances where both parties are absent the court may extend the interim protection order and postpone the matter to a certain date for the hearing of oral evidence, which date must be communicated to the parties by the clerk of the court. This amendment addresses comment received where interim protection orders have lapsed due to non-attendance by the complainant or both parties.

3.10 **Clause 10** inserts a new section 6A. This section is an empowering provision for the establishment of an integrated electronic repository for domestic violence protection orders and related matters.

3.11 **Clause 11** amends section 7, which determines the court's powers in respect of protection orders.

3.11.1 In terms of the amendment to section 7(1)(a) a protection order may prohibit a respondent from attempting to commit an act of domestic violence, in addition to actually committing an act of domestic violence. The effect of this amendment is that any attempt to commit an act of domestic violence may be used to activate a warrant of arrest that is issued at the time of the issuing of a final protection order. Section 7(1)(f) is also amended to provide that the respondent can, in terms of a protection order, now be prohibited from entering the complainant's workplace or place of studies, and not only his or her place of employment, as is currently the position. This extends protection to complainants in attendance at campuses of higher learning for example. Section 7(1)(g) is amended to specify which other acts the respondent can be prohibited from committing, including the distribution of any specified communication, whether electronically or otherwise, on social media or elsewhere. The effect of this amendment is to empower the court to prohibit the respondent from resorting to social media, which is now the most common platform for the distribution of offensive material, to harass people.

3.11.2 Section 7(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. Section 7(2) is amended to include discretion for the court to recommend to the complainant that they may approach the relevant police station to investigate the matter with a view to the possible institution of a criminal prosecution against the respondent. This addresses concerns that the police may merely refer matters to the court and not investigate acts of domestic violence that constitute offences.

3.11.3 The clause also inserts subsection (4A) 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). In deserving cases, the court can commit the respondent to a treatment centre for substance abuse. The aim is to highlight the role of alcohol and drug abuse as an underlying cause in some acts of domestic violence.

3.11.4 Subsection (5) inserts a provision in paragraph (c) to provide 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.

3.12 **Clause 12** amends section 8 of the Act, which deals with the issuing of a warrant of arrest upon the issuing of a protection order.

3.12.1 In terms of section 8(1) whenever a court issues a 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.

3.12.2 It is proposed in the Bill that the subsection be amended to include an interim protection order. The effect of this amendment is that when the court issues an interim protection order it is clear that it must simultaneously make an order authorising the issue a warrant of arrest of the respondent, coupled with the suspension of the

execution of such warrant, subject to compliance with any prohibition, condition, obligation or order imposed.

3.12.3 Section 8(4)(b) empowers a police official to 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. This subsection is amended to broaden the powers of police officials to also execute an arrest if harm may be suffered by a related person (as defined). The requirement for "imminent" harm is deleted as it has been reported to lead to interpretational issues. All that is necessary for an arrest is that the complainant or related person may suffer harm as a result of an alleged breach of a protection order by the respondent.

3.12.4 In terms of section 8(5) of the Act, when considering whether a complainant or a related person is suffering or may suffer harm, a police official must take into consideration a number of factors, namely the risk to the safety, health or well-being of the complainant or related person, the seriousness of the conduct and the length of time since the alleged breach of the protection order. It is proposed that this subsection be amended to add a further consideration, namely "the nature and extent of the harm previously suffered in the domestic relationship by the complainant or related person".

3.13 **Clause 13** amends section 9 of the Act, which deals with the seizure of arms and dangerous weapons.

3.13.1 The section is amended to remove the words "**arms**" and "**dangerous**" in order for the section to make reference only to "**weapon**" as defined in section 1 of the Bill. The term "arm" was defined in the Arms and Ammunition Act, 1969 (Act No. 75 of 1969) which was repealed by the Firearms Control Act, 2000 (Act No. 60 of 2000). A '**dangerous weapon**' is defined in the Dangerous Weapons Act, 2013 (Act No. 15 of 2013) to mean any object, other than a firearm, capable of causing death or inflicting serious bodily harm, if it were used for an unlawful purpose. The definition of dangerous weapon is deleted from section 1 of the Bill, as that is covered in the newly inserted definition of "weapon". In light of the above, there is no need to refer to arms or dangerous weapon in the Bill.

3.13.2 In terms of section 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, if the court is satisfied on the evidence placed before it that 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. It is proposed that the subsection be amended to provide for the seizure of any weapon in the possession or under the control of a respondent, regardless of the requirements of the respondent's employment to possess such weapon. The effect of this amendment is that the respondent can be dispossessed of a weapon even if that weapon is possessed by the respondent for legitimate work-related purposes. The concern necessitating the seizure of the weapon in this regard is the safety of any person in a domestic relationship, of a related person and of the respondent himself or herself.

3.13.3 Clause 13 also proposes the addition of a new subclause (4) which provides that when a final protection order has been issued against a respondent, the clerk of the court must, in the prescribed manner, inform the National Commissioner of the South African Police Service. This assignment is in line with existing delegations in the police. The National Commissioner must, on receipt of the information in question, 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 in terms of section 102 of the Firearms Control Act, 2000, determine whether the person is unfit to possess a firearm. The effect of this insertion is to provide for the investigation to be carried out as to the suitability of the respondent to be allowed to continue to possess a firearm. If unsuitable, the respondent may be declared unfit to possess a firearm for a determined period of time.

3.14. **Clause 14** amends section 10 of the Act, which governs the variation or setting aside of a protection order. A new paragraph is inserted under subsection (1) to clarify what should happen if the other party opposes the application for the variation or setting aside of a protection order. That party must, within ten days of receiving the notice of application, give written notice to the other party and the court setting out grounds and facts on which the application is opposed. In terms of section 10(2) the court, if it is satisfied that good cause has been shown for the variation or setting aside of a protection order, may issue an order to this effect. However, the court may not grant such an application to a complainant unless it is satisfied that the application by the complainant is made freely and voluntarily. It is proposed that this provision be amended to include an additional requirement that the applicant for variation or setting aside of the protection

order must satisfy the court that the circumstances have changed materially since the granting of the original protection order. The effect of this amendment is that the applicant will no longer be required to show only good cause but also the changed circumstances since the granting of the original order.

3.15 **Clause 15** amends section 11 of the Act to update the outdated use of language but does not change the meaning in any way.

3.16 **Clause 16** amends section 12, which regulates the jurisdiction of the court.

3.16.1 Section 12(1) provides that (1) any court within the area in which—

- (a) the complainant permanently or temporarily resides, carries on business or is employed;
- (b) the respondent resides, carries on business or is employed; or
- (c) the cause of action arose,

has jurisdiction to grant a protection order as contemplated in the Act. It is proposed that paragraph (b) be amended to read: "the respondent permanently or temporarily resides, carries on business or is employed;". The effect of this amendment is to give the court within the area in which the respondent resides, carries on business or is employed the necessary jurisdiction in respect of a domestic violence matter, whether the respondent resides, carries on business or is employed within that area permanently or temporarily. In essence, the court where the respondent finds himself or herself in can be approached by the complainant or other person on his or her behalf to apply for the issuing of a protection order, even if the respondent is within the jurisdiction of that court temporarily, thereby facilitating access to justice.

3.16.2 In terms of section 12(2) of the Act, there is no specific minimum period required in relation to the complainant's or the respondent's residence, business or employment in the area for the court to have jurisdiction to entertain a particular domestic violence matter. The importance of this provision is that the complainant does not have to be within his or her residence, place of business or employment for a specific period of time in order to obtain a protection order. On the other hand, the complainant does not have to wait for the respondent to be within a particular area of jurisdiction for the purposes of obtaining a protection order against the respondent. Instead, the complainant can approach the court within the area where the respondent is, or even the court where the complainant himself or herself is, no matter how long the respondent or the complainant himself or herself has been or will be in that area of jurisdiction.

3.17 **Clause 17** amends section 13 of the Act, which deals with service. The manner in which service should be issued is a contentious issue in practice. It deserves serious consideration as it is an important start of court proceedings, and activates the protection granted in terms of an interim protection order and may, depending on the need therefor, do the same where a final protection order has been issued in the absence of the respondent. Subsection (1) provides that service of any document in terms of this Act must forthwith be effected in the prescribed manner by the clerk of the court, the sheriff or a peace officer, or as the court may direct. This provision has been amended to provide for service 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. The effect of the amendment is to provide for the time, manner, place or subject of service. If service cannot be effected in that manner, electronic means of service should be resorted to. In this instance, the court must be provided with proof of the manner of service. However, if service could still not be effected, then the clerk of the court must obtain directions from the magistrate on the manner of service.

3.18 **Clause 18** amends section 15 of the Act, which deals with costs orders to be awarded by the court under certain circumstances.

3.18.1 The heading of this section is amended from "Costs" to "Orders as to costs of service and directions" as necessitated by the new insertions. Section 15(1) provides that the court may only make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably. It is proposed in the Bill that the subsection be amended to provide that the court may award a costs order, having regard to the conduct of the parties in so far as it may be relevant. The effect of this provision would be to require the court to consider the conduct of the party to be mulcted with a costs order throughout the proceedings.

3.18.2 The proposed new section 15(2) provides that despite 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 obtaining the information contemplated in section 5B(1). Section 5B, discussed above, deals with the furnishing of particulars to court by an electronic communications service provider. The effect of the new insertion is to enable the court to order any party to pay the costs associated

with the service of documents or of obtaining information from an electronic communications service provider.

3.19 **Clause 19** amends section 16 by substituting the "Supreme Court Act, 1959" with the Act that repealed it, namely the "Superior Courts Act 2013.

3.20 **Clause 20** amends section 17 of the Act, which deals with offences.

Section 17(1) proposes an escalation in liability on conviction where an offender is a second or subsequent offender. Section 17 further adds new subsections, making the contravention of the provisions of the new sections 5A and 5B a criminal offence. These new offences are consequential amendments.

3.21 **Clause 21** amends section 18 of the Act, which regulates the application of the Act by the prosecuting authority and members of the South African Police.

3.21.1 In terms of section 18(1) a prosecutor may not refuse to institute a prosecution or may not withdraw a charge in respect of a contravention of section 17(1)(a) of the Act, unless authorised thereto by the Director of Public Prosecutions or a senior member of the prosecuting authority designed in writing thereto by the Director. Section 17(1)(a) provides that a person who contravenes any prohibition, condition, obligation or order imposed in terms of section 7 of the Act is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

3.21.2 The purpose of section 18(1) is to enhance the effectiveness of the Act by ensuring that prosecutors do institute criminal proceedings against persons who contravene protection orders and that prosecutors do not withdraw criminal proceedings involving a contravention of a protection order, unless the prosecutors in question have authority to do so from senior officials in the prosecuting authority, namely the Director of Public Prosecutions having jurisdiction or a senior member of the prosecuting authority. It is argued that this safety mechanism should be broadened to include all other offences which are committed against a person in a domestic relationship involving the infliction of grievous bodily harm or a dangerous wound or where the complainant is threatened with a firearm, which section 18(1) does.

3.22 **Clause 22** inserts a new section 18A in the Act, in order to regulate the issuing of directives for clerks of the court. The new provision empowers the Director-General: Justice and Constitutional Development to issue and publish in the *Gazette* directives with which clerks of the court must comply in the execution of their functions in terms of the Act. Before taking effect, the directives must be submitted to Parliament by the Minister. The directives must provide that adequate disciplinary steps will be taken against a clerk of the court who fails to comply with any directive and may be amended or withdrawn in like manner. This will make for a more consistent approach in the application of the Act across the country. This provision emulates a similar provision in the Harassment Act. Clause 22 further inserts a new section 18B in order to provide for directives for the Departments of Health, Social Development, Basic and Higher Education and Training and Communications. The new provisions empowers the Director-General Justice and Constitutional Development, the National Director of Public Prosecutions and the National

Commissioner of the South African Police Service to publish in the *Gazette* directives regarding all matters which are reasonably necessary or expedient to be provided for and which are to be followed by all medical practitioners, social workers and other relevant persons when dealing with domestic violence cases, in order to achieve the objects of the Act.

3.23 **Clause 23** amends section 19 of the Act, which provides for the making of regulations by the Minister.

3.23.1 This clause amends the empowering clause to make regulations. It brings it in line with the corresponding provisions in the Harassment Act. Section 19(1) proposes that the Minister may make regulations regarding 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 also to any witness who attends proceedings. The subsection further proposes that the Minister may make regulations 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 the child with an application for a protection order.

3.23.2 Section 19(2) provides for the submission of the regulations to Parliament prior to their publication in the *Gazette*, and places an obligation for the Minister to consult with the Minister of Finance when making regulations which may result in expenditure for the State.

3.24 **Clause 24** substitutes section 20 with a new provision dealing with "Amendment of laws". In terms of this clause, the Bill amends the laws contained in the Schedule, and to the extent indicated in the third column of that Schedule. Three laws are amended by the Bill, namely:

- (a) The Firearms Control Act, 2000 (Act No. 60 of 2000) by including the Domestic Violence Act, 1998 under item 7(e) of Schedule 2 of that Act, where an offence in terms of the Domestic Violence Act would require the court to conduct an unfitness enquiry;
- (b) The Protection from Harassment Act, 2011 (Act No. 17 of 2011) by deleting the word '**stalking**' as a stand-alone term as it is incorporated under harassment; and
- (c) The Superior Courts Act, 2013 (Act No. 10 of 2013) by excluding an application made in terms of the Domestic Violence Act, 1998 from the application of section 47 of the Superior Courts Act, the effect of this being that no consent of the head of the court or Chief Justice or the President of the Supreme Court of Appeal is required before service of an application under the Domestic Violence Act on any judge, the head of the court or the Chief Justice respectively.

3.25 **Clause 25** deals with the short title of the Act and the manner in which it will come into operation.

#### **4. 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 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.

## **5. FINANCIAL IMPLICATIONS**

5.1 Although Clause 6A which establishes an integrated electronic repository will have financial implications for the State, it 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.

5.2 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.

5.3 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 towards training.

5.4 Clause 23 empowers the Minister to make certain regulations, among others, regarding financial assistance to be provided for 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 the 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 Minister of Finance. These financial implications will be considered when regulations are prepared.

## **6. IMPLICATIONS FOR PROVINCES**

There are no implications for the provinces.

## **7. PARLIAMENTARY PROCEDURE**

7.1 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.

7.2 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.

7.3 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.

7.4 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 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."

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<sup>1</sup> Functional areas of concurrent national and provincial legislative competence

7.5 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.

7.6 The Bill seeks to amend provisions of the Domestic Violence Act, 1998 dealing with the issuing of protection order (either interim or final) against a respondent who commits an offence 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.

## **8. 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.