

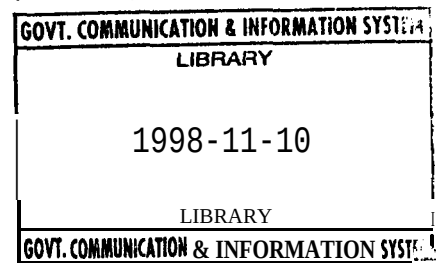
REPUBLIC OF SOUTH AFRICA

DOMESTIC VIOLENCE BILL

*(As submitted by the Portfolio Committee on Justice (National Assembly) in terms of
Rule 147(2)(b), after consideration of the Domestic Violence Bill [B 75—98])*

(MINISTER OF JUSTICE)

[B 75 B—98]



REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP GESINSGEWELD

*(Soos voorgelê deur die Portefeuje-komitee oor Justisie (Nasionale Vergadering) ingevolge
Reël 147(2)(b), na oorweging van die Wetsontwerp op Gesinsgeweld [W 75—98])*

(MINISTER VAN JUSTISIE)

[W 75B—98]

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GENERAL EXPLANATORY NOTE:

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

BILL

To provide for the issuing of protection orders with regard to domestic violence; and for matters connected therewith.

PREAMBLE

RECOGNISING that domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective;

AND HAVING **REGARD** to the Constitution of South Africa, and in particular, the right to equality and to freedom and security of the person; and the international commitments and obligations of [he State towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and the Rights of the Child;

IT IS THE PURPOSE of this Act to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and [hereby to convey that the State is committed to the elimination of domestic violence.

B E II THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—

- (i) “arm” means any arm as defined in section 1(l) or any armament as defined in section 32(1) of the Arms and Ammunition Act, 1969 (Act No. 75 of 1969); (xxiii) 5
- (ii) “clerk of the court” means a clerk of the court appointed in terms of section 13 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and includes an assistant clerk of the court so appointed; (xvi) 10
- (iii) “complainant” means any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant; (xv)

- (iv) "court" means any court contemplated in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) or any family court established in terms of an Act of Parliament; (xiii)
- (v) "damage to property" means the wilful damaging or destruction of property belonging to a complainant or in which the complainant has a vested interest; 5
(iii)
- (vi) "dangerous weapon" means any weapon as defined in section 1 of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968); (xi)
- (vii) "domestic relationship" means a relationship between a complainant and a respondent in any of the following ways: 10
 - (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; 15
 - (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; (x)
- (viii) "domestic violence" means— 25
 - (a) physical abuse;
 - (b) sexual abuse;
 - (c) emotional, verbal and psychological abuse;
 - (d) economic abuse;
 - (e) intimidation;
 - (f) harassment; 30
 - (g) stalking;
 - (h) damage to property;
 - (i) entry into the complainant's residence without consent, where the parties do not share the same residence; or
 - (j) any other controlling or abusive behaviour towards a complainant, that harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant, (ix) 35
- (ix) "economic abuse" includes—
 - (a) 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, where such deprivation may cause imminent harm to the complainant; or
 - (b) the unreasonable disposal of household effects or other property in which the complainant has an interest, where such disposal may cause imminent harm to the complainant; (v) 45
- (x) "emergency monetary relief" means compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including— 50
 - (a) loss of earnings;
 - (b) medical and dental expenses;
 - (c) relocation and accommodation expenses; or
 - (d) household necessities: (viii)
- (xi) "emotional, verbal and psychological abuse" means a pattern of degrading or humiliating conduct towards a complainant, including— 55
 - (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 privacy, liberty, integrity or security; (vi)
- (xii) "harassment" means engaging in a pattern of conduct that induces the fear of harm to a complainant including—
 - (a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
 - (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
 - (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant; (xx)
- (xiii) "intimidation" means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear; (xiv)
- (xiv) "member of the South African Police Service" means any member as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995); (xvii)
- (xv) "peace officer" means a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); (xxii)
- (xvi) "physical **abuse**" means any act or threatened act of physical violence towards a complainant; (vii)
- (xvii) "prescribed" means prescribed in terms of a regulation made under section 19; (xxi)
- (xviii) "protection order" means an order issued in terms of section 5 or 6 but, in section 6, excludes an interim protection order; (iv)
- (xix) "residence" includes institutions for children, the elderly and the disabled; (xxiv)
- (xx) "respondent" means any person who is or has been in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant; (xviii)
- (xxi) "sexual abuse" means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant; (xix)
- (xxii) "sheriff" means a sheriff appointed in terms of section 2(1) of the Sheriffs Act, 1986 (Act No. 90 of 1986), or an acting sheriff appointed in terms of section 5(1) of the said Act; (ii)
- (xxiii) "stalking" means repeatedly following, pursuing, or accosting the complainant; (i)
- (xxiv) "this Act" includes the regulations. (xii)

Duty to assist and inform complainant of rights

2. Any member of the South African Police Service must, at the scene of an incident of domestic violence or as soon thereafter as is reasonably possible, or when the incident of domestic violence is reported—

- (a) render such assistance to the complainant as may be required in the circumstances, including assisting or making arrangements for the complainant to find a suitable shelter and to obtain medical treatment;
- (b) 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
- (c) if it is reasonably possible to do so, explain to the complainant the content of such notice in the prescribed manner, including the remedies at his or her disposal in terms of this Act and the right to lodge a criminal complaint, if applicable.

Arrest by peace officer without warrant

3. A peace officer may without warrant arrest any respondent at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence against a complainant.

Application for protection order

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

(2) If the complainant is not represented by a legal representative, the clerk of the court must inform the complainant, in the prescribed manner—

(a) of the relief available in terms of this Act; and

(b) of the right to also lodge a criminal complaint against the respondent, if a criminal offence has been committed by the respondent.

(3) Notwithstanding the provisions of any other law, the application may be brought on behalf of the complainant by any other 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—

(a) a minor;

(b) mentally retarded;

(c) unconscious; or

(d) a person whom the court is satisfied is unable to provide the required consent.

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

(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, if the court is satisfied that the complainant may suffer imminent harm.

(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 submit the application and affidavits to the court.

Consideration of application and issuing of interim protection order

5. (1) The court must as soon as it 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 evidence or evidence by affidavit, which shall form part of the record of the proceedings.

(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) imminent harm may be suffered by the complainant as a result of such domestic violence,

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 interim protection order must 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 subsection (1) must be served on the respondent together with the interim protection order.

(4) If the court does not issue an interim protection order in terms of subsection (2), the court must direct the clerk of 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) The return dates referred to in subsections (3)(a) and (4) may not be less than 10 days after service has been effected upon the respondent: provided that the return date referred to in subsection (3)(a) may be anticipated by the respondent upon not less than 24 hours' written notice to the complainant and the court.

(6) An interim protection order shall have no force and effect until it has been served on the respondent.

(7) Upon service or upon receipt of a return of service of an interim protection order, the clerk of the court must forthwith cause—

(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.

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Issuing of protection order

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

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(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 must issue a protection order in the prescribed form.

(2) If the respondent appears on the return date in order to oppose the issuing of a protection order, the court must proceed to hear the matter and—

(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 form part of the record of the proceedings.

(3) The court may, on its own accord or on 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, a respondent who is not represented by a legal representative—

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

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(b) shall 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 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.

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(5) Upon the issuing of a protection order the clerk of the court must forthwith in the prescribed manner cause—

(a) the original of such order to 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 be served on the complainant.

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(6) The clerk of the court must forthwith 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.

(7) Subject to the provisions of section 7(7), a protection order issued in terms of this section remains in force until it is set aside, and the execution of such order shall not be automatically suspended upon the noting of an appeal.

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Court's powers in respect of protection order

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

(a) committing any act of domestic violence;

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

(c) entering a residence shared by the complainant and the respondent: 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;

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(e) entering the complainant's residence;

(f) entering the complainant's place of employment;

(g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in subparagraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or

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(h) committing any other act as specified in the protection order.

(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 an order—

(a) to seize any arm or dangerous weapon in the possession or under the control of the respondent, as contemplated in section 9; and

(b) that a peace officer must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property.

(3) In ordering a prohibition contemplated in subsection 1(c), the court may impose on the respondent obligations as to the discharge of rent or mortgage payments having regard to the financial needs and resources of the complainant and the respondent.

(4) The court may order the respondent to pay emergency monetary relief having regard to the financial needs and resources of the complainant and the respondent, and such order has the effect of a civil judgment of a magistrate's court.

(5) (a) The physical address of the complainant must be omitted from the protection order, unless the nature of the terms of the order necessitates the inclusion of such address.

(b) The court may make any directions to ensure that the complainant's physical address is not disclosed in any manner which may endanger the safety, health or wellbeing of the complainant.

(6) If the court is satisfied that it is in the best interests of any child it may—

(a) refuse the respondent contact with such child; or

(b) order contact with such child on such (conditions as it may consider appropriate.

(7) (a) The court may not refuse—

(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.

(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, the court must order that such a provision shall be 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.

Warrant of arrest upon issuing of protection order

8. (1) Whenever a court issues a protection order, the court must make an order—

(a) authorizing 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.

(2) The warrant referred to in subsection (1)(a) remains in force unless the protection order is set aside, or it is cancelled after execution.

(3) The clerk of the court must issue the complainant with a second or further warrant of arrest, if the complainant files an affidavit in the prescribed form in which it is stated that such warrant is required for her or his protection and that the existing warrant of arrest has been—

(a) executed and cancelled; or

(b) lost or destroyed.

(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.

(b) If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 17(a).

(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 must forthwith hand a written notice to the respondent which—

- (i) specifies the name, the residential address and the occupation or status of the respondent;
- (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(a); and
- (iii) contains a certificate signed by the member concerned to the effect that he or she handed the original notice to the respondent and that he or she explained the import thereof to the respondent,
- (d) The member must forthwith 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 *prima facie* proof that the original thereof was handed to the respondent specified therein.
- (5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account—
 - (a) the risk to the safety, health or wellbeing of the complainant;
 - (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.
- (6) Whenever a warrant of arrest is handed to a member of the South African Police Service in terms of subsection (4)(a), the member must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

Seizure of arms and dangerous weapons

- 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, including any affidavits supporting an application referred to in section 4(1), that—
 - (a) the respondent has threatened or expressed the intention to kill or injure himself or herself, or any person in a domestic relationship, whether or not by means of such arm or dangerous weapon; or
 - (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, 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 seized in terms of subsection (1) must be handed over to the holder of an office in the South African Police Service as contemplated in section 11(2)(b) of the Arms and Ammunition Act, 1969 (Act No. 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 for consideration in terms of section 11 of the Arms and Ammunition Act, 1969.
 - (3) Any dangerous weapon seized in terms of subsection (1)—
 - (a) must be given a distinctive identification mark and retained in police custody for such time as the court may determine; and
 - (b) shall 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; 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.

Variation or setting aside of protection order

- 10. (1) 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 [he prescribed manner.

(2) If the court is satisfied that good cause has been shown for [he variation or setting aside of the protection order, it may issue an order to this effect: Provided that the court shall not grant such an application to the complainant unless it is satisfied that the 5 application is made freely and voluntarily.

(3) The clerk of the court must forward a notice as prescribed to the complainant and the respondent if the protection order is varied or set aside as contemplated in subsection (1).

Attendance of proceedings and prohibition of publication of certain information 10

11. (1) (a) No person may be present during any proceedings in terms of this Act except—

- (a) officers of the court;
- (b) the parties to the proceedings;
- (c) any person bringing an application on behalf of the complainant in terms of 15 section 4(3);
- (d) any legal representative representing any party to the proceedings;
- (e) witnesses;
- (f) not more than three persons for the purpose of providing support to the 20 complainant;
- (g) not more than three persons for the purpose of providing support to the respondent; and
- (h) any other person whom the court permits to be present:

Provided that the court may, if it is satisfied that it is in the interests of justice, exclude any person from attending any part of the proceedings. 25

(b) Nothing in this subsection limits any other power of the court to hear proceedings *in camera* or to exclude any person from attending such proceedings.

(2) (a) No person shall publish in any manner any information which might, directly or indirectly, reveal the identity of any party to the proceedings.

(b) The court, if it is satisfied that it is in the interests of justice, may direct that any 30 further information relating to proceedings held in terms of this Act shall 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.

Jurisdiction 35

12. (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, 40

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).

(3) A protection order is enforceable throughout the Republic.

Service of documents

13. (1) Service of any document in terms of this Act must forthwith be effected in the 45 prescribed manner by the clerk of the court, the sheriff or a peace officer, or as the court may direct.

(2) The regulations contemplated in section 19 must make provision for financial assistance by the State to a complainant or a respondent who does not have the means to 50 pay the fees of any service in terms of this Act.

Legal representation

14. Any party to proceedings in terms of this Act may be represented by a legal representative.

costs

15. 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, 5

Appeal and review

16. The provisions in respect of appeal and review contemplated in the Magistrate's Courts Act, 1944 (Act No. 32 of 1944), and the Supreme Court Act, 1959 (Act No. 59 of 1959), apply to any proceedings in terms of this Act, 10

Offences

17. 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 section 8(4)(a), wilfully makes a false statement in a material respect,

is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and in the case of an offence contemplated in paragraph (b), (c), or (d), to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment, 20

Application of Act by prosecuting authority and members of South African Police Service 25

18. (1) No prosecutor shall—

- (a) refuse to institute a prosecution; or
- (b) withdraw a charge,

in respect of a contravention of section 17(a), 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. 30

(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. 35

(3) The National Commissioner of the South African Police Service must issue national instructions as contemplated in section 25 of the South African Police Service Act, 1995 (Act No. 68 of 1995), with which its members must comply in the execution of their functions in terms of this Act, and any instructions so issued must be published in the *Gazette*. 40

(4) (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 Independent Complaints Directorate, established in terms of that Act, must forthwith be informed of any such failure reported to the South African Police Service. 45 50

(b) Unless the Independent Complaints Directorate directs otherwise in any specific case, the South African Police Service must institute disciplinary proceedings against any member who allegedly failed to comply with an obligation referred to in paragraph (a).

(5) (a) The National Director of Public Prosecutions must submit any prosecution policy and policy directives determined or issued in terms of subsection (2) to Parliament, and the first policy and directives so determined or issued, must be submitted to Parliament within six months of the commencement of this Act.

(b) The National Commissioner of the South African Police Service must submit any national instructions issued in terms of subsection (3) to Parliament, and the first instructions so issued, must be submitted to Parliament within six months of the commencement of this Act.

(c) The Independent Complaints Directorate must, every six months, submit a report to Parliament regarding the number and particulars of matters reported to it in terms of subsection (4)(a), and setting out the recommendations made in respect of such matters.

(d) The National Commissioner of the South African Police Service must, every six months, submit a report to Parliament regarding-

- (i) the number and particulars of complaints received against its members in respect of any failure contemplated in subsection (4)(a); 15
- (ii) the disciplinary proceedings instituted as a result thereof and the decisions which emanated from such proceedings; and
- (iii) steps taken as a result of recommendations made by the independent Complaints Directorate.

Regulations 20

19. (1) The Minister of Justice may make regulations regarding—

- (a) any form required to be prescribed in terms of this Act;
- (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. 25

(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 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. 30

Amendment of section 40 of Act 51 of 1977, as amended by section 41 of Act 129 of J 993 and section 4 of Act 18 of 1996

20. Section 40 of the Criminal Procedure Act, 1977, is hereby amended by the addition in subsection (1) of the following paragraph: 35

“(g) 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 an offence in respect of which violence is an element.”.

Repeal of laws and savings 40

21. (1) Sections 1, 2.3, 6 and 7 of the Prevention of Family Violence Act, 1993 (Act No. 133 of 1993), are hereby repealed.

(2) Any application made, proceedings instituted or interdict granted in terms of the Act referred to in subsection (1) shall be deemed to have been made, instituted or granted in terms of this Act. 45

Short title and commencement

22. This Act shall be called the Domestic Violence Act, 1998, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE DOMESTIC VIOLENCE BILL, 1998

1. The South African Government has committed itself to the eradication of violence against women and has stated that it intends to comply with the provisions of the Beijing Platform and has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) during 1995. It has, in the final Constitution, entrenched the rights to gender equality and freedom from violence. The Department of Justice stated in Justice Vision 2000, a strategy document for transforming the administration of justice, that it aims to achieve a criminal justice policy that addresses the special needs of vulnerable groups such as women and children. On 25 November 1996, International Day of No Violence Against Women, the Minister and the Deputy Minister of Justice launched an ongoing public campaign on preventing violence against women. The campaign was developed as a result of deep concern for the endemic problem of violence against women in South Africa.

2. The limited scope of the existing Prevention of Family Violence Act, 1993 (Act No. 133 of 1993) (hereafter referred to as “the Act”), diminishes its effectiveness as a legal remedy for victims of domestic violence. The Bill is progressive and constitutes a substantial broadening of the limited scope of the Act. The Bill recognises that domestic violence is a serious crime against society and is an obstacle to achieving gender equality. The most important provisions in the Bill which will alleviate the plight of victims of domestic violence are the following:

2.1 The present Act which applies to “parties to a marriage” is too narrow in scope and many relations in which abuse often occurs do not fall within the ambit of the Act. The new Bill offers protection to any victim who is in a “domestic relationship” with the abuser. (Clause 1, sv “domestic relationship”.)

2.2 The Act does not define “family violence”, and appears to be limited to physical violence. In the Bill “domestic violence” is broadly defined. (Clause 1, sv “domestic violence”.)

2.3 In practice, the role of the South African Police Service in implementing the Act has been problematic. The Bill places a duty on a member of the South African Police Service to inform a victim of his or her rights at the scene of an incident of domestic violence. Provision is also made that the National Commissioner of the South African Police Service must issue national guidelines which must be observed when dealing with domestic violence, and failure to comply therewith shall result in disciplinary proceedings being instituted against such a member. (Clause 2.)

2.4 The offence of common assault is not a Schedule 1 offence (Criminal Procedure Act, 1977 (Act No. 51 of 1977)). Most domestic violence assaults are common assaults. This creates a situation that when the Police attend to a common assault resulting from domestic violence, the victim is still left to the mercy of the perpetrator of violence. The Bill remedies this situation by providing that a peace officer may without warrant arrest any person at the scene of an incident of domestic violence whom he or she reasonably suspects of having committed an offence containing an element of violence. (Clause 3.)

2.5 Victims of domestic violence are disempowered persons. An application for a protection order may therefore be brought on behalf of the applicant by any other person (including a member of the South African Police Service) who has a material interest in the wellbeing of the applicant. (Clause 4.)

2.6 There has been strong criticism that the Act is an unjustified departure from the *audi alteram partem* principle — the court is required to grant a final interdict, with potentially serious repercussions against a respondent without having heard him or her. Provision is made in the Bill for the granting of an interim protection order upon application. Since the most dangerous time for any domestic violence victim is separation from the abuser, the Bill provides that the interim protection order must be issued *ex parte*. The respondent has the opportunity to appear on a return date. (Clause 5.) If the respondent does not appear on the return date, a final protection order may be issued. (Clause 6.)

2.7 The relief provided for in the Act is limited. The Bill clearly spells out the terms which may be contained in a protection order. In times of crisis, financial matters are often a cause of great concern to victims of domestic violence. The Bill provides that the court may impose on the respondent certain obligations as to the discharge of rent or mortgage payments, or order the respondent to pay emergency monetary relief. Children should not become the contact point through which the respondent can regain control over the applicant. Contact with any child by the respondent may therefore be refused or structured contact with such child may be ordered. (Clause 7.)

2.8 The Bill contains provisions regarding seizure of arms and dangerous weapons in domestic violence situations. (Clause 9.)

2.9 Under the present Act, in granting an interdict, the court shall authorise the issue of a suspended warrant for the arrest of the respondent. The Bill provides that, in granting a protection order, the court shall issue a suspended warrant for the arrest of the respondent which remains in force unless the interim protection order is set aside. The applicant is furnished with the original warrant of arrest and provision is made for a second or further warrant of arrest. When the respondent has breached the protection order the Police must execute the warrant of arrest. The Bill provides that the respondent be criminally charged for breaching the protection order and also with any other offence resulting from a complaint lodged by the applicant against the respondent. (Clauses 8 and 17.)

2.10 The Act does not allow for the applicant to apply for the amendment or setting aside of the interdict. Recognizing that allowing applicants to apply for the amendment or setting aside of protection orders might open the door for manipulation by respondents, the Bill provides that the court shall not grant such an application unless it is satisfied that the application is made freely and voluntarily. (Clause 10.)

2.11 There appears to be some confusion as to precisely how jurisdiction is conferred on any particular court in terms of the Act. The Bill affords the applicant a choice of jurisdictional factors as regards the conferment of jurisdiction in respect of the application for a protection order. (Clause 12.)

2.12 With a view to protecting the interests of victims of domestic violence, the Bill provides that only certain persons will be allowed to attend proceedings in terms of the Act. (Clause 11.)

2.13 It appears that the courts have different attitudes to legal representation at the various stages of the interdict in terms of the Act. The Bill makes it clear that any party to proceedings may be represented by a legal representative. (Clause 14.)

2.14 In terms of the Act a person who breaches the interdict is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months or to both such fine and imprisonment. By increasing the period of imprisonment to a period not exceeding five years, the Bill recognises the fact that domestic violence is a serious crime against society. (Clause 17.)

INTERESTED PARTIES CONSULTED

3. Written **submissions** were received from all relevant role-players, including magistrates, the South African Police Service, the legal profession, and non-governmental organisations actively involved in the area of domestic violence. The official involved with the preparation of the Bill also participated in a number of workshops and briefing sessions during which public opinion was gleaned on and preliminary proposals for draft domestic violence legislation were prepared.

4. The Bill should, in the opinion of the State Law Advisers and the Department of Justice, be dealt with in accordance with section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).