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Comments on the Domestic Violence Amendment Bill, 2020

Submission in response to the Domestic Violence Amendment Draft Bill, 2020
to amend the Domestic Violence Act, 1998

For the attention of Mr V Ramaano: Gbvills@parliament.gov.za

Submitted by
Mosaic Training, Service & Healing Centre for Women (MOSAIC)
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MOSAIC

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Introduction

Mosaic Training, Service and Healing Centre for Women (MOSAIC) welcomes this opportunity to comment on the Domestic Violence Amendment Bill, 2000 (Amendment Bill).

MOSAIC works to prevent and reduce abuse and domestic violence (DV) by providing holistic, integrated services for the healing and empowerment of women to claim their rights.

MOSAIC is a community based non-governmental (NGO) organisation that offers holistic and integrated programmes, aimed at preventing all forms of abuse and violence against women, providing high quality response services when incidences occur and supporting our clients through the process of healing and rebuilding their lives. Abuse and Violence against women is deeply rooted and is at the core of rights' violation on women and girls in South Africa. It is deeply systemic and rooted in communities, institutions and cultures. Our goal is to end gender-based violence, domestic abuse and violence in particular.

MOSAIC creates an enabling environment through our holistic and integrated three pillar service model:

- Access to Justice – Domestic Violence Court Support Services and First Responders services at Thuthuzela Care Centres
- Support and Healing - Counselling Services, Clinical Services and Engaging Men and Boys
- Empower - Mentoring and Training

MOSAIC, established in 1993, has been facilitating access to justice for victims of Domestic Violence for 27 years in the Western Cape Province, and more recently in Gauteng and KwaZulu-Natal.

In preparing for this submission, we have drawn on our 27 years of practical implementation of the Prevention of Family Violence Act 133 of 1993 and the current Domestic Violence Act (the Act) 116 of 1998.

We submit this written submission now and welcome an invitation for oral submission.

Section 1 – Definitions

MOSAIC supports the expansion of the definitions as proposed in the Amendment Bill. We also support the amendment of the definitions in the current Act to align them with other pieces of legislation. The definitions contained in the Domestic Violence Act, and the changes proposed by this Bill, are important for creating a shared understanding of the substance and the intention of the law on domestic violence.

Below are our suggestions in this regard, with material changes underlined>.

Current text of the Domestic Violence Amendment Bill 2020	Proposed amendments to the Amendment Bill 2020	Comment
<p>Section 1(b) of the Bill amends section 1 of the Domestic Violence Act 1998, as follows: <i>(b)</i> the insertion after the definition of “arm” of the following definitions: “child” means a person under the age of 18 years;” and “coercive behaviour” means an act or pattern or acts of assault, threats, humiliation or other abuse that is used to harm, punish, or cause fear;” “controlling behaviour” means causing a person to be dependent or subordinate by isolating them from sources of support, exploiting their resources for personal gain or depriving them of the means needed for independence, resistance or escape and regulating their everyday behaviour;”; ...</p>	<p>Amend section 1(b) to include a definition of “corporal punishment”, as follows: <i>(b)</i> the insertion after the definition of “arm” of the following definitions: “child” means a person under the age of 18 years;” and “coercive behaviour” means an act or pattern or acts of assault, threats, humiliation or other abuse that is used to harm, punish, or cause fear;” “controlling behaviour” means causing a person to be dependent or subordinate by isolating them from sources of support, exploiting their resources for personal gain or depriving them of the means needed for independence, resistance or escape and regulating their everyday behaviour;”</p>	<p>MOSAIC welcomes the inclusion of coercive and controlling behaviour in the definitions.</p> <p>We also propose the inclusion of the definition of “corporal punishment” as it stands in the United Nations Committee on the Rights of the Child’s General Comment No. 8.</p>

<p>(c) the substitution for the definition of “court” of the following definition: ...”</p>	<p>“corporal punishment’ means any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light;”;</p>	
<p>In the first draft of the amendment bill Section 1(c) provided a definition of ‘court.’ This definition now appears to have been removed.</p>	<p>Return the definition of court to the Bill. We propose the following definition: <u>‘court’ means any court contemplated in the Magistrates’ Courts Act, 1944 (Act 32 of 1944), and does not include traditional courts”.</u></p>	<p>The definition initially provided of ‘court’ appears to have been removed without an alternative being provided. We support a definition of ‘court’ being included. We would recommend that this clarifies that traditional courts cannot hear applications for protection orders</p>
<p>Section 1(i) of the Bill amends section 1 of the Domestic Violence Act 1998, as follows: “(g) the substitution for the definition of “domestic violence” of the following definition: “domestic violence’ means - (g) [stalking]</p>	<p>Section 1(i) of the Bill amends section 1 of the Domestic Violence Act 1998, as follows: “(g) the substitution for the definition of “domestic violence” of the following definition: “domestic violence’ means - (g) stalking</p>	<p>As we suggested before, we would propose to retain “stalking” in the definition of domestic violence. Stalking is a well understood and widely used term and should be retained in the Bill.</p>

<p>Section 1(i) of the Bill amends section 1 of the Domestic Violence Act 1998, as follows: “(g) the substitution for the definition of “domestic violence” of the following definition: “domestic violence’ means - (a) physical abuse; (b) sexual abuse; (c) emotional, verbal or psychological abuse; (d) economic abuse; (e) intimidation; (f) harassment; (g) spiritual abuse; (h) damage to property; (hA) elder abuse; (hB) coercive behaviour; (hC) controlling behaviour; ...”</p>	<p>Amend section 1(i) of the Bill to include “corporal punishment and child neglect” in the definition of domestic violence, as follows: “(g) the substitution for the definition of “domestic violence” of the following definition: “domestic violence’ means - (a) physical abuse; (b) sexual abuse; (bA) child neglect; (c) emotional, verbal or psychological abuse; (cA) all forms of corporal punishment; (d) economic abuse; ...”</p>	<p>We propose the inclusion of two additional definitions under the “domestic violence” to include “child neglect” and “all forms of corporal punishment”. The additions will expand the current definitions to include forms of violence and maltreatment against children that are often ignored because of the difficulties in obtaining substantial proof.</p>
<p>Section 1(k) of the Bill amends section 1 of the Domestic Violence Act, 1998 as follows: the insertion after the definition of “economic abuse” of the following definitions: “elder abuse’ means conduct or the lack of appropriate action, occurring within a domestic relationship, which causes harm or distress or is likely to cause harm or distress to an older person as defined in the Older Persons Act, 2006 (Act No. 13 of 2006), and includes social isolation or neglect.</p>	<p>Amend section 1(k) of the Bill to: “<u>abuse of older person</u>” [elder abuse] means abusive behaviour occurring in any domestic relationship which causes harm or distress or is likely to cause harm or distress to an older person. It includes physical, sexual, psychological, emotional abuse and financial abuse,<u>[physical abuse, emotional abuse, sexual abuse], as well as controlling behaviour like social isolation or intentional and unintentional neglect.</u></p>	<p>This amended definition is an improvement upon the original definition and brings it in line with the Older Persons Act 2006. We would recommend that it is expanded to include all of the recognized forms of domestic violence.</p>

<p>Section 1(l) of the Bill amends section 1 of the Domestic Violence Act, 1998 as follows: the substitution for the definition of “emergency monetary relief” of the following definition: “emergency monetary relief” means compensation for monetary losses suffered by a complainant before or at the time of the issue of a protection order as a result of the domestic violence, including-</p> <ul style="list-style-type: none"> (a) loss of earnings; (b) medical, optical, [and] dental and related expenses; (c) relocation and accommodation expenses; [or] (d) household necessities; (e) educational expenses; or (f) psychosocial services and counselling;” 	<p>Amend section 1(l) of the Bill to: (d) household <u>expenses</u> [necessities]</p>	<p>We support the changes made to this section to include provision for psychosocial support and educational costs.</p> <p>We would suggest this further change which will enable existing household expenses to be covered. We suggest that this must not be limited, or open to what is deemed a necessity, but must instead consider all existing household expenses.</p>
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<p>Section 1(o) of the Bill amends section 1 of the Domestic Violence Act, 1998 as follows:</p> <p>the substitution for the definition of “harassment” of the following definition: “harassment' means directly or indirectly engaging in [a pattern of] conduct that [induces the fear of] the respondent knows or ought to know – <i>(a)</i> causes harm or inspires the reasonable belief that harm may be caused to [a] the complainant or a related person by unreasonably [including] - [(a)](i) [repeatedly] following, watching, pursuing or accosting the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;</p>	<p>Amend section 1(o) of the Bill to include “stalking”</p> <p>“harassment' means directly or indirectly engaging in conduct that the respondent knows or ought to know – (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably following, watching, <u>stalking</u>, pursuing or accosting the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;</p>	<p>MOSAIC welcomes the amendment of this section to align with the Protection from Harassment Act, 2011.</p> <p>Stalking is a well understood and widely used term. We propose that the term “stalking” be included in the definition of harassment.</p>
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<p>Section 1(q) of the Bill amends section 1 of the Domestic Violence Act, 1998 as follows:</p> <p>the insertion after the definition of “protection order” of the following definition: “‘related person’ means any member of the family or household of a complainant, or any other person in a close relationship to the complainant;”;</p>	<p>Amend section 1(j) of the Bill to include “service providers”</p> <p>“‘related person’ means any member of the family or household of a complainant, or any other person in a close relationship to the complainant, <u>including persons rendering assistance to the complainant</u>”;</p>	<p>The addition refers to persons providing psychosocial, legal, medical, and practical assistance/support services to complainants such as shelters/places of safety, other civil society organisations and institutions</p>
<p>In addition to the existing definitions, MOSAIC proposes the inclusion of one additional definition: <u>1(w) – “residence” means a permanent or temporary residence, premises, or property.</u></p>		

Section 2

Section 2A – Obligations of functionaries relating to domestic violence

MOSAIC proposes that this Bill should only place an obligation to report for domestic violence offences relating to children, older persons and those with disabilities, as already set doen in parallel existing legislation, and by certain persons.

MOSAIC supports the proposed amendments set out in 2A. (1) (a) but **does not support** the provision set out in subsection 2A. (1) (b).

Subsection 2A. (3) - MOSAIC supports the addition of this proposed amendment which compels functionaries to assist in an incident of DV in a standardised manner.

We suggest the following additions and amendments to strengthen the support provided to victims in this response and further offer direct language that can be used for proposed amendments.

Subsection 2A(3) (b) – We propose that the assistance provided following an incident of DV must include safety planning. A safety plan is a personalized, practical plan that can help DV survivors avoid dangerous situations and know the best way to react when they are in danger.

We support the provision of a prescribed list of accessible shelters and public health establishments but we propose that the **address of shelters must not be distributed**. It is imperative to the safety of all DV survivors and shelter personnel that only the contact details and not addresses of shelters are provided.

Current text of the Domestic Violence Amendment Bill, 2020:

“(b) must, if it is reasonably possible to do so—

- (i) provide the complainant with a prescribed list containing the names and contact particulars of accessible shelters and public health establishments;
- (ii) hand a notice containing information as prescribed to the complainant in the official language of the complainant’s choice; and
- (iii) explain to the complainant the content of such notice, including the remedies at the complainant’s disposal in terms of this Act and the right to lodge a criminal complaint, if applicable; and

Proposed amendment:

2A. (3) “(b) must, if it is reasonably possible to do so—

(i) provide the complainant with a prescribed list containing the names and telephone numbers of accessible shelters, this list must not contain the addresses of the shelters

(ii) provide the complainant with a prescribed list containing the names and contact particulars of public health establishments;

- (ii) hand a notice containing information as prescribed to the complainant in the official language of the complainant’s choice; and

(iii) explain to the complainant the content of such notice, including the remedies at the complainant's disposal in terms of this Act and the right to lodge a criminal complaint, if applicable; and

(iv) Help the complainant prepare a safety plan in order to help them avoid dangerous situations and to know the best way to react when they are in danger.

Section 2B – Obligations to report domestic violence and provide information

2B (1) (a) - MOSAIC supports and welcomes the addition of the duty to report in commission of acts of DV against a child, person with a disability, or an older person as this is already mandated within existing legislation.

However, we suggest that the duty to report should not apply to all those with disabilities. Not all physical disabilities prevent a person from having agency from expressing their agency. Therefore the duty to report should only apply in respect of those with physical, psycho-social or intellectual disabilities which inhibit them from speaking out.

2B. (1) (b) – MOSAIC does not support the duty to report commission of acts of domestic violence against adults. **We therefore call for the complete removal of these provisions.** The criminalisation of the failure to report for adults experiencing violence may reduce help-seeking by women experiencing DV and it removes a woman's agency on whether to report such violence. Family members and friends may limit their support to a victim of DV for fear of criminal liability for failure to report.

We also recommend that the Bill should specify the obligations upon the police and DSD upon receiving a mandatory report.

With these suggestions in mind, we recommend the following wording:

“Obligations of functionaries relating to domestic violence

2A. (1) A functionary, who in the course of the performance of their duties or the exercise of their functions in relation to any person—

(a) becomes aware of the fact or on reasonable grounds believes or suspects, that a child, a person **[with a] who presents with a physical, psycho-social or intellectual disability that impacts on their capacity to make decisions** or an older person, is a complainant as contemplated in section 1, must comply with subsection (2); or

[(b) becomes aware of the fact that an adult person, other than an adult person with a disability or an older person as contemplated in paragraph (a), is a complainant as contemplated in section 1, must comply with subsection (3).]

(2) Where the complainant is a person contemplated in subsection

(1)(a), the functionary—

(a) must— (i) complete a report in the prescribed form setting out the reasons for such knowledge, belief or suspicion; and (ii) in the prescribed manner submit the report to—

(aa) a social worker; and

(bb) the South African Police Service; and

(b) may, after conducting, and evaluation of, a risk assessment as prescribed in terms of section 18B, provide or refer the complainant for further services as prescribed in section 18B.

(3) Where the complainant is an adult person as contemplated in paragraph (b), the functionary—

[(a) must—

(i) **complete a report in the prescribed form setting out the reasons for such knowledge; and**

(ii) **in the prescribed manner submit the report to—**

(aa) **a social worker; or**

(bb) **the South African Police Service;**

(b) must, if it is reasonably possible to do so—.]

(i) must provide the complainant with a prescribed list containing the names and contact particulars of accessible shelters and public health establishments;

...

“Obligation to report domestic violence and to provide information”

2B. (1) In circumstances other than those contemplated in section

2A(1), an adult person who—

(a) has knowledge or a reasonable belief or suspicion that an act of domestic violence has been committed against a child, a person **[with a] who presents with a physical, psycho-social or intellectual disability that impacts on their capacity to make decisions** or an older person; or

[(b) has knowledge that an act of domestic violence has been committed against an adult in a domestic relationship], must report such knowledge as soon as possible to a social worker or the South African Police Service.

(2) The report referred to in subsection (1), must be—

(a) in the prescribed form and must set out the reasons for such knowledge, belief or suspicion; and

(b) submitted in the prescribed manner to a social worker or the South African Police Service.

(3) A person referred to in subsection (1)—

(a) who makes the report in good faith, is not liable to civil, criminal or disciplinary action on the basis of the report, despite any law, policy or code of conduct prohibiting the disclosure of personal information;

and

(b) is entitled to have his or her identity kept confidential, unless the interests of justice require otherwise.

(4) A functionary who fails to comply with subsection (1), is guilty of an offence.

2C Upon receiving a mandatory report of domestic violence SAPS are obliged to:

a) **investigate;**

b) **conduct a safety check upon the alleged victim;**

c) **if required, refer them to DSD**

d) **if required, provide them with a list of shelters and/or public health establishments**

e) **if indicated, open a criminal case for the domestic violence matter;**

f) **if indicated, refer the victim to court for a protection order.**

- g) Hand the complainant a notice containing information as prescribed to the complainant in the official language of the complainant's choice;
- h) Explain to the complainant the contents of that notice including the remedies at the complainant's disposal in term of this act.

Upon receiving a mandatory report of domestic violence The Department of Social Development are obliged to:

- a) investigate;
- b) conduct a safety assessment upon the alleged victim;
- c) if required, refer them to SAPS
- d) if required, provide them with a list of shelters and/or public health establishments
- e) if indicated, refer the victim to court for a protection order.

Section 3 - Arrest by a Peace Officer without a warrant

MOSAIC supports and welcomes the amended provisions proposed in this section. In addition to these provisions, we propose the following additions:

3 (2) A peace officer must arrest a person who is reasonably suspected of having committed an offence where physical violence or damage to property is involved;

(3) (a) where necessary, make arrangements for the complainant to obtain medical attention and psychosocial support;

Section 4 – Application for a protection order

We welcome the uptake of the proposal to expand the roll out of online submission of affidavits beyond the limitations of applications brought outside of ordinary court hours. In practice, we know that it is not always safe or possible for complainants to bring the application to court, and this proposed amendment will increase access to justice for victims of DV.

Section 5 – Consideration of application and issuing of interim protection order

MOSAIC again acknowledges and supports the provisions in the Amendment Bill aimed at increasing the use of technology in the issuing, delivery and storage of interim protection orders (IPO).

MOSAIC acknowledges and welcomes the uptake of the recommendation made to the Department of Justice in previous submissions to reduce the burden on the complainant to follow up on the outcome of interim protection order applications. We especially welcome the duty placed on the court to immediately inform the complainant of the outcome of the interim protection order in the instance of the order being granted and when not granted as set out in section 5 (3)(a) and (4) of this Bill.

Further to this, we support the proposed amendment set out in section 5(7) that places the duty on the court to *“immediately cause (a) a certified copy of the interim protection order;*

and (b) the original warrant of arrest as contemplated in section 8(1)(a) be served on the complainant...”.

We do offer one suggestion to increase the safety of the complainant – we suggest that this Bill make provision for applications for interim protection orders to be considered on the same day. The following text is offered as an option for inclusion in the Bill:

Section 5(1)B Protection order applications must be decided on the date of application

Section 6 - Issuing of final protection order

We are concerned at the proposed amendment in section 6(2C) that states *“if neither the complainant nor the respondent appears in a return date contemplated in section 5(4), the court may discharge the matter.”*

This provision has replaced the provisions set out in previous iterations of this Bill, that was:

If the complainant does not appear on a return date contemplated in section 5(3) or (4),:

(a) and the court is satisfied that the application contains an affidavit made by or on behalf of the applicant that reports that the respondent has committed or is committing an act of domestic violence, the court must issue a protection order in the prescribed form.

(b) the court must make provision to locate and/or contact the complainant to establish reasons for not appearing on the return date.

We strongly propose that the above provision replace the current proposed amendment.

Considering the nature of domestic violence being that of power and control, MOSAIC proposes the inclusion of a provision for a decision to be made on the order despite the non-attendance of the complainant and/or respondent on the return date.

Section 6A – Establishment of an integrated electronic repository

We reiterate our support for the proposed *central electronic repository of protection orders* made in subsection 6A of the Bill. If implemented, this repository will enable the speedy recovery of IPO and final protection order documents for reissue, as well as allowing for the electronic delivery to both the complainant and the respondent.

Section 7

MOSAIC supports the provisions as amended from the principal legislation. We particularly draw attention to the following sections:

(a) (1) (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

Mosaic proposes that this provision be strengthened so as to not be superseded by Protection of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act 19 of 1998), or any other legislation that governs evictions. We recommend the addition of the following provision:

(1) A: A protection order may prohibit, suspend or restrict the exercise of the respondent's rights to occupy the residence. For the purposes of determining who has the right to remain living within a residence, and who is obliged to vacate a residence, a protection order excluding a respondent from all or part of a residence shall take precedence over the information contained in the lease, the property deeds, or any other written agreement in respect of who has the right to inhabit the property;

(1)B The terms of the protection order shall also take precedence over the provisions contained within the Protection of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act 19 of 1998) and any other legislation governing evictions.

(2) (b) which recommends that the complainant approaches the relevant police station to investigate the matter with the view to the possible institution of a criminal prosecution against the respondent."

We propose that this text be amended to:

*(2)(b) which recommends **to lay a criminal complaint against the person who committed the act of domestic violence (who will now be called the respondent) if the conduct of the respondent constitutes a criminal offence which will be investigated by the police.** [that the complainant approaches the relevant police station to investigate the matter with the view to the possible institution of a criminal prosecution against the respondent.]*

This will align the provision with the South African Police Services Form 1 [Regulation 2]: Notice to complainant in a case of domestic violence.¹

Section 8 – Arrest

We again raise concerns at the reference to the "length of time" since an alleged breach of a protection order in section 8(. MOSAIC is of the opinion that the length of time since the breach occurred is irrelevant and presents opportunity for the use of individual discretion and ultimately failure to arrest.

On this basis we propose the **full removal of the provision under 12(5)(c)** that includes the "*length of time since the alleged breach occurred*" as a consideration in determining whether the complainant or related person is suffering harm.

Section 18 – Directives and Regulations

We reiterate our support for the extension of directives to the Departments of Health, Social Development, Basic and Higher Education and Training and Communications. This addition

¹ https://www.saps.gov.za/services/downloads/protection_order_notice_complainant.pdf

brings the Amendment Bill in line with the call for a multi-sectoral response to gender-based violence as outlined in the draft National Strategic Plan to combat gender-based violence and femicide.

We, however, note that our previous proposal for a provision for time frame for the finalisation of the directives has not been taken up in this Bill. We then again propose that a time frame of 6 (six) months, from the date of the promulgation of the Amendment Act, be provided to the Director-Generals from the respective departments to finalise the directives.

General comments

We reiterate the importance for this Bill to make provision for the clarification of all language that can lead to the use of individual discretion, opening up the opportunity for inconsistent implementation of the laws. In particular, we highlight the use of terms such as:

- *If reasonably possible;*
- *Reasonable grounds;*
- *Is of the opinion;*
- *Immediately.*

These concepts must be clearly articulated in the relevant directives, regulations and national instructions attached to the Amendment Act.