**3 March 2021: Working Document Portfolio Committee on Justice and Correctional Services.**

**REPUBLIC OF SOUTH AFRICA**

**DOMESTIC VIOLENCE ACT AMENDMENT BILL**

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**WORKING DOCUMENT**

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**(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)**

**[B20—2020]**

**GENERAL EXPLANATORY NOTE:**

~~Abcdef~~ Words with strikethrough indicate omissions from the Bill

\_\_\_\_\_\_\_\_\_\_\_ Words double underlined indicate insertions in the Bill

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**BILL**

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

**\* amend and insert certain definitions;**

**\* further provide for the manner in which acts of domestic violence and matters related thereto, must be dealt with by certain functionaries, persons and Government departments;**

**\* further regulate obtaining of protection orders in response to acts of domestic violence;**

**\* delete and amend provisions of certain laws; and**

**\* provide for matters connected therewith.**

**PARLIAMENT** of the Republic of South Africa enacts as follows:—

**~~Substitution~~ Insertion of Arrangement of Sections in Act 116 of 1998**

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

**"ARRANGEMENT OF SECTIONS**

*Sections*

1. Definitions

2. Duty to assist and inform complainant of rights

2A. Obligations of functionaries relating to domestic violence

2B. Obligation to report of domestic violence and to provide information

3. Arrest by peace officer without warrant

3A. Entering of private dwelling for purposes of obtaining evidence

4. Application for protection order

5. Consideration of application and issuing of interim protection order

5A. Attendance of witnesses

5B. Electronic communications service provider to furnish particulars to court

5C. Existing orders or reciprocal orders

6. Issuing of final protection order

6A. Establishment of ~~an~~ integrated electronic repository for domestic violence protection orders and related matters

7. Court's powers in respect of protection order

8. Warrant of arrest upon issuing of protection order

9. Seizure of weapons

10. Variation or setting aside of protection order

11. Attendance of proceedings and prohibition of publication of certain information

12. Jurisdiction

13. Service of documents

14. Legal representation

15. Orders as to costs of service and directions

16. Appeal and review

17. Offences

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

18A. Directives for clerks of ~~the~~ court

18B. Directives for Departments of Health, Social Development, Basic Education, Higher Education and Training and Communications and Digital Technologies

19. Regulations

20. Amendment of laws

21. Repeal of laws and savings

22. Short title and commencement".

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

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

*(a)* by the deletion of the definition of “arm”;

*(b)* by the insertion before the definition of “clerk of the court” of the following definitions:

 “ **‘child’** means a person under the age of 18 years;

'**Children’s Act, 2005**' means the Children’s Act, 2005 (Act No. 38 of 2005)[[1]](#footnote-1)”;

*(c)* by the insertion after the definition of “clerk of the court” of the following definition:

“ **‘coercive behaviour’** means any abusive conduct or acts of force, **~~intimidation~~** or undue pressure intended to cause or which ~~have~~ has the effect of causing a complainant to act, not to act, or be subjected to certain acts against his or her will;”;

*Discussion*

(a) "Intimidation" amounts to domestic violence in own right. It is proposed that "intimidation" should be omitted from the definition of "coercive behaviour".

(b) "acts of force" is undefined and must be given its ordinary dictionary meaning of act/conduct that exert force. The question may be asked whether "acts of force" are not already included under "physical abuse", "intimidation", "sexual abuse", or "emotional, verbal or psychological abuse".

(c) "abusive conduct" is used in paragraph *(j)* of the definition of "domestic violence" as an extension of the conduct that qualifies as domestic violence contemplated in paragraphs *(a)* to *(i).*

(d) The definition is silent as to the person towards whom the conduct must be directed that have intended consequences. In terms of the definition, coercive behaviour will result if it is directed to the related person only and for that person to do or not to do an act, notwithstanding the fact that the complainant is not affected by the conduct (the definition of related person includes in addition to a member of the family or household of a complainant, **also any other person in a close relationship with the complainant** (such as a complainant's friends or new life partner). In terms of the definition of "complainant" (defined as "(i) any person who is or has been in a domestic relationship with a respondent; and (ii) who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant), the complainant cannot apply for a protection order". A related person may only apply for a protection order if he or she is a complainant.

Proposal:

**"'coercive behaviour'** means any pattern ofabusive behaviour towards a complainant ~~or a related person~~ that is intended to exert undue pressure on a complainant to act, not to act, or be subjected to certain acts, against his or her will;"

**Final proposal**

**"'coercive behaviour'** means—

*(a)* violence or threatened violence towards a complainant or a related person;

*(b)* damage to property or threats of damage to property belonging to the complainant or a related person; or

*(c)* any pattern of abusive behaviour towards a complainant,

which is intended to exert undue pressure on a complainant to act, not to act, or be subjected to certain acts, against his or her will;"

**Definition of "complainant" and conduct that amounts to domestic violence against a related person (February 2021):**

(a) In terms of section 1 of the DVA, a "complainant" is defined as "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". The effect of the definitions is that an act of domestic violence must be committed against the complainant or any child in the care of the complainant by a person. This definition excludes the various acts of domestic violence that can be committed against a "related person" from this definition unless it can be argued that the conduct against a related person is regarded as instances of domestic violence against the complainant. The various definitions of the conduct that amounts to domestic violence (physical abuse; sexual abuse; emotional, verbal or psychological abuse; economic abuse; intimidation; harassment; spiritual abuse; damage to property; elder abuse; coercive behaviour; controlling behaviour etc), in so far as it relates to a related person do not clarify whether domestic violence against a related person also amounts to domestic violence against the complainant.

(b) A related person is defined as "any member of the family or household of a complainant, or any other person in a close relationship with the complainant". The person in a close relationship with the complainant may be a friend of the complainant, his or her new life partner or employer (these persons are not in a domestic relationship with the respondent). If the various conducts that constitutes domestic violence is interpreted to extend their application, that an act of domestic violence against a related person also amounts to domestic violence against the complainant, the complainant is entitled to apply for a domestic violence interdict on their behalf, even where a related person is a complainant in own right (see clause 6 which aims to amend section 4(3) of the DVA to the extent that a person may brought an application on behalf of a complaint, however such an application "must be brought with the written consent of the complainant, except in circumstances where the complainant is a person who, in the opinion of the court, is unable to provide the required consent". A related person "as any member of the family or household of a complainant", may also not be in a "domestic relationship" with the respondent (the new life partner of the complainant and the life partner's family or a child of the life partner), thereby extending domestic violence beyond the intended family or domestic nexus in which it is intended to apply.

(c) It is a well-known fact in domestic violence, that persons endure violence due to their dependency on the perpetrator. To extend the scope and ambit of the right of a complainant to bring an application on behalf of a related person, when the conduct that amounts domestic violence are committed against them, may extend the protection of the protection afforded by the DVA, but may give rise to additional implications, among others, where the victim opposes the protection order. It is submitted that the proposed section 4(3) of the DVA, adequately caters for the right of a person to apply on behalf of another for a protection order – however, with the other person's permission.

(d) The ambit of the DVA will, however, unnecessarily be restricted if domestic violence against related persons (who is or was not in a domestic relationship with the responded) is completely removed from the Bill. In various instances, the complainant may be harmed as a result of harm caused to related persons. In some instances harm to a related person, although not intended to cause harm to a complainant, may in any event cause psychological or emotional harm to a complainant.

(e) The effect of the Criminal and Related Matters Amendment Bill, 2020, where offences are committed against a related person (who is not in a domestic relationship with the respondent), result in stricter bail conditions and in certain instances give rise to minimum sentences.

*Proposals:*

\* *Option 1*

Consider domestic violence against a related person as an act of domestic violence against the complainant (as is currently proposed) which necessitates an amendment to the definitions of "complainant" and "domestic relationship" and section 4(3) of the DVA.

\* *Option 2*

Provide for domestic violence against a related person, where it causes harm to a complainant, as a special category of domestic violence. Amendments to the various definitions of the conduct that constitutes domestic violence are necessary and a new definition needs to be inserted to provide for domestic violence against a related person.

**The amendments proposed gives effect to option 2**

*(d)* by the insertion after the definition of “complainant” of the following definition:

“ **‘controlling behaviour’** means causing the complainant ~~or a related person~~ to be dependent on or subordinate to the respondent by—

*(a)* isolating him or her from sources of support;

*(b)* exploiting his or her resources for personal gain;

*(c)* depriving him or her of the means needed for independence, resistance or escape; or

*(d)* regulating his or her everyday behaviour;”;

Proposal:

No adverse comments were received regarding this definition. However, the following amendments are proposed to the definition:

‘**controlling behaviour’** means a pattern of behaviour towards ~~causing the~~ a complainant ~~or a related person~~ that is aimed at making the complainant dependent on or subservient to the respondent, which includes—

~~to be dependent on or subordinate to the respondent by—~~

*(a)* isolating him or her ~~them~~ from ~~family, friends or other~~ sources of support;

*(b)* exploiting his or her their resources or capacities for personal gain;

*(c)*  depriving him or her ~~them~~ of the means ~~to live independently~~ needed for independence, resistance or escape; or

*(d)* regulating his or her ~~their~~ everyday behaviour~~;,~~;

~~that is aimed at making the complainant dependent on or subservient to the respondent~~;"

**Definition of "communication" – See amendments to "harassment"**

 **"communication"** means anything that is used to impart information or ideas, and includes a letter, text, photo, video recording, audio recordings;"

*(e)* by the substitution for the definition of “damage to property” of the following definition:

**“ ‘damage to property'** means the wilful damaging or destruction of corporeal or incorporeal property, including ~~those~~ that belonging to a complainant or **[in which the complainant has a vested interest]** a related person which causes harm to the complainant;”;

Discussion:

The commentator (p 3: par 2.2), is of the opinion that harm to domestic pets must be included, because there is frequently threats to harm or pets are harmed during domestic violence incidents. The indicated conduct may be covered by the other conduct that is regarded as domestic violence, among others, intimidation, undue pressure to cause a complainant/related person to act, not to act, or be subjected to certain acts against his or her will); emotional, verbal or psychological abuse (which includes threats to cause emotional pain or any conduct inducing fear); and harassment (any conduct that causes harm or inspires the reasonable belief that harm may be caused). It is submitted that paragraphs *(a)* and *(c)* of the definition, can probably better be accommodated under the definition of emotional, verbal or psychological abuse (clause 2*(m)*). However, paragraph *(b)*, may be considered in the place of the current definition. The "vested interest" requirement must be retained (LRC page 16):

Proposal 1:

 ‘‘**‘damage to property’** means—

*(a)* the wilful damaging or destruction of any property in close vicinity of a complainant or a related person with the aim to cause mental or psychological harm to a complainant;

*(b)* the wilful damaging or destruction of property or threats of wilful damaging or destruction of property, ~~including those~~ belonging to a complainant or **[in which the complainant has a vested interest]** a related person, or in which the complainant or related person has a vested interest, ~~which causes harm to a complainant~~ where such behaviour causes harm to the complainant; or

 *(c)* the harming of, or threats to harm a household pet or other animal belonging to a complainant or related person, where such behaviour causes harm to the complainant;"

**Comment (February 2021):**

The harming of, or threats to harm a household pet or other animal, can also be dealt with under emotional, verbal or psychological abuse – see *infra*.

Proposal 2:

**'damage to property’** means the wilful damaging or destruction of property or threats of wilful damaging or destruction of property[, including those belonging to a complainant or **[in which the complainant has a vested interest]** a related person, or in which the complainant or related person has a vested interest, ~~which causes harm to a complainant~~ where such behaviour harms, or inspires the reasonable belief that harm may be caused to the complainant ~~or a related person~~;

**Proposal 3 (February 2021):**

**'damage to property’** means—

*(a)* the wilful damaging or destruction of property; or

*(b)* threats to damage or destruction of property,

belonging to, which is in the possession or under the control of the complainant, or in which the complainant has a vested interest;

*(f)* by the deletion of the definition of “dangerous weapon”;

*(g)* by the insertion before the definition of “domestic relationship” of the following definitions:

“ **'Director-General'** means the Director-General: Justice and Constitutional Development;

**‘disability’** means a physical, mental, intellectual or sensory impairment which prevents a person having such an impairment from operating in an environment developed for persons without such an impairment;”;

Discussion:

The definition of disability is closely interlinked with the reporting obligations contemplated in the proposed sections 2A and 2B of the Bill (clause 3). Various commentators (paragraph 3.1(c) p13; 3.1 (g) p 15; par 4.1.4 and 4.1.5 p 18) opposed the wide definition of disability that is applicable to the reporting obligations of adults and older persons with disabilities and they proposed that it be restricted to persons who cannot make their own decision. A proposed definition that substitutes the current definition of "disability" is the following:

 **'disability'** means a mental illness or severe or profound mental disability as contemplated in the Mental Health Care Act, 2002 (Act No. 17 of 2002), which makes a person incapable of making an informed decision or give lawful consent;

The Mental Health Care Act, 2002, defines a 'severe or profound intellectual disability' as a range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self-care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care. A 'mental illness' is in turn defined as a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis. Section 26 of that Act further regulates care, treatment and rehabilitation services for mental health care users incapable of making informed decisions, and set out the conditions that must be met in respect of persons before they can be provided with the assistance provided for in that Act.

*(h)* by the substitution for the definition of “domestic relationship” of the following definition:

“ **'domestic relationship'** means a relationship between a complainant and a respondent in any of the following ways:

*(a)*  they are or were married to each other, including marriage according to any law, custom or religion;

*(b)* they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

*(c)* they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

*(d)* they are family members related by consanguinity, affinity or adoption;

*(e)* they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or

*(f)* they share or **[recently]** shared the same residence, premises or property within the preceding year;”;

**Option 1:**

*(f)* they share or **[recently]** shared the same residence, premises or property **[within the preceding year]**;

**Discussion (February 2021):**

(i) The "premises or property" requirement is unduly wide and may give rise to various unintended consequences. "Property" includes the sharing of among others a bicycle. "Premises" may include a workplace, thereby bringing an employer-employee or employee-employee relationship within the context of domestic violence.

A new definition of "residence" is proposed, that is more description and which aims to address the property issue:

"'**residence**' means any part of any structure, including a building, house, room, shed, hut, tent, mobile home, caravan, boat or other place, that is used as a place of residence by a natural person, irrespective whether or not other people also occupy that structure;"

(ii) There are various instances where persons may share a residence without any domestic or family nexus between them, for instance a male residence at a University, a residence for the elderly, letting of a room etc. This is very important in the context of the Criminal and Related Matters Amendment Bill, 2020, where—

\* stricter bail conditions are imposed in respect of;

\* participation in parole proceedings is extended to; and

\* the minimum sentence regime as contemplated in the Criminal Law Amendment Act, 1997, is extended to,

offences against a person in a domestic relationship, as defined in section 1 of the Domestic Violence Act, 1998, with the accused. The wide ambit of paragraphs *(d)* and *(f)* may need to be restricted to instances where there is a domestic or family nexus or other close relationship.

**Option:**

*"(f)* they are persons in a close relationship that share or **[recently]** shared the same residence**[, premises or property within the preceding year]**;"

*(i)* by the substitution for the definition of “**domestic violence**” of the following definition:

**“ 'domestic violence'** means—

*(a)* physical abuse;

*(b)* sexual abuse;

*(c)* emotional, verbal **[and]** or psychological abuse;

*(d)* economic abuse;

*(e)* intimidation;

*(f)* harassment;

**Proposal (February 2021):**

Sexual harassment may be considered as a form of harassment, but may also be regarded as a form of domestic violence. As an option it is proposed that sexual harassment be included as a form of domestic violence.

*(fA)* sexual harassment;

**Proposal (February 2021):**

Related person abuse is inserted as a result of the discussions in relation to the wide ambit of the domestic violence against a related person (see pages 6 to 7 supra).

*(fB)* related person abuse;

*(g)* **[stalking]** spiritual abuse;

*(h)* damage to property;

(*h*A) elder abuse;

(*h*B) coercive behaviour;

(*h*C) controlling behaviour;

(*h*D) intentionally exposing or subjecting children to behaviour listed in (*a*) to (*h*C);

Paragraph *(hD)* is amended to cater for the comment on p5 of the comment and responses (see LRC page 4), that a non-abusive partner may unintended fall within the web of the provision where an act of domestic violence is committed against her by an abusive partner.

*(i)* entry into the complainant's ~~or a related person's~~—

(i) permanent or temporary residence without his or her consent, where the parties do not share the same residence; or

(ii) workplace or place of study, without his or her consent, where the parties do not share the same workplace or place of study; or

*(j)* any other **[controlling or abusive]** behaviour **[towards a complainant]**, where such **[conduct]** behaviour harms, or **[may cause imminent]** inspires the reasonable belief that harm may be caused to**[, the safety, health or wellbeing of]** the complainant or a related person;”;

WLC (p23) does not support the inclusion of the word ‘abusive’ (see paragraph *(j)* of the definition). The "any other behaviour" is already qualified by the words "harms" or "inspires the reasonable belief that harm may be caused" and to add ‘abusive’ renders the inclusion of this type of behaviour in the definition of "domestic violence" tautologous and should therefore be deleted.

**General observation:**

 "Harm" should form part of the definition of "domestic violence" in relation to the following conduct: emotional, verbal or psychological abuse - paragraph *(c)*; harassment - paragraph *(f) (included)*; spiritual abuse - paragraph *(g)*; coercive behaviour - paragraph *(hB)*; and controlling behaviour - paragraph *(hC)*, or included in the various definitions of this conduct. This will narrow down the wide ambit of their application.

**Discussion (February 2021):**

Paragraph *(j)*, is a catchall provision that is unqualified and overlaps, among others, with physical abuse, intimidation and harassment. In order to restrict the ambit of the provision and to clarify the conduct that is intended to amount to domestic violence, a reasonable person in conjunction with certain identified conduct are proposed. The following provision is proposed:

*"(j)* any other **[controlling or abusive]** behaviour **[towards a complainant]**, towards a complainant which a reasonable person having regard to all the circumstances would regard as behaviour that—

(i) **[**~~where such~~ **~~[conduct]~~** ~~behaviour harms, or~~ **~~[may cause imminent~~]** is intimidating, threatening, abusive, degrading, offensive or humiliating; or

(ii) inspires the reasonable belief that harm may be caused to**[, the safety, health or wellbeing of]** the complainant ~~or a related person~~;”;

 *(j)* by the substitution for the definition of “economic abuse” of the following definition:

**“ 'economic abuse'** includes—

*(a)* the **[unreasonable]** deprivation of economic or financial resources to which a complainant[[2]](#footnote-2) ~~or a related person~~ is entitled under law or which the complainant ~~or a related person~~ requires out of necessity, including education expenses, household necessities for the complainant ~~or a related person~~, and mortgage bond repayments or payment of rent in respect of the shared residence or accommodation; or

*(b)* the **[unreasonable]** disposal of household effects or other property in which the complainant has an interest;”;

Discussion:

Paragraph *(a)* is amended to include "education expenses", as recommended by the Warrior Project (page 25).

 **Proposal (February 2021):**

Economic abuse is not defined and is open-ended, with various conducts that may be considered as economic abuse. Further examples may be included to clarify this definition. The following is proposed:

 **“ 'economic abuse'** includes—

*(a)* the **[unreasonable]** deprivation of economic or financial resources to which a complainant[[3]](#footnote-3) ~~or a related person~~ is entitled under law or which the complainant ~~or a related person~~ requires out of necessity, including education expenses, household necessities for the complainant ~~or a related person~~, and mortgage bond repayments or payment of rent in respect of the shared residence or accommodation; **[or]**

*(b)* the **[unreasonable]** disposal of household effects or other property in which the complainant has an interest without the complainant's permission;

*(c)* the use of financial resources of a complainant, without the complainant's permission; or

*(d)* the coercing a complainant to sign a legal document that would enable the complainant's finances to be managed by another person;”;

*(k)* by the insertion after the definition of “economic abuse" of the following definitions:

**~~[“‘educator’~~** ~~means any person, including a person who is appointed to exclusively perform extracurricular duties, who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at all public and independent schools as defined in the South African Schools Act, 1996 (Act No. 84 of 1996), all public and private colleges and all public and private further education and training institutions established, declared or registered in terms of the Further Education and Training Colleges Act, 2006 (Act No. 16 of 2006), and all public and private higher education institutions defined in the Higher Education Act, 1997 (Act No. 101 of 1997);]~~

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

Proposed amendment:

‘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~~ "abuse" of an older person as contemplated in section 30(2) of the Older Persons Act, 2006 (Act No. 13 of 2006)~~, and includes social isolation or neglect~~ occurring within a domestic relationship;

**Discussion:**

The definition in the Bill is a repeat of section 30(2) of the Older Persons Act, 2006. Section 30(3) of that Act, however, defines 'abuse' in subsection (2), to "include" physical, sexual, psychological and economic abuse. The proposed definition will ensure an open-ended definition which can cater for other types of conduct, as long as such conduct qualifies as "conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person constitutes abuse of an older person". This will also include social isolation or neglect.

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

**Proposal (February 2021):**

As a result of the proposed amendments to "harassment", the following definition is proposed:

**‘electronic communications’** ~~means electronic communications as defined in section 1 of the Electronic Communications Act, 2005;~~ means information, including without limitation, voice, sound, data, text, video, animation, visual images, moving images and pictures or a combination thereof that is transmitted by means of an electronic communications service;

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

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

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

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

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

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

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

*(a)* loss of earnings;

*(b)* medical, optical, **[and]** dental and related expenses;

*(c)* relocation and accommodation expenses; **[or]**

*(d)* household necessities;

*(e)* education~~al~~ expenses; or

*(f)* psychosocial services and counselling;”;

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

**“ 'emotional, verbal [and] or psychological abuse'** means a **[pattern of]** degrading, manipulating, threatening or humiliating conduct towards a complainant or a related person (with the aim to cause mental or psychological harm to a complainant), including—

*(a)* **[repeated]** insults, ridicule or name calling;

*(b)* **[repeated]** threats ~~to~~ that cause ~~emotional pain~~ harm; **[or]**

**Discussion:** Harm is defined as "mental, psychological, physical or economic harm". In the context of this definition "emotional pain" should be substituted with "mental or psychological harm":

*"(b)* **[repeated]** threats ~~to~~ that cause ~~emotional pain~~ mental or psychological harm;

*(c)* the **[repeated]** exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's or a related person’s privacy, liberty, integrity or security; ~~or~~

*(d)* inducing fear;

*(e)* the wilful damaging or destruction of any property in close vicinity of a complainant or a related person( with the aim to cause mental or psychological harm to a complainant); or

*(f)* to harm or threaten to harm a household pet or other animal, belonging to a complainant or related person(, where such behaviour causes harm to the complainant);”;

**Proposal (February 2021):**

**“ 'emotional, verbal [and] or psychological abuse'** means **[a ~~[~~pattern of]** degrading~~, manipulating,~~ threatening, offensive, intimidating or humiliating conduct towards a complainant ~~or a related person with the aim to~~ that causes emotional or psychological harm to a complainant, including—

*(a)* **[repeated]** insults, ridicule or name calling;

*~~(b)~~***~~[repeated]~~** ~~threats to that cause emotional pain harm;~~ **[or]**

*~~"~~(b)* **[repeated]** threats ~~to that~~ to cause emotional pain/ mental or psychological harm;~~"~~

*(c)* the **[repeated]** exhibition of obsessive possessiveness or jealousy, which **[~~is such as to ]~~**constitute a serious invasion of the complainant's ~~or a related person’s~~ privacy, liberty, integrity or security; ~~or~~

*(d)* inducing fear;

*(e)* the wilful damaging or destruction of any property in close vicinity of a complainant ~~or a related person with the aim to cause mental or psychological harm to a complainant~~;

*(f)* to harm or threaten to harm a household pet or other animal, ~~belonging to, or~~ whose welfare affects significantly a complainant's well-being; ~~or related person(, where such behaviour causes harm to the complainant)~~;

*(g)* to disclose or threatening to disclose a complainant's sexual orientation to others against the complainant's wishes; or

*(h)* to threaten the complainant with the death or injury of another person or damage of another person's property; or

*(i)* to threatening to commit suicide or self-harm;”;

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

“ **‘functionary’**, for purposes of section 2A, means a medical practitioner, health service provider, social worker, official in the employ of a public health establishment, educator or a care-giver or any other person or entity designated by the Minister by notice in the *Gazette;*”;

*(o)* by the substitution for the definition of “harassment” of the following definition:

**“ 'harassment'** means directly or indirectly engaging in **[a pattern of]** conduct that **[induces the fear of]** the respondent knows or ought to know—

*(a)* causes harm or inspires the reasonable belief that harm may be caused to **[a]** the complainant ~~or a related person~~ by unreasonably **[including]**—

**[*(a)*]**(i) **[repeatedly]** following, watching, pursuing or accosting the complainant ~~or a related person~~, or loitering outside of or near the building or place where the complainant ~~or a related person~~ resides, works, carries on business, studies or happens to be;

**[*(b)*]** (ii) **[repeatedly making telephone calls or inducing another person to make telephone calls to]** engaging in verbal, electronic or any other communication aimed at the complainant ~~or a related person~~, by any means whether or not conversation ensues; or

**[*(c)*]** (iii) **[repeatedly]** sending, delivering or causing the delivery of letters, **[telegrams,]** packages, facsimiles, electronic mail, texts, photos, videos, recordings or other objects to the complainant ~~or a related person~~, or leaving them where they may be found by, given to, or brought to the attention of, the complainant ~~or a related person~~; or

*(b)* amounts to sexual harassment of—

(i) the complainant; ~~or~~

~~(ii) a related person which causes harm to a complainant~~;”;

**Proposed amendment (February 2021):**

To address the concerns above, the definition below is proposed. It must be pointed out that harassment of a related person to the extent that it may cause harm to the complainant is retained. The use of another person to harass the complainant must still be provided for.

"**“ 'harassment'** means ~~directly or indirectly engaging in~~ **~~[a pattern of]~~** ~~conduct that~~ **~~[induces the fear of]~~** ~~the respondent knows or ought to know—~~

*~~(a)~~* ~~causes harm or inspires the reasonable belief that harm may be caused to~~ **~~[a]~~** ~~the complainant or a related person by unreasonably~~ **~~[including]~~**~~—~~

**[*(a)*]**(*~~i~~a*)**[repeatedly]** the unreasonable—

(i) following, watching, pursuing or accosting of the complainant or a related person; or

(ii) 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,

 which inspires the belief in the complainant that he or she or a related person may be harmed or their property may be damaged;

*(b)* to enter any part of the joint residence that is exclusively used by the complainant or other property of the complainant, without the complainant's permission;

*(c)* to interfere with, any property that is exclusively used by or in the complainant's possession;

*(d)* to repeatedly contact the complainant by means of an electronic communications service, irrespective whether or not—

(i) a conversation ensues; or

 (ii) any information is conveyed to the complainant;

**~~[[~~*~~(b)~~*~~]~~** ~~(ii~~*~~b~~*~~)~~**~~[repeatedly making telephone calls or inducing another person to make telephone calls to]~~** ~~engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means whether or not conversation ensues; or~~**~~]~~**

**[*(c)*]**(~~iii~~*e*) **[repeatedly]** the repeated sending, delivering **~~[or causing the delivery~~** ~~of letters,~~ **~~[telegrams,]~~** of packages, ~~[facsimiles, electronic mail, texts, photos, videos, recordings]~~ communications or other objects to the complainant ~~or a related person~~, or leaving them where they may be found by, given to, or brought to the attention of, the complainant ~~or a related person~~; ~~[or~~

(f) to disclose an electronic communication to the complainant, or cause the complainant to receive a communication, which—

(i) is abusive, degrading, offensive or humiliating;

(ii) violates or offends the sexual integrity or dignity of a complainant; or

(iii) inspires the belief in the complainant that he or she or a related person may be harmed or their property may be damaged; or

*(f)* to disclose an electronic communication, or make a communication available, to another person concerning a complainant, which—

 (i) contains information of a private nature;

(ii) violates or offends the sexual integrity or dignity of a complainant;

 (iii) is abusive, degrading, offensive or humiliating; or

(iv) inspires the belief in the complainant that he or she or a related person may be harmed or their property may be damaged;

*~~(b)~~* ~~amounts to sexual harassment of—~~

~~(i) the complainant; or~~

~~(ii) a related person which causes harm to a complainant]~~;”;;

*(p)* by the insertion of the following definition after the definition of “harassment”:

“ **‘harm’** means any mental, psychological, physical or economic harm;”;

**Comment (February 2021):**

The definition is identical to the definition of "harm" in the Protection from Harassment Act, 2011 (Act 17 of 2011), and relates to harassment in that Act. In the various conducts that amounts to domestic violence, any reference to "harm" must be interpreted as either "mental, psychological, physical or economic harm", which is not always reconcilable with all the definitions of the conduct that constitutes domestic violence, for instance "economic abuse" may give rise to physical harm. See also "intimidation", below. Harm is, however, not part of all the definitions of the conduct that amounts to domestic violence. A problamatic aspect of this definition relates to section 8(4)*(b)*, which provides for arrest by a peace officer where are reasonable grounds to suspect that the complainant is suffering or may "suffer harm" as a result of the alleged breach of the protection order. It is submitted that a peace officer is in most instances not in a position to determine mental or physical harm and this may lead to a discretionary enforcement of the powers to arrest.

*(q)* by the substitution for the definition of “intimidation” of the following definition:

“ **'intimidation'** means uttering or conveying a threat to, or causing a complainant or a related person to receive a threat, which ~~induces fear of imminent~~ causes harm;”;

**Discussion:**

Page 32, WLC, Lisa Vetten page 6, LRC page 4: Remove "imminent" that qualifies harm.

**Proposal (February 2021):**

Intimidation can also take place through conduct, other than "uttering or conveying" of a threat. The reference to "fear of imminent harm" (defined as "mental, psychological, physical or economic harm"), is problematic. The following amendment is proposed:

“ **'intimidation'** means uttering or conveying a threat to, or causing a complainant ~~or a related person~~ to receive a threat, or any conduct nearby or directed at a complainant, which ~~induces fear of imminent harm~~ has the effect that a complainant fears for her or his own safety or damage of her or his property;”;

*(r)* by the insertion of the following definition after the definition of “member of the South African Police Service”:

“ **‘Minister’** means the Cabinet member responsible for the administration of justice;”;

*(s)* by the substitution for the definition of “physical abuse” of the following definition:

“ **'physical abuse'** means any act or threatened act of physical violence towards a complainant **~~or a related person~~** or, in the case of a complainant who is a child, includes abuse as defined in section 1 of the Children’s Act, 2005 ~~(Act No. 38 of 2005)[[4]](#footnote-4)~~;”;

**Discussion (February 2021):**

(a) The reference to "a complainant who is a child, includes abuse as defined in section 1 of the Children’s Act, 2005", unnecessarily over extends and complicates this definition. In terms of the Children’s Act, 2005, "abuse", in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child, and includes-

"*(a)* assaulting a child or inflicting any other form of deliberate injury to a child; (This is already included in the definition of physical abuse.)

*(b)* sexually abusing a child or allowing a child to be sexually abused; (This surely is included in the definition of "sexual abuse");

*(c)* bullying by another child; (A domestic violence interdict is questionable in such circumstances. The incitement of bullying of a child by another child who is a respondent in a domestic relationship may be relevant, but is already catered for under "emotional, verbal or psychological abuse" and "physical abuse")

*(d)* a labour practice that exploits a child; (The definition deals with physical abuse. If the labour practise amounts to physical abuse it is already covered. Other remedies exist to deal this aspect – see section 141 read with section 305 of the Children's Act, 2005.)

*(e)* exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally; (This is catered for in the proposed paragraph *(hD)* of the definition of domestic violence and "emotional, verbal or psychological abuse".)"

(b) It is further submitted that "any act or threatened act of physical violence towards a complainant" as contemplated in the definition of physical abuse is extremely narrow, for instance the a complainant be physically abused, by locking her or him up in a room, applying restraining mechanisms to the complainant, substance administration, or withholding medication. Additional forms of physical abuse should be included in the definition to extend it beyond physical violence.

 *(t)* by the insertion of the following definition after the definition of “protection order”:

“ **‘related person’** means any member of the family or household of a complainant~~,~~ ~~or any other person in a close relationship with the complainant;"~~

**Discussion:**

A "related person" may also be someone that is outside the sphere of a "domestic relationship" for instance the complainant's new life partner (a person in close relationship with the complainant). It is recommended that the sentence "or any other person in a close relationship with the complainant", be deleted – see SAPS page 33.

**Discussion (February 2021):**

To address the "related person" issue (see pages 6 and 7), the following is proposed:

(i)*Definition of related person:* The definition can be retained without any amendments:

 **‘related person’** means any member of the family or household of a complainant or any other person in a close relationship with the complainant;

(ii) *Related person abuse as conduct that amounts to domestic violence: The following definition is proposed:*

"**related person abuse**" means to—

*(a)* threaten the complainant with the causing of physical violence to, or the damage of property of, a related person;

(*b*) threaten a related person with physical violence or causing damage to the property of such a person; or

*(c)* commit an act of physical violence against or to cause damage to property of a related person,

where such actions can in the circumstances be regarded as abuse to cause harm to the complainant;

**New definition of residence** (see pages 11 to 12)**:**

"'**residence**' means any part of any structure, including a building, house, room, shed, hut, tent, mobile home, caravan, boat or other place, that is used as a place of residence by a natural person, irrespective whether or not other people also occupy that structure;"

 *(u)* by the substitution for the definition of “sexual abuse” of the following definition:

“ **'sexual abuse'** means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant ~~or a related person,~~ whether or not such conduct constitutes a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)or, in the case of a complainant who is a child, constitutes sexual abuse as contemplated in the Children’s Act, 2005;”;

**Discussion (February 2021):**

The Children’s Act, 2005, defines 'sexual abuse', in relation to a child, as-

"*(a)* sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted;

*(b)* encouraging, inducing or forcing a child to be used for the sexual gratification of another person;

*(c)* using a child in or deliberately exposing a child to sexual activities or pornography; or

*(d)* procuring or allowing a child to be procured for commercial sexual exploitation or in any way participating or assisting in the commercial sexual exploitation of a child".

These conducts that constitutes "sexual abuse" in terms of the Children's Act, 2005, are sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and by implication already included under the definition of "sexual abuse".

*(v)* by the insertion of the following definition after the definition of “sexual abuse”:

“ **'sexual harassment'** means any—

*(a)* unwelcome sexual attention from a person in a domestic relationship with the complainant who knows or ought reasonably to know that such attention is unwelcome;

*(b)* unwelcome explicit or implicit behaviour, suggestions, gestures, messages or remarks of a sexual nature towards the complainant ~~or a related person~~ that have the effect of offending, intimidating or humiliating the complainant in circumstances~~,~~ which a reasonable person having regard to the circumstances would have anticipated that the complainant would be offended, intimidated or humiliated;

*~~(c)~~* ~~unwanted verbal, written, or physical conduct based on the complainant’s sexual orientation, gender, gender expression, or physical appearance;~~

**Discussion:**

LRC page 38. The definition concerns itself with sexual harassment. The proposal of the LRC (proposed paragraph *(c)*, above) is already catered for in paragraph *(b)*.

“ **'sexual harassment'** means any—

*(a)* unwelcome sexual attention from a ~~person in a domestic relationship with the complainant~~ respondent who knows or ought reasonably to know that such attention is unwelcome;

*(b)* unwelcome explicit or implicit behaviour, suggestions, gestures, messages or remarks towards the complainant ~~or a related person~~—

(i) of a sexual nature; or

(ii) regarding the complainant’s or related person's sexual orientation, gender or gender expression,

 by arespondent, that have the effect of offending, intimidating or humiliating the complainant; ~~in circumstances, which a reasonable person having regard to the circumstances would have anticipated that the complainant would be offended, intimidated or humiliated;~~

*~~(c)~~* ~~unwanted verbal, written, or physical conduct based on the complainant’s sexual orientation, gender, gender expression, or physical appearance;~~

*(~~d~~c)* implied or expressed promise of reward made to the complainant for complying with a sexually oriented request; or

*(d)* implied or expressed threat of reprisal made to, or actual reprisal ~~made to~~ against, the complainant for refusal to comply with a sexually oriented request;”;

*(w)* by the insertion after the definition of “sheriff” of the following definition:

**Amendments (February 2021):**

“ ‘**spiritual abuse**’ 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 or abuse him or her~~,;~~ or

*(d)* ~~including~~ using religious texts or beliefs as a pretext to justify, minimize or rationalize abusive behaviour against a complainant or related person;";

*(x)* by the deletion of the definition of “stalking”;

*(y)* by the addition after the definition of “this Act” of the following definition:

“ **‘weapon’** means—

*(a)* any airgun, ammunition, imitation firearm, muzzle loading firearm, firearm or handgun as defined in section 1 of the Firearms Control Act, 2000 (Act No. 60 of 2000); or

*(b)* any object, other than that which is referred to in paragraph *(a)*, which is likely to inflict grievous bodily harm or a dangerous wound, if it were used to commit an assault.”.

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

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

 **" Obligations of functionaries relating to domestic violence**

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

*~~(a)~~* ~~becomes aware of the fact or on reasonable grounds believes or suspects, that a child, a person with a disability or an older person, is a complainant as contemplated in section 1, must comply with subsection (2); or~~

*~~(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).~~

“(1) A functionary, who in the course of the performance of **[their]** ~~his or her~~ their duties or the exercise of **[their]** their functions [**in relation to any person]** has knowledge, or a reasonable belief or suspicion, that a child, a person with a disability or an older person, is a complainant as contemplated in section 1, must comply with subsection (2).”.

(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, believe or suspicion; and

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

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

*(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 prescribe manner submit the report to—~~

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

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

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

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

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

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

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

 ~~(4)~~(3) A functionary referred to in subsection (1)—

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

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

~~(5)(4) A functionary who fails to comply with subsection (1), is guilty of an offence.~~

**Obligation to report domestic violence and to provide information**

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

*~~(a)~~* ~~has knowledge or a reasonable belief or suspicion that an act of domestic violence has been committed against a child, a person with a disability or an older person; or~~

*~~(b)~~* ~~has knowledge that an act of domestic violence has been committed against an adult in a domestic relationship,~~

~~must report such knowledge as soon as possible to a social worker or the South African Police Service.~~

 (1) In circumstances other than those contemplated in section 2A(1), an adult person who has knowledge or a reasonable belief or suspicion that an act of domestic violence has been committed against a child, a person with a disability or an older person must report such knowledge, reasonable belief or suspicion as soon as possible to a social worker or the South African Police Service.

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

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

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

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

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

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

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

**Discussion:**

It is acknowledged that the Children’s Act, the Older Persons Act and the Mental Health Care Act, provides for reporting mechanisms of abuse and measures to further deal with the persons involved. The functionaries involved are the SAPS and social workers. Sections 2A and 2B does not exclude the mechanisms provided for in those Acts to further deal with a matter. However, the directives in the proposed section 18B (clause 22), aims to oblige various Departments to provide additional services to victims of domestic violence that are may not be included in the Children’s Act, the Older Persons Act and the Mental Health Care Act (this aspect is discussed on Page 48 to 51 of the Comments and Responses document).

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

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

 “**Arrest by peace officer without warrant**

 **3.** (1) A peace officer may, at the scene of an incident of domestic violence, without a warrant, arrest any **[respondent]** person ~~respondent~~ **~~[at the scene of an incident of domestic violence~~****~~whom he or she]~~**  who such peace officer reasonably suspects of having committed **[an offence containing an element of violence against a complainant]**—

*(a)* an act of domestic violence which constitutes an offence in terms of any law; or

*(b)* an offence referred to in section 17(1)*(a).*

**Discussion:**

See SAPS page 67: To arrest a person who is not a respondent expands the ambit of provision with unintended consequences and it is suggested that "person" should be substituted with "respondent".

***Response***

A respondent may use other persons to commit an act of domestic violence. A "respondent" is defined in section 1 as "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", and exclude other persons who participate in acts of domestic violence.

 (2) A peace officer must, at the scene of an incident of domestic violence arrest a person who is reasonably suspected/they on reasonable grounds believe of having committed an act of domestic violence where physical violence is involved.

**Discussion:**

\* See SAPS pages 67 to 68 and 90: This insertion of the words " at the scene of an incident of domestic violence" is necessary to balance the powers with the discretion that is afforded to a member of the SAPS to arrest as contemplated in section 8(4) (complainant hands the warrant of arrest and affidavit to member of SAPS for an alleged contravention of a protection order). For purposes of section 8(4), the considerations in section 8(5) are relevant to determine whether a complainant suffers harm. It is submitted that physical violence will, for purposes of section 8(4) qualify as harm as contemplated in section 8(5), where a member of the SAPS must arrest the respondent.

\* Section 40 of the CPA affords the SAPS discretion to arrest without a warrant on a reasonable suspicion that certain offences have been committed. To require "reasonable grounds to believe", may balance the obligation imposed to arrest and ensure that the provision does not have adverse consequences where a person acts in self-defence.

**Recommendation (February 2021):**

"(2) A peace officer **[may]**must, without a warrant, arrest any **[respondent]** person at the scene of an incident of domestic violence who he or she on reasonable **[suspects]** grounds believes of having committed an act of domestic violence which constitutes an offence containing an element of violence against a complainant.".

***Discussion:***

(i) The higher standard of "reasonable ground believe", balances the mandatory powers of peace officers to arrest a person[[5]](#footnote-5).

(ii) Section 40(1)*(q)* of the CPA provides that a peace officer may without a warrant arrest any person 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. This must also be amended to give effect to the proposal – see Schedule to the Bill.

 (3) A peace officer contemplated in subsection (1) or (2), who is not a member of the South African Police Service, must—

*(a)* where necessary, make arrangements for the complainant to obtain medical attention;

*(b)* where a protection order has not been issued against the person who has been arrested for committing an **[act of domestic violence]** offence as contemplated in subsection (1)*(a)* or (2), or where there is no pending application for a protection order against that person—

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

(ii) if it is reasonably possible to do so, hand a notice containing information as prescribed to the complainant in the official language of the complainant's choice; and

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

*(c)* provide such further assistance as prescribed in terms of section 18B.”.

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

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

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

3A. (1) If a member of the South African Police Service—

*(a)* receives a report that an offence containing an element of physical violence has allegedly been committed during an incident of domestic violence; and

*(b)* reasonably suspects that a person who may furnish information regarding that alleged offence is in any private ~~dwelling~~ residence,

that member may, notwithstanding the proviso to section 26 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), without a warrant, enter ~~[those premises]~~ that residence for the purposes of interrogating that person and obtaining a statement from him or her.

 (2) Any member referred to in subsection (1)—

*(a)* must audibly demand admission to the ~~dwelling~~ residence and notify of the purpose for which the member seeks to enter that ~~dwelling~~ residence; and

*(b)* may, if an occupier of the ~~dwelling~~ residence does not provide admission to the ~~dwelling~~ residence, use such force as may be reasonably necessary to overcome any resistance against entry to the ~~dwelling~~ residence, including the breaking of any door or window of that ~~dwelling~~ residence.”.

**Discussion (February 2021):**

The word "residence" is used throughout the DVA. Substitute the word "dwelling" for the word "residence".

**Substitution of section 4 of Act 116 of 1998**

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

 “ **Application for protection order**

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

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

**Discussion:**

It is submitted that subsection (1A), is not necessary. The form and manner to make applications in person and via electronic means, differs. Subsection (1A) envisages a process that is more than to e-mail the documents to the clerk of the court. To provide for procedural aspects in legislation is problematic, since it cannot readily be adopted to serve practical needs or a change in circumstances. Although section (1A) aims to ensure that electronic applications are recognized as a valid procedure for such applications, this is not necessary since Part I of Chapter III of the Electronic Communications and Transactions Act, 2002 (Act 25 of 2002), give legal recognition thereto. It is submitted that subsection (1A) be deleted and subsection (1) be amended as follows:

**Proposal (February 2021):**

"(1) Any complainant may, in the prescribed form and manner, apply to the court for a protection order.

(1B) The application referred to in subsection (1) must—

*(a)* be lodged with the clerk of the court; or

*(b)* electronically be submitted to an electronic address,

of the court having jurisdiction.

An aspect that must be considered is the admissibility of documents for the application for a protection order, which is made under oath or affirmation. This aspect needs further investigation.

 (1~~B~~C) The clerk of the court must ~~upload all electronic and hard copies of the~~ capture all applications referred to in subsection (1B) and such other information as may be prescribed on~~to~~ the integrated electronic repository established in terms of section 6A of this Act.

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

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

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

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

***(a)* a minor;**

***(b)* mentally retarded;**

***(c)* unconscious; or**

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

*(b)*An application referred to in paragraph *(a)* must be brought with the written consent of the complainant, except in circumstances where the complainant is—

*(a)* a child who is under the age of 16 years, if the court considers the application to be in the best interests of the child; or

*(b)* a person who, in the opinion of the court, is unable to provide the required consent.

**Discussion (February 2021):**

The "required consent" is a broad concept and does not *per se* extend to legal capacity – see among others section 129 of the Children's Act, 2005, that provides that a child over the age of 12 (if the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications) can consent to medical treatment. It is acknowledged that the Children's Act, mainly section 110, and Chapter 9, do provide for measures to deal with a child in need of care and protection. However, in a domestic relationship, many children endure domestic abuse and the likelihood that they would approach a court for a protection order is very slim. In many instances another family member in the domestic relationship usually takes the initiative to approach authorities to deal with such domestic abuse against a child and in various instances the first port of call is a magistrate's court. The balancing factor is the "best interest of the child" and it is submitted that even in the required consent is not obtained, an applicant should be allowed to apply for a protection order where the court deems it in the best interest of a child.

(4) Notwithstanding the provisions of any other law, any **[minor]** child, or any person on behalf of a **[minor]** child, may apply to the court for a protection order without the consent or 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 ~~or may be submitted online as prescribed~~, if the court **[is satisfied]** has a reasonable belief that the complainant is suffering or may suffer **[undue hardship]** harm if the application is not dealt with immediately.

(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]** clerk of the court must immediately submit [the] an application referred to in subsection (1B) and supporting affidavits to the court.”.

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

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

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

**5.** (1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 4(7) and may, for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which **[shall]** must form part of the record of the proceedings.

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

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

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

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

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

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

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

 (3) *(a)* **[An]** Upon the issuing of an interim protection order **[must]** ~~the clerk of the court must immediately notify the complainant in the prescribed form and manner thereof, and~~ the court must direct that— copies of—

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

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

(iii) the interim protection order issued in terms of subsection (2),

be served on the respondent **~~[in the prescribed manner and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued]~~**~~.~~

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

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

~~(ii) electronically, at the address or number specified in the application,:] [Provided that where the complainant and respondent share the same residence, service must be effected by hand on the respondent personally]~~

**Discussion:**

\* Lisa Vetten page 97: Where the applicant and respondent share a residence, it is possible that documents which must be served on the respondent, may also be served on the complainant, who must then bring those documents to the attention of the respondent, which may give rise to further incidents of domestic violence. An amendment to this section is proposed to the effect that in the case of a shared residence, documents may not be served on the other party to the proceedings but must be served on the respondent personally.

\* It is submitted that the provisions how service must be effected as indicated between brackets are not necessary in light of section 13 (clause 17), which provides for service of documents in terms of the DVA. Section 13 requires that the manner of service must be prescribed. Regulations can therefore provide for the concerns of the commentator.

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

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

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

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

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

 *(~~e~~d)* The clerk of the court must immediately, upon the issuing of an interim protection—

(i) in the prescribed form and manner notify the complainant thereof; and

(ii) capture a copy of the interim protection order on the integrated electronic repository of protection orders.

(4) If the court does not issue an interim protection order in terms of subsection (2), the clerk of the court must immediately notify the complainant in the prescribed form and manner thereof, and the court must direct the clerk of the court, sheriff or a peace officer identified by the court to cause certified copies of the application concerned and any supporting affidavits to be served on the respondent in the prescribed manner, together with a prescribed notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued.

(5) The return dates referred to in subsections (3)**[*(a)*]***(~~c~~b)* and (4) may not be less than 10 days after service has been effected upon the respondent**[; Provided that the]**: Provided that ~~but~~ a return date referred to in subsection (3)**[*(a)*]***(cb)* and (4) 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]** is of force and effect **[until it has been served on]** from the time the existence and content of the order have been brought to the attention of the respondent.

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

*(a)* in the prescribed form and manner notify the complainant thereof;

*(b)* cause—

*(~~a~~*i*)* a certified copy of the interim protection order; and

*(~~b~~*ii*)* the original warrant of arrest contemplated in section 8(1)*(a)*,

to be served on the complainant in the prescribed manner and upload the documents referred to in paragraphs *(a)* and *(b)* and the return of service of the interim protection order on the complainant, on the integrated electronic repository of protection orders in the prescribed manner; and

*(c)* in the prescribed manner, forward certified copies of any interim protection order and of the warrant of arrest contemplated in section 8(1)(a) to the police station of the complainant's choice.

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

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

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

 " **Attendance of witnesses**

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

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

 *(b)* A person who—

(i) is in attendance at any proceedings under this Act, though not subpoenaed as a witness; and

(ii) is warned by the court to remain in attendance at the proceedings,

 must remain in attendance until excused by the court.

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

*(a)* attend or to remain in attendance;

*(b)* appear at the place and on the date and at the time to which the proceedings in question may be adjourned;

*(c)* remain in attendance at those proceedings as so adjourned; or

*(d)* produce any book, document, object or thing specified in the subpoena,

is guilty of an offence.

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

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

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

*(b)* issue a direction in the prescribed form, directing an electronic communications service provider, that is believed to be able to furnish such particulars, to furnish the court in the prescribed manner by means of an affidavit in the prescribed form with—

(i) the electronic communications identity number from where the electronic communication originated;

(ii) the name, surname, identity number and address of the person to whom the electronic communications identity number has been assigned;

(iii) any information which indicates that the electronic communication was or was not sent from the electronic communications identity number of the person to the electronic communications identity number of the complainant;

(iv) any information that is available to an electronic communications service provider that may be of assistance to the court to identify the person who disclosed the electronic communication or the electronic communications service provider, that provides a service to that person;

(v) any information that is available to an electronic communications service provider which may be of assistance to the court to identify the electronic communications service provider whose service is used to host or was or is used to disclose the data message in questions; or

(vi) an assessment whether or not the electronic communications service provider is in a position—

*(aa)* to remove the electronic communication or a link to the electronic communication; or

*(bb)* to disable access to such electronic communication or a link to such electronic communication.

(2) If the court issues a direction in terms of subsection (1) the court must direct that the direction be served on the electronic communications service provider in the prescribed manner: Provided, that if the court is satisfied that the direction cannot be served in the prescribed manner, the court may make an order allowing service to be effected in the form and manner specified in that order.

(3) *(a)* The information referred to in subsection (1)*(b)* must be provided to the court within five ordinary court days from the time that the direction is served on an electronic communications service provider.

 *(b)* An electronic communications service provider on which a direction is served, may in the prescribed manner by means of an affidavit in the prescribed form apply to the court for—

(i) an extension of the period of five ordinary court days referred to in paragraph *(a)* for a further period of five ordinary court days on the grounds that the information cannot be provided timeously; or

(ii) the cancellation of the direction on the grounds that—

*(aa)* it does not provide an electronic communications service to the complainant or the respondent;

*(bb)* the requested information is not available in the records of the electronic communications service provider; or

*(cc)* its service is not used to host or was or is not used to disclose the electronic communication in question.

(4) After receipt of an application in terms of subsection (3)*(b)*, the court—

*(a)* must consider the application;

*(b)* may, in the prescribed manner, request such additional evidence by way of an affidavit from the electronic communications service provider as it deems fit;

*(c)* must give a decision in respect thereof; and

*(d)* must inform the electronic communications service provider in the prescribed form and in the prescribed manner of the outcome of the application.

(5) *(a)* The court may, on receipt of an affidavit from an electronic communications service provider which contains the information referred to in subsection (1)*(b)*, consider the issuing of an interim protection order in terms of section 5(2) against the respondent on the date to which the proceedings have been adjourned.

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

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

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

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

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

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

 *(a)* information that is to be provided to the court;

 *(b)* reference number of the direction; and

 *(c)* name and address of the court.

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

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

(i) the name, physical and postal addresses;

(ii) the electronic mail address;

(iii) a telephone and facsimile numbers; and

(iv) the names of persons who are responsible for providing the information referred to in subsection (1)*(b)*.

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

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

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

*(a)* providing the information referred to in subsection (1)*(b)*;

*(b)* providing the information to the respondent as contemplated in subsection (7); and

*(c)* removing or disabling access to the electronic communications which was used to commit an act of domestic violence as contemplated in subsection 6*(a)*.

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

*(b)* The court may, at any time hold an inquiry into—

(i) the means of the complainant; and

(ii) any other circumstances which, in the opinion of the court, should be taken into consideration,

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

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

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

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

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

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

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

*(d)* fails to comply with subsection (7),

is guilty of an offence.

 (12) For purposes of this section—

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

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

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

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

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

**Discussion:**

Section 205 of the CPA may be used to obtain call-related information where there are allegations that a protection order has been contravened where electronic communications are involved.

 **Existing orders and reciprocal orders**

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

(2) Where it is established by a court, that considers an application in terms of section 5(1), that there is another application pending between the same parties, the court must—

*(a)* order that both applications be dealt with together;

*(b)* adjourn the matter for a hearing as contemplated in section 6; and

*(c)* give directions regarding the notification of parties and service of documents.

**Discussion:**

The proposed subsection (2) gives effect to a recommendation by Lisa Vetten, page 82, namely, that where it is established that a previous protection order is in place, and a new application has not been finalized, an attempt should be made to hear the parties together. It is submitted that the proposal of the commentator is addressed in the subsection below (subsection (3)). However, the proposal is also relevant in terms of section 5 (application for an interim protection order), where there are two simultaneous applications.

 ~~(2)~~(3) Where existing orders are in place, the court—

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

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

*(c)* may, where it is satisfied that urgent relief against an act of domestic violence is necessary, it may notwithstanding any other order, issue a protection order or impose any condition or make any order which it is competent to impose or make under section 7, and order that they remain in force for a limited period as it may determine in order to afford the complainant an opportunity to apply for the amendment, variation or setting aside of such order.”.

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

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

“**Issuing of final protection order**

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

*(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 final protection order in the prescribed form.

(1A) If the complainant appears on the return date contemplated in section 5(3), (4) or (5), but the respondent does not appear, the court may issue a final protection order in the prescribed form after hearing the matter and considering—

*(a)* ~~considering~~ any evidence previously received in terms of section 5(1); and

*(b)* ~~considering~~ such further affidavits or oral evidence as it may direct, which must form part of the record of the proceedings.

(2) If the respondent appears on the return date contemplated in section 5(3) ~~or (5) in order to oppose the issuing of a final protection order, or in section 5(4),~~ (4) or (5), 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]** must form part of the record of the proceedings; and

*(c)* if there are disputes of fact in the versions before it, the court may extend the return date for the hearing of oral evidence.

(2A) If the respondent appears on the return date contemplated in section 5(3) ~~or (5)~~, (4) or (5), but the complainant does not appear, the court must extend the interim protection order and the return date and the clerk of the court must notify the complainant of the extended date: Provided that the court may discharge the interim order if the complainant does not appear on the extended date.

(2B) If neither the complainant nor respondent appears on the return date contemplated in section 5(3) ~~or~~~~(5)~~,(4) or (5) and if the court is satisfied that—

*(a)* proper service has been effected on the respondent; and

*(b)* the application contains *prima facie* evidence that the respondent has committed or is committing an act of domestic violence, ~~the court may—~~

the court may—

(i) extend the interim protection order and the return date for the hearing of oral evidence;

(ii) set a new return date where no interim order is in place, and the clerk of the court must notify the parties of the extended date; or

(iii) discharge the matter.

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

(3) The court may, on its own accord or **[on]** at the request of the complainant**[, if it is of the opinion that it is just or desirable to do so,]** , and if it is in the interests of justice to do so, order that in the examination of witnesses, including the complainant or related person, 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

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

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

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

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

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

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

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

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

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

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

**(iii) RETURN OF SERVICE**

**Redraft suggestion (February 2021)**

 "*(b)* The clerk of the court must capture—

(i) the final protection order;

(ii) the warrant of arrest contemplated in section 8(1)(a); and

(iii) the return of service of—

 *(aa)* the original final protection order on the respondent; and

*(bb)* a copy of the final protection order and original warrant of arrest on the complainant,

on the integrated electronic repository of protection orders.

(7) Subject to the provisions of ~~section~~ sections 5C~~(2)~~(3)*(c)* and 7(7), a final protection order issued in terms of this section—

*(a)* is of force and effect from the time the existence and content of the order have been brought to the attention of the respondent; and

*(b)* remains in force until it is set aside, and the execution of such order **[shall]** is not **[be]** automatically suspended upon the noting of an appeal.”.

**Insertion of section 6A in Act 116 of 1998**

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

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

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

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

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

 **6A.** (1) The Minister must, develop, establish and maintain the integrated electronic repository for domestic violence protection orders.

 (2) *(a)* The ~~Minister~~ Director-General must appoint or designate a fit and proper person, with due regard to his or her relevant expertise, experience, conscientiousness and integrity, ~~to administer the~~ as administrator of the integrated electronic repository.

 *(b)* The administrator of the integrated electronic repository—

(i) must carry out the administrative duties relating to the functioning of the integrated electronic repository;

(ii) must manage, and exercise administrative control over the integrated electronic repository;

(iii) must ensure compliance with any directive issued in terms of subsection (3); and

(iv) is, for purposes of the exercise of the powers, performance of the functions and carrying out of the duties conferred upon, assigned to or imposed upon him or her under this Act, accountable to the Director-General.

 (3) In achieving the objectives contemplated in subsection (1), the Minister must, issue directives to prescribe—

*(a)* the functional requirements of the integrated electronic repository;

*(b)* the technical specifications for the integrated electronic repository;

*(c)* the specifications for the interface between the integrated electronic repository and any authorised party interfacing with the integrated electronic repository;

*(d)* the persons or categories or class of persons who will be authorised to access documents or any other electronic records in integrated electronic repository;

*(e)* the standards governing the information security of the integrated electronic repository;

*(f)* the operation of the integrated electronic repository;

*(g)* the processing of information using the integrated electronic repository;

*(h)*  the secure retention and subsequent production of documents or any other electronic records, which may be required for purposes of this Act, and which must be complied with by persons interacting with the integrated electronic repository; and

*(i)* any other matter any matter which may be necessary or expedient to prescribe in order to achieve or promote the objects of the integrated electronic repository.".

Discussion:

The new proposed section aims to cater for concerns that have been raised by Pro Bono.org pages 86 and 87; LRC and MOSAIC, page 87. The redrafted provision further aims to ensure that the necessary facets for the establishment and operation of the integrated electronic repository be regulated by directives to be issued by the Minister of Justice, which include, restriction of access to the integrated electronic repository, information security measures to be implemented, interface requirements etc.

**Amendment of section 7 of Act 116 of 1998**

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

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

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

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

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

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

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

*(e)* entering the complainant's residence;

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

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

*(h)* committing any other act as specified in the protection order, including the ~~distribution~~ disclosures of any ~~specified~~ electronic communication or the making available of any communication~~,~~ as may be specified in the protection order ~~whether electronically or otherwise, on social media or elsewhere~~.

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

*(a)* an order—

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

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

*(b)* the making of a recommendation that the complainant should approach the relevant police station to investigate the matter with the view to the possible institution of a criminal prosecution against the respondent.”;

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

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

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

“(5) *(a)* The physical, home and work address and contact details of the complainant or related person to whom the protection order relates must be omitted from the protection order, unless the nature of the terms of the order necessitates the inclusion of such **[address]** particulars.

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

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

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

“(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 (Act No. 99 of 1998), the court must order that such a provision **~~[shall be]~~** ~~is~~ 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.”.

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

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

*(a)* by the substitution for subsection (1) of the following subsection~~s~~:

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

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

*(b)* suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.”; and

*(b)* by the substitution for subsections (4) and (5) of the following subsections:

“(4) *(a)* A complainant may hand the warrant of arrest together with an affidavit in the prescribed form, wherein it is stated that the respondent has contravened any prohibition, condition, obligation or order contained in a protection order, to any member of the South African Police Service.

*(b)* If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant is suffering or may suffer **[imminent]** harm as a result of the alleged breach of the protection order by the respondent, the member must **[forthwith]** immediately arrest the respondent for allegedly committing the offence referred to in section 17(1)*(a)*.

*(c)* If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph *(b)*, **[he or she]** the member must **[forthwith]** immediately hand a written notice, in the prescribed form, to the respondent which—

(i) specifies the name, the residential and work 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(1)*(a)*; and

(iii) contains a certificate signed by the member concerned to the effect that **[he or she]** the member handed the original notice to the respondent and that **[he or she]** the member explained the import thereof to the respondent.

*(d)* The member must **[forthwith]** immediately forward a duplicate original of a notice referred to in paragraph *(c)* to the clerk of the court concerned, and the mere production in the court of such a duplicate original **[shall be]** is *prima facie* proof that the original thereof was handed to the respondent specified therein.

(5) In considering whether or not the complainant is suffering harm or may suffer **[imminent]** harm, as contemplated in subsection (4)*(b)*, the member of the South African Police Service must take into account—

 *(a)* the risk to the safety, health or wellbeing of the complainant or related person or damage of their property;

*(b)* the seriousness of the conduct comprising an alleged breach of the protection order;

*(c)* the length of time since the alleged breach occurred; and

**Discussion:**

See WLC and MOSAIC page 91: The length of time since the breach occurred is irrelevant and presents opportunity for the use of individual discretion and ultimately failure to arrest. Paragraph *(c)* seems to be intended to address the time period that has elapsed from the contravention of the protection order to the time that a police official is requested to execute a warrant. For a complainant to request a police official to enforce a warrant of arrest a month after the incident, may, depending on the circumstances, be a clear indication that harm is not present which requires the arrest of the respondent. **It is proposed that the requirement be retained.**

*(d)* the nature and extent of the harm previously suffered in the domestic relationship by the complainant or a related person.”.

**Discussion:**

See WLC page 91: Paragraph *(d)* is qualified by paragraphs *(a)* (risks to health, safety and wellbeing) and *(b)* (the seriousness of breach of a protection order). If paragraph *(d)* is to be removed, conduct that falls outside the ambit of paragraphs (a) and (b) will never ensure arrest, even if past conduct indicates extreme violence against the complainant. **It is proposed that the requirement be retained.**

**Substitution of section 9 of Act 116 of 1998**

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

 "**Seizure of [arms and dangerous] weapons**

**9.** (1) The court must order a member of the South African Police Service to seize any **[arm or dangerous]** weapon in the possession or under the control of a respondent as specified in that order, regardless of the requirements of the respondent’s employment to possess such weapon, if the court is satisfied on the evidence placed before it, including any affidavits supporting an application referred to in section 4 (1), that—

*(a)* the respondent has threatened or expressed the intention to kill or injure himself or herself, **[or]** any person in **[a]** the domestic relationship **[or]**, a related person, or any other person, whether or not by means of such **[arm or dangerous]** weapon; or

*(b)* the possession of such **[arm or dangerous]** weapon is not in the best interests of the respondent or any other person in a domestic relationship or a related person, as a result of the respondent's—

 (i) state of mind or mental condition;

 (ii) inclination to violence; or

 (iii) use of or dependence on intoxicating liquor or drugs.

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

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

*(a)* must be given a distinctive identification mark and retained in police custody for such period of time as the court may determine; and

*(b)* **[shall]** may only be returned to the respondent or, if the respondent is not the owner of the **[dangerous]** weapon, to the owner thereof, by order of the court and on such conditions as the court may determine:

Provided that—

(i) if, in the opinion of the court, the value of the **[dangerous]** weapon so seized is below **[R200]** the amount determined by the Minister in the *Gazette* from time to time; **[or]**

(ii) if the return of the **[dangerous]** weapon has not been ordered within 12 months after it had been so seized; or

(iii) if the court is satisfied that it is in the interest of the safety of any person concerned,

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

(4) *(a)* When a final protection order has been issued against the respondent in terms of section 6, the clerk of the court must as soon as reasonably possible, in the prescribed manner, inform the relevant station commander and National Commissioner of the South African Police Service thereof.

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

(i) determine whether the respondent holds a licence, permit, competency certificate or other authorisation in terms of the Firearms Control Act, 2000, for any firearm; [and]

(ii) in terms of section 102 of the Firearms Control Act, 2000, determine whether the person is unfit to possess a firearm**[.]**; and

(iii) **[and]** inform the National Commissioner of the South African Police Service of their decision regarding the fitness of the person to possess a firearm.”.

**Amendment of section 10 of Act 116 of 1998**

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

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

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

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

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

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

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

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

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

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

 “(1) Any court within the area in which—

*(a)* the complainant permanently or temporarily resides, studies, carries on business or is employed;

*(b)* the respondent permanently or temporarily resides, carries on business or is employed; or

*(c)* the cause of action arose,

has jurisdiction to grant a protection order as contemplated in this Act.

(2) No specific minimum period is required in relation to subsection (1)*(a)*, or *(b)*.”.

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

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

 “(1) *(a)* Service of any document in terms of this Act must **[forthwith]** be effected immediately on the person affected by it at his or her residence or place of business, employment or study in the prescribed manner by the clerk of the court, the sheriff or a peace officer**[, or as the court may direct]**.

 *(b)* Where the complainant and respondent share the same residence, the service of documents—

(i) referred to in sections 5(3)*(a)* or(4) and 6(5)*(a)*, must be effected by hand on the respondent personally; and

(ii)referred to in sections5(7)*(b)* and 6(5)*(b)*, must be effected by hand on the complainant personally.

*(~~b~~c)* If a document cannot be served as contemplated in paragraph *(a)*, service must be effected by electronic mail, facsimile, short messaging service or other known social media platform of the person who must be served: Provided that proof of service effected in that manner must be provided to the court.

**Comments (February 2021)**

Proof of service, where documents are served electronically, is always problematic and should be considered as a last option. It is proposed that paragraph *(c)*, be substituted with the following paragraph:

*(c)* If the court is satisfied that service of any document cannot be effected in the prescribed manner, the court may make an order allowing service to be effected in the form or manner specified in that order.

*(~~c~~d)* If service cannot be effected as contemplated in paragraphs *(a)* and *(b)*, the clerk of the court must obtain directions from the magistrate on the manner of service.”.

**Comments (February 2021)**

Paragraph *(d)* may be omitted as a result of the proposed paragraph *(c)*, above.

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

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

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

**15.** (1)The court may **[only]**, having regard to the conduct of the parties as far as it may be relevant, make an order as to costs against any party if it is satisfied that such party has acted frivolously, vexatiously or unreasonably.

(2) Despite the provisions of subsection (1), the court may make an order as to costs against any party in respect of the—

*(a)* service of any process or documents;

*(b)* obtaining the information contemplated in section 5B(1)*(b)*; or

*(c)* removal or disabling of Access to Electronic Communications completed in section 5B(6).”.

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

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

 “**Appeal and review**

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

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

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

“**Offences**

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

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

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

*(c)* fails to comply with any direction in terms of the provisions of section11(2)*(b)*; or

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

is guilty of an offence and liable on conviction—

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

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

*(bb)* if it is a second or subsequent ~~[offender]~~ conviction, to a fine or imprisonment for a period not exceeding 10 years; and

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

*(aa)* if it is a first [~~offender~~] conviction, to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment; or

*(bb)* if it is a second or subsequent [~~offender~~] conviction, to a fine or imprisonment for a period not exceeding four years or to both such fine and such imprisonment.

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

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

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

**Discussion:** Rather provide for a maximum penalty.

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

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

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

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

**Discussion:** The amended section 2A does not provide for an offence.

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

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

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

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

“(1) No prosecutor **[shall]** may—

*(a)* refuse to institute a prosecution; or

*(b)* withdraw a charge,

in respect of a contravention of section 17(1)*(a)* or in respect of any offence against a person in a domestic relationship—

(i) involving the infliction of grievous bodily harm or a dangerous wound against the complainant or a related person; or

(ii) where the complainant or a related person is threatened with a weapon,

unless **[he or she has been]** authorised thereto, whether in general or in any specific case, by a Director of Public Prosecutions as contemplated in section 13(1)*(a)* of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), or a senior member of the prosecuting authority designated thereto in writing by such a Director.

(2) The National Director of Public Prosecutions referred to in section 10 of the National Prosecuting Authority Act, 1998, in consultation with the Minister **[of Justice]** and after consultation with the Directors of Public Prosecutions, must determine prosecution policy and issue policy directives regarding any offence arising from an incident of domestic violence.”; and

*(b)* by the substitution for paragraph *(a)* of subsection (4) of the following paragraph:

"*(a)* Failure by a member of the South African Police Service to comply with an obligation imposed in terms of this Act or the national instructions referred to in subsection (3), constitutes misconduct as contemplated in the South African Police Service Act, 1995, and the Secretariat, established in terms of section 4(1) of the Civilian Secretariat for Police Service Act, **[2010]** 2011 (Act No. 2 of 2011), must **[forthwith]** be informed immediately of any such failure reported to the South African Police Service.".

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

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

 “ **Directives for clerks of court**

**18A.** (1) The Director-General must issue directives with which clerks of the court must comply in the execution of their functions in terms of this Act, and any directives so issued must be published in the *Gazette*.

(2) The Minister must submit any directives issued in terms of subsection (1) to Parliament before those directives take effect.

(3) The directives referred to in this section must provide that adequate disciplinary steps will be taken against a clerk of the court who fails to comply with any directive.

(4) Any directive issued under this section may be amended or withdrawn in like manner.

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

 **18B.** (1) The Directors-General: Health, Social Development, Basic Education, Higher Education and Training and Communications and Digital Technologies must—

*(a)* in consultation with the Ministers of Health, Social Development, Basic Education, Higher Education, Science and Innovation as well as Communications and Digital Technologies; and

*(b)* after consultation with the Director-General, National Director of Public Prosecutions and National Commissioner of the South African Police Service,

publish in the *Gazette* directives regarding matters which are reasonably necessary or expedient to be provided for and which are to be followed by functionaries and other relevant persons when dealing with domestic violence cases, in order to achieve the objects of this Act.

 (2) Without limiting the scope of the directives contemplated in subsection (1), the directives must—

*(a)* prescribe services to be provided to a complainant who is a child, a person with a disability or an older person;

*(b)* prescribe the manner in which a functionary must deal with a complainant who is a child, a person with a disability or an older person, in order to protect them against further acts of domestic violence;

*(c)* prescribe services to be provided to a complainant who is an adult person;

(*d*) provide for a public education and communication initiative to educate the public on the provisions of this Act, the obligations of the relevant functionaries, including the South African Police Services, in respect of domestic violence incidents and institutions where complaints may be lodged against a functionary or a member of the South African Police Service;

*(e)* provide for the designation of accredited shelters;

*(f)* prescribe standards and minimum conditions for the provision of services in accredited shelters; and

*(g)* prescribe the manner in which a risk assessment must be conducted in respect of a complainant to provide or refer the complainant for further services.”.

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

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

 “**Regulations**

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

*(a)* any form required to be prescribed in terms of this Act;

**[*(b)* any matter required to be prescribed in terms of this Act; and**

***(c)* any other matter which the Minister deems necessary or expedient to be prescribed in order to achieve the objects of this Act.**

 **(2) Any regulation made under subsection (1)—**

***(a)* must be submitted to Parliament prior to publication thereof in the *Gazette*;**

***(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.]**

*(b)* financial assistance to be provided by the State—

(i) to a complainant or respondent who does not have the means to pay for fees of any service in terms of this Act; and

 (ii) to a witness who attends any proceedings in terms of this Act;

*(c)* the granting of legal aid at State expense in appropriate cases in consultation with the Legal Aid South Africa to a child to assist him or her with an application for a protection order in terms of this Act;

*(d)* any matter required to be prescribed in terms of this Act; and

*(e)* any other matter which the Minister deems necessary or expedient to be prescribed in order to achieve the objects of this Act.

 (2) Any regulation made under subsection (1)—

*(a)* must be submitted to Parliament prior to publication thereof in the *Gazette*;

*(b)* which may result in expenditure for the State, must be made in consultation with the Cabinet member responsible for finance; and

*(c)* may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and on conviction is liable to a fine or to imprisonment for a period not exceeding one year.”.

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

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

" **Amendment of laws**

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

**Short title and commencement**

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

**SCHEDULE**

**LAWS AMENDED**

(Section 20)

| **No. and year of law** | **Short title** | **Extent of repeal or amendment** |
| --- | --- | --- |
| Act No. 51 of1977 | CriminalProcedure Act,1977 | Section 40 of the Criminal Procedure Act, 1977, is hereby amended by—*(a)* the substitution for paragraph *(q)* of subsection (1) of thefollowing paragraph:‘‘*(q)* who is reasonably suspected of having committed an act of domestic violence as contemplated in section 1 of the Domestic Violence Act, 1998, which constitutes—(i) an offence in respect of which violence is an element **[.]**; or(ii) an offence, other than the offence referred to in subparagraph (i); or’’; and*(b)* by the addition to subsection (1) of the following paragraph:‘‘*(r)* who is reasonably suspected of having contravened section 17(1)*(a)* of the Domestic Violence Act, 1998.’’. |
| Act No. 60 of 2000 | Firearms Control Act, 2000  | Schedule 2 to the Firearms Control Act, 2000 is hereby amended by the substitution for paragraph *(e)* of Item 7 of the following paragraph:“*(e)* in terms of **[section 18(1)*(a)* of]** the Domestic Violence Act, 1998 (Act No. 116 of 1998) or the Protection from Harassment Act, 2011 (Act No. 17 of 2011).”. |
| Act No. 17 of 2011 | Protection from Harassment Act, 2011 | The Protection from Harassment Act, 2011 is hereby amended by—1. the substitution for subsection (2) of section 1 of the following subsection:

“(2) This Act does not prevent a person who may apply for relief against harassment **[or stalking]** in terms of the Domestic Violence Act, 1998 ([Act No. 116 of 1998](http://dojcdnoc-jutas/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bstatreg%7d&xhitlist_q=%5bfield%20folio-destination-name:'a116y1998'%5d&xhitlist_md=target-id=0-0-0-179873)), from applying for relief in terms of this Act.”; and1. the substitution for paragraph *(a)* of subsection (5) of section 10 of the following paragraph:

“*(a)* Provided that the complainant is not in possession of or not in the process of applying for a protection order against harassment **[or stalking]** as provided for in the Domestic Violence Act, 1998 ([Act No. 116 of 1998](http://dojcdnoc-jutas/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bstatreg%7d&xhitlist_q=%5bfield%20folio-destination-name:'a116y1998'%5d&xhitlist_md=target-id=0-0-0-179873)), the court may not refuse—1. to issue a protection order; or
2. to impose any condition or make any order,

which it is competent to impose or make under this section, merely on the grounds that other legal remedies are available to the complainant.”. |
| Act No. 10 of 2013 | Superior Courts Act, 2013 | The Superior Courts Act, 2013 is hereby amended by the substitution for subsection (1) of section 47 of the following subsection:“**[Notwithstanding any other law]** Except for an application made in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998), no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be.”. |

1. Children's Act is used in the definitions of "physical abuse" and "sexual abuse" and clause 5, recommends the insertion of this definition. [↑](#footnote-ref-1)
2. The definition of "complainant" in section 1 of the DVA, includes any child in the care of the complainant. [↑](#footnote-ref-2)
3. The definition of "complainant" in section 1 of the DVA, includes any child in the care of the complainant. [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. [13] It is clear from the cases that reason to believe that a state of affairs exists involves an objectively justifiable belief - 'a belief based on reason' in which a 'factual basis for the reason' exists. There must, in other words, be 'grounds, or facts, which give rise to, or form the basis of, the belief' and they must be reasonable grounds. That the belief must be objectively rational (even, I venture to suggest, when more subjective language is used in a statute) is now a constitutional imperative, flowing from the founding value of the rule of law - See NDPP v Stander and Others 2008 (1) SACR 116 (E), where the court referred to Hurley and Another v Minister of Law and Order and Another 1985 (4) SA 709 (D) at 716J - 717A and at 577I and 578D. In NDPP v Elran 2013 (1) SACR 429 (CC) the court remarked as follows: "[95] Section 38 does not require that, before the court may make a preservation order, it should have reasonable grounds to suspect that the property is an instrumentality of an offence or is proceeds of unlawful activities. It requires that the court be satisfied that there are reasonable grounds to believe that it is so. This choice of words is not without significance. The requirement of reasonable grounds to suspect is a lower threshold than the requirement of being satisfied that there are reasonable grounds to believe that the property is an instrumentality of an offence or is proceeds of unlawful activities. There is a difference between saying 'I suspect that', and saying 'I believe that'." Also see Divisional Commissioner of SA Police, Witwatersrand Area, and Others v SA Associated Newspapers Ltd and Another 1966 (2) SA 503 (A) at 511G-H; Ndabeni v Minister of Law and Order and Another 1984 (3) SA 500 (D) at 513C-D; and Control Magistrate, Durban v Azanian Peoples Organization 1986 (3) SA 394 at 400F. [↑](#footnote-ref-5)