

**SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON JUSTICE AND
CONSTITUTIONAL DEVELOPMENT IN THE NATIONAL ASSEMBLY ON THE
PROTECTION FROM HARASSMENT BILL (B1-2010)**

SUBMITTED ON BEHALF OF AVUSA LIMITED

30 September 2010

The Committee is requested to note that the parties wish to make an oral presentation during the hearings

**WEBBER WENTZEL
10 Fricker Road
Illovo Boulevard
JOHANNESBURG
2196
South Africa**

Ref: Dr Dario Milo / Duncan Wild

Tel: +27 11 530 5232

Fax: +27 11 530 6232

dario.milo@webberwentzel.com



Webber Wentzel
Attorneys

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1. Introduction

- 1.1 These submissions on the Protection from Harassment Bill B1-2010 (**"the Bill"**) are made on behalf of the Avusa Limited ("**Avusa**"). Avusa is the publisher of, amongst other titles, the *Sunday Times*, *The Times*, *Sowetan*, *Sunday World*, *Business Day*, *Financial Mail*, *The Herald*, *Weekend Post*, *Daily Dispatch*, *Saturday Dispatch*, and *I-Net Bridge*
- 1.2 The Bill is aimed at affording protection to victims of stalking who are not protected under the Domestic Violence Act¹ The Bill is the result of a investigation and report by the South African Law Reform Commission ("**SALRC**") into stalking behaviour (Project 130).
- 1.3 Avusa fully supports the objects of this Bill and understands that this area of South African law needs to be reformed in order to protect victims of stalking. However, Avusa submits that the Bill will have the unintended consequence of curtailing investigative reporting on matters of public interest, which will result in an infringement of rights to freedom of expression.
- 1.4 The SALRC Report on Stalking,² found that:³
- that existing civil and criminal law remedies are insufficient or inadequate to deal with what is understood to constitute stalking in the broader sense and as legislated for in comparative jurisdictions. After evaluating the above options the Commission recommended the enactment of specific legislation addressing stalking, with the primary focus on interrupting the pattern of behaviour before physical harm ensues.**
- 1.5 Avusa submits that the Bill may unintentionally go further than the objective of addressing current *lacunae* in the law in order to address the problem of stalking and may be used against journalists who, legitimately and in good faith, are pursuing a story of public interest, in the following ways:
- 1.6 Where a journalist acting in his or her professional capacity exceeds the bounds of reasonableness in gathering facts for a story, the law already provides remedies, for example, the right to privacy; the civil and criminal

¹ 116 of 1998.

² South African Law Reform Commission, **Report on Stalking** , Project 130, November 2006, ("**the SALRC Report**").

³ At para 2.9.



sanction available through *crimen iniuria* and possibly trespass; and an interdict where the victim fears harm or the violation of his or her rights. Moreover, the vast majority of newspapers are bound by the Press Code, and broadcasters by the Broadcasting Complaints Commission of South Africa's Code, which police ethical breaches by journalists, including in relation to news gathering.

- 1.7 We structure our submissions as follows:
 - 1.7.1 first, we examine the South African legal background against which the Bill's constitutionality must be assessed;
 - 1.7.2 secondly, we set out the structure of the Bill and analyse the aspects of the Bill that Avusa contends lead to its over-breadth examining where relevant foreign authority;
 - 1.7.3 finally, we show how the problematic effects of the Bill might be ameliorated.



The right to freedom of expression and of the media

1.8 Freedom of expression is protected by section 16(1) of the Constitution:

Everyone has the right to freedom of expression which includes –

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas ...

1.9 The importance of freedom of expression to an open and democratic society has been reiterated by our courts on numerous occasions. It suffices to mention one of the leading pronouncements of the Constitutional Court, its decision in **South African National Defence Union v Minister of Defence & Another**:⁴

Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally.⁵

1.10 It should also be emphasised that freedom of the media – expressly protected by section 16(1)(a) of the Constitution – is inextricably connected with the right of the public to receive information and ideas (protected in section 16(1)(b) of the Constitution). It is an aspect of the right to freedom of expression that has received specific emphasis in the judgments of our highest courts:

1.10.1 in **Khumalo v Holomisa**,⁶ the Constitutional Court stated as follows:

The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected;⁷

⁴ 1999 (4) SA 469 (CC).

⁵ At para 7. The Supreme Court of Appeal has similarly attached great prominence to the right to freedom of expression: see eg **National Media Ltd v Bogoshi** 1998 (4) SA 1195 (SCA) at 1206.

⁶ 2002 (5) SA 401 (CC).

⁷ At para 22.



1.10.2 the Supreme Court of Appeal has also articulated the importance of media freedom in our democracy. In the **Bogoshi** case, the Court held that:⁸

[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens ...

1.10.3 In the recent case of ***Brummer v Minister of Social Development and Others (South African History Archives Trust and South African Human Rights Commission as Amici Curiae)***,⁹ Ncgobo J (as he then was) held:

The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state.¹⁰

⁸ **Bogoshi** (above) at 1209.

⁹ 2009 (6) SA 323 (CC).

¹⁰ At para 63 (footnotes omitted).



2. The problematic aspects of the Bill for journalism

2.1 The structure of the Bill

2.1.1 "Harassment" is the central concept of the Bill and is described in clause 1(1) of the Bill as meaning:

directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—

(a) following, watching, pursuing or accosting of 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) 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) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving it where it will be found by or given to, or brought to the attention of, the complainant or a related person;

2.1.2 The term "harm" is also defined broadly in clause 1(1) of the Bill as **"any mental, psychological, physical or economic harm."**

2.1.3 The definition of harassment is the fundamental concept underlying the Bill, and describes the conduct which the Bill seeks to guard against. In Clause 2(1) of the Bill:

[a] complainant may in the prescribed manner apply to the court for a protection order against harassment.

2.1.4 Importantly clause 3 provides that an application for an interim protection order can be brought on an urgent basis and at any time, and without giving notice to the other side, provided the complainant can show that the purpose of the order would not be served if such notice was given. The court may, however, order that the application be served on the respondent, though such orders are bound to be rare given the nature of the conduct being prohibited.¹¹

¹¹ See clause 3(4).



- 2.1.5 The court may then issue an interim order if:¹²
- (a) the respondent is engaging or has engaged in harassment;
 - (b) harm is being or may be suffered by the complainant or a related person as a result of that conduct if a protection order is not issued immediately; and
 - (c) the protection to be accorded by the interim order is likely not to be achieved if prior notice of the application is given to the respondent,
- 2.1.6 This interim order is then served upon the respondent, and in the typical case it will only be at this stage that the respondent will likely be made aware of the order, and the respondent is then called upon to show reasons on the return day, why the interim order should not be made final, and thus the respondent bears the onus.
- 2.1.7 Importantly, a court "**must**", issue a warrant for the arrest of the respondent on granting an interim or final protection order in terms of clause 8(1) of the Bill. This warrant is suspended subject to the compliance of the respondent with the terms of the order.
- 2.1.8 The concern of Avusa is that the definition of "**harassment**" is potentially broad enough to ensnare the newsgathering and publishing activities of journalists. Some examples follow:
- 2.1.8.1 a journalist may email, telephone, text and/or perhaps seek to meet a particular person in order to put certain allegations to a person for the purposes of investigating a story and particularly offering a right of reply, or simply to seek to interview that person for a story. If such a person deliberately seeks to avoid the journalist but the journalist persists in attempting to contact this person, the subject of the attention of the journalist may turn to the courts to seek a protection order under this harassment legislation;
 - 2.1.8.2 the publication of articles might be argued by the subject of the articles to constitute harassment, for example if a newspaper publishes a series of articles that expose a person for committing

¹² Clause 3(2).



a crime. This will involve engaging in a course of conduct that may be argued by the subject of the story to inspire an apprehension of harm in him or her (given the broad definition of “harm” in the Bill). There is some support for the proposition that the publication of a series of articles could conceivably fall within an harassment offence in England in the case of **Thomas v News Group Newspapers Ltd.**¹³

- 2.1.8.3 a journalist engaged in an undercover investigation may well be required to follow the subject of the investigation in the public interest in order to verify claims, for instance, that a public official is a cocaine addict and purchases drugs from a drug dealer.
- 2.1.9 In all these instances, the complainant could approach the court with no notice to the journalist and, if he or she makes out a *prima facie* case, will obtain a protection order which may well have the effect of stopping an investigation in its tracks. The court would typically not have had the opportunity at that stage to weigh this evidence against the evidence that the journalist might present (particularly as to whether the conduct is reasonable in the circumstances). Even if the journalist overturns the order on the return day, the story will have been delayed and the threat of such an order may well create a chilling effect on the publication of certain stories;
- 2.1.10 The Bill may therefore be interpreted in a manner that may allow a target of press or broadcast attention to frustrate legitimate journalistic investigations by providing such a person with a weapon to stop such an investigation. Avusa readily accepts that this can never have been the intention of the drafters of the legislation. It simply requests that this be clarified with sufficiently curative wording which we propose below:
- 2.1.11 Clause 5 of the Bill deals with when proceedings may not take place in open court as well with restrictions on the publication of information. We produce clause 5 below for ease of reference:

¹³ [2002] E.M.L.R. 4. An application was brought under the English Act against the *Sun*, a tabloid newspaper, by a woman mentioned in a series of articles which the court found to have caused her to receive hate mail.



(1) The court may, of its own accord or at the request of the complainant or related person, if it is of the opinion that it would be in the interests of the administration of justice that the proceedings in question be held behind closed doors, direct that—

(a) the public or any class thereof may not be present at those proceedings or any part thereof;

(b) the identity or address of any person may not be revealed; or

(c) no information relating to the proceedings be published in any manner whatsoever.

(2) Where a witness in proceedings under this Act is a child, the court may direct that no person, other than the witness and his or her parent or guardian or a person *in loco parentis*, may be present at the proceedings, unless that person's presence is necessary in connection with the proceedings or that person is authorised by the court to be present.

(3) Nothing in this section limits any other power of the court to hear proceedings *in camera* or to exclude any person from attending those proceedings.

2.1.12 Avusa submits that clause 5 fails to give proper effect to the principle of open justice. It is necessary at this juncture to consider the potency of this principle in our law, before examining how clause 5 could be argued to fall foul of this jurisprudence.

2.1.13 The open justice principle was recognised in the South African common law even before the enactment of the Constitution.¹⁴ It was first alluded to by the Constitutional Court in **S v Mamabolo**.¹⁵

Since time immemorial and in many divergent cultures it has been accepted that the business of adjudication concerns not only the immediate litigants but is a matter of public concern which, for its credibility, is done in the open where all can see. Of course this openness seeks to ensure that the citizenry know what is happening, such knowledge in turn being a means towards the next objective: so that the people can discuss, endorse, criticise, applaud or castigate the conduct of their courts and, ultimately such free and frank debate about judicial proceedings serve more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and

¹⁴ See e.g. **Botha v Minister van Wet en Order en Andere** 1990 (3) SA 937 (W).

¹⁵ **Mamabolo** (above) at paras 28-9.



effectiveness, three of the more important aspirational attributes prescribed for the judiciary by the Constitution

However, such vocal public scrutiny performs another important constitutional function. It constitutes a democratic check on the judiciary. The judiciary exercises public power and it is right that there be an appropriate check on such power.¹⁶

2.1.14 Avusa submits that the provisions in clause 5(1) of the Bill that the proceedings may be closed to the general public or any part thereof, that a person's identity may not be revealed and that the court may order that no information concerning the proceeding might be published, while defensible in some instances, does not take due account of the principle of open justice.

2.2 **Curing the problematic aspects of the Bill**

2.2.1 Avusa submits that three amendments to the Bill would address the difficulties we have outlined. These are:

2.2.1.1 amending the definition of "harassment" to require intention;

2.2.1.2 including an exclusion in the definition of harassment in order to exclude legitimate and lawful action;

2.2.1.3 adding a subsection to clause 5 which allows interested parties to make submissions to the court before the court orders that the proceedings should be closed, that the identity of person should be not be disclosed or that information concerning the proceedings should not be published, or alternatively once the closure or reporting restriction has come to his or her attention..

Strict liability

2.2.2 As mentioned above at paragraph 2.1.1, "harassment" means:

¹⁶ For equivalent foreign law, see **Richmond Newspapers Inc v Virginia** 448 US 555 (1980) at 570-2; **Edmonton Journal v Attorney General for Alberta, Attorney General of Canada and Attorney General of Ontario** [1989] 2 SCR 1326, 64 DLR (4th) 577; **Named Person v Vancouver Sun** 2007 SCC 43.



directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person...

- 2.2.3 Although this section requires the belief of the complainant to be reasonable, there is no requirement of either intent or negligence regarding the respondent. In other words it appears that the section contemplates strict liability. There is also no fault standard set out for the violation of a protection order, so there is strict liability on two levels: whether an action constitutes harassment in the first place, and on whether a person is liable for the offence of violating a protection order.
- 2.2.4 It is a general principle in South African common law that conduct is not unlawful unless it is committed with a guilty mind (*mens rea* or fault).¹⁷
- 2.2.5 This established principle of criminal justice is generally expressed in the maxim *actus non facit reum, nisi mens sit rea* (the act is not wrongful unless the mind is guilty).¹⁸ In the Constitutional Court's decision in **S v Coetzee**,¹⁹ the Court affirmed the pre-eminence of fault as a requirement for criminal liability. O'Regan J held that it is a fundamental principle of democratic societies that "**people who are not at fault should not be deprived of their freedom**".²⁰
- 2.3 Our law presumes that the legislature intended *mens rea* to be an element of liability.²¹ The clearest statement of this presumption is to be found in the Appellate Division's decision in **S v Arenstein**.²²

The general rule is that *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary not to have intended innocent violations thereof to be punishable.²³

- 2.3.1 However, the presumption may generally be rebutted - and hence strict liability imposed - in three circumstances:

¹⁷ J Burchell *Principles of Criminal Law* (3rd ed, 2005) at 151.

¹⁸ Burchell at 152.

¹⁹ **S v Coetzee** 1997 (3) SA 527 (CC).

²⁰ At para 176.

²¹ Burchell at 546.

²² 1964 (1) SA 361 (A).

²³ At 365.



- 2.3.1.1 if the legislature intended the offence to be one of strict liability;
 - 2.3.1.2 in the context of 'regulatory' offences; and
 - 2.3.1.3 in the context of what is referred to as 'public welfare' offences.²⁴
- 2.4 Avusa is concerned that the offences as referred to above could be argued by the prosecution to import strict liability on the basis that the offence is a public welfare offence (for the well-being of the community).

2.5 We note that in other jurisdictions the requirement of intent is made clear.

The position in the England and Canada

2.5.1 The Protection from Harassment Act 1997 ("**the English Act**") performs the function that the Bill seeks to, protect persons from stalking and similar conduct.

2.5.2 Section 1 of the English Act prohibits a person from pursuing "**a course of conduct –**

(a) which amounts to the harassment of another, and

(b) which he knows or ought to know amounts to harassment of another. (our emphasis)

2.5.3 In Canada, stalking is regulated under The Domestic Violence and Stalking Act²⁵ ("**the Canadian Act**") The Canadian Act states:²⁶

Stalking occurs when a person, without lawful excuse or authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, repeatedly engages in conduct that causes the other person reasonably, in all the circumstances, to fear for his or her own safety. (our emphasis)

2.5.4 It is therefore clear that both these countries the law specifies that a person must either knowingly or negligently act in order for his or her actions to amount to stalking or harassment.

²⁴ Public welfare offences include laws regulating the content and purity of foodstuffs, safety, health and well-being of the community.

²⁵ C.C.S.M. c. D93.

²⁶ Section 2(2)



- 2.6 Avusa submits that making it clear that a person cannot, without acting either intentionally or negligently, obtain a protection order against him or her, would ameliorate the potentially negative effect of the Bill on the media.

A limitation on the definition of harassment

- 2.7 Importantly the Bill fails to provide any limitation on what might constitute harassment, other than that the person must be acting "**unreasonably**".²⁷ Although this allows a respondent to argue that his or her actions were reasonable, there is no guidance as to how to evaluate this and in any event, most applications for protection orders are likely to be ex parte, meaning a magistrate will have to consider the requirement of reasonableness without hearing the respondent's version.
- 2.8 In South African law other analogous areas of law include defences for publishing material in the public interest. For instance, in the law of defamation and privacy, material can be published that is of public interest. The English Act includes specific exclusions from the definition of harassment, where the respondent shows was pursued.²⁸

(a) ... for the purpose of preventing or detecting crime;

(b) ... under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any condition or requirement imposed by any person under any enactment; or

(c) ...that in the particular circumstances the pursuit of the course of conduct was reasonable.

- 2.9 The Canadian Act also includes in its definition of stalking that the action must be "**without lawful excuse or authority**",²⁹ to clarify the basis on which a violation will take place.
- 2.10 Avusa submits that the Bill should be amended to include an exclusion to definition of harassment, explicitly laid out, that will prevent the Bill being used against the media in order to obstruct it from reporting on matters of public interest (albeit that this is an objective not intended by the legislature).

²⁷ Clause 1(1), definition of "harassment".

²⁸ Section 1(3) of the English Act.

²⁹ Section 2(2) of the Canadian Act



Avusa has suggested such exclusion in the attached marked-up version of those provisions of the Bill which are relevant.



3. Conclusion

- 3.1 Avusa submits that this over-breadth will unnecessarily limit freedom of expression and undermine investigative journalism, and the Bill also falls foul of the principle of open justice.
- 3.2 We have submitted that the Bill is undoubtedly a useful and necessary tool to protect innocent persons from victimisation and stalking behaviour. However, the Bill can be interpreted to apply to a broader set of activities, including those of journalists reporting on matters in the public interest, and even a series of articles focusing on a particular person. Avusa submits that in order the Bill should therefore be amended in order to protect the interests of the vulnerable in society who need protection without unnecessarily and unintentionally limiting the rights to freedom of expression or the principle of open justice.

Dr Dario Milo and Duncan Wild

WEBBER WENTZEL ATTORNEYS

on behalf of Avusa Limited

30 September 2010



REPUBLIC OF SOUTH AFRICA

PROTECTION FROM HARASSMENT BILL

*(As introduced in the National Assembly (proposed section 75);
explanatory summary of Bill published in Government Gazette No. 32922 of
1 February 2010)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 1—2010]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP BESKERMING TEEN TEISTERING

*(Soos ingedien by die Nasionale Uergadering (voorgestelde artikel 75);
verduidelikende memorandum in Staatskoerant No. 32922 van 1 Februarie 2010
gepubliseer)
(Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

(MINISTER VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W 1—2010]

ISBN 978-1-77037-623-6

BILL

To provide for the issuing of protection orders against harassment; to amend the Criminal Procedure Act, 1955, so as to provide for an increase of the amount which may be fixed by a magistrate in respect of a recognisance as security to keep the peace; to effect consequential amendments to the Criminal Procedure Act, 1977; to amend the Domestic Violence Act, 1998, so as to provide a mechanism to subpoena witnesses to attend proceedings in terms of that Act; to effect consequential amendments to the Firearms Control Act, 2000; and to provide for matters connected therewith.

PREAMBLE

SINCE the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance;

AND IN ORDER to—

- (a) afford victims of harassing behaviour an effective remedy against such behaviour; and
- (b) introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act,

PARLIAMENT of the Republic of South Africa therefore enacts as

f o l l o w s : —

Definitions and application of Act

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

“**arm**” means any firearm or any handgun or airgun or ammunition as defined in section 1(1) of the Firearms Control Act, 2000 (Act No. 60 of 2000);

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

“**clerk of the court**” means a clerk of the court appointed in terms of section 13 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and includes an assistant clerk of the court so appointed; 10

“**complainant**” means any person who alleges that he or she is being subjected to harassment;

“**court**” means any magistrate’s court for a district referred to in the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

“**dangerous weapon**” means any object, other than a firearm, which is likely to 15 cause serious bodily injury if it were used to commit an assault;

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

“**harassment**” means directly or indirectly engaging in conduct that [the respondent knows or ought to know](#) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably— 20

- (a) following, watching, pursuing or accosting of 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) 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) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving it where it will be found by or given to, or brought to the attention of, the complainant or a related person;

A course of conduct shall not amount to a harassment if the person who pursued it shows:

- (a) that it was pursued for the purpose of detecting or preventing crime;
- (b) that it was pursued to reveal a threat to public safety or the environment;
- (c) that it was pursued to reveal an undue advantage is being given to anyone in a competitive bidding process;
- (d) that it was pursued in order to comply with any duty or obligation imposed by law; or
- (e) that in the particular circumstances the course of conduct was reasonable.

“**member of the South African Police Service**” means any member as defined in section 1 of the South African Police Service Act, 1995 (Act No. 68 of 1995); “**Minister**” means the Cabinet member responsible for the administration of justice; 15

“**peace officer**” means a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);

“**prescribed**” means prescribed in terms of a regulation made under section 16;

“**related person**” means any member of the family or household of a complainant, or any other person in a close relationship to the complainant; 20

“**respondent**” means any person against whom proceedings are instituted in terms of this Act;

“**sheriff**” means a person appointed as a sheriff in terms of the Sheriffs Act, 1986 (Act No. 90 of 1986); and

“**this Act**” includes the regulations. 25

(2) This Act does not prevent a person who may apply for relief against harassment or stalking in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998), from applying for relief in terms of this Act.

Application for protection order

2. (1) A complainant may in the prescribed manner apply to the court for a protection order against harassment. 30

(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 35
- (b) the right to also lodge a criminal complaint against the respondent of *crimen injuria*, assault, trespass, extortion or any other offence which has a bearing on the *persona* or property of the complainant or related person.

(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 another person who has a material interest in the well-being of the complainant or related person. 40

(b) An application referred to in paragraph (a) must be brought with the written consent of the complainant, except in circumstances where the complainant is a person who, in the opinion of the court, is unable to do so. 45

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

(5) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court has a reasonable belief that the complainant or a related person is suffering or may suffer 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 must 55 immediately submit the application and affidavits to the court.

Consideration of application and issuing of interim protection order

3. (1) The court must as soon as is reasonably possible consider an application submitted to it in terms of section 2(7) and may, for that purpose, consider any additional 6 evidence it deems fit, including oral evidence or evidence by affidavit, which must form part of the record of proceedings.

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

- (a) the respondent is engaging or has engaged in harassment;
- (b) harm is being or may be suffered by the complainant or a related person as a 5 result of that conduct if a protection order is not issued immediately; and
- (c) the protection to be accorded by the interim order is likely not to be achieved if prior notice of the application is given to the respondent,

the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings referred to in subsection (1), issue an interim protection order against 10 the respondent, in the prescribed manner.

(3) (a) Upon the issuing of an interim protection order the court must direct that the interim protection order be served on the respondent in the prescribed manner by the clerk of the court, sheriff or peace officer identified by the court.

(b) A copy of the application referred to in section 2(1) and the record of any evidence 15 noted in terms of subsection (1) must be served on the respondent together with the interim protection order.

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

(4) If the court does not issue an interim protection order in terms of subsection (2), 20 the court must direct that the certified copies of the application concerned and any supporting affidavits be served on the respondent in the prescribed manner by the clerk of the court, a sheriff or a peace officer identified by the court, 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. 25

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

(6) An interim protection order has no force and effect until it has been served on the 30 respondent.

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

- (a) a certified copy of the interim protection order; and
- (b) the original warrant of arrest referred to in section 8(1)(a), 35

to be served on the complainant.

Attendance of witnesses

4. (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, if the evidence of that person appears to the court essential to the just decision of the case. 40

(2) A witness who is subpoenaed as provided for in subsection (1), must attend the proceedings and remain in attendance at the proceedings, and a person who is in attendance at any proceedings under this Act, though not subpoenaed as a witness, and who is warned by the court to remain in attendance at the proceedings, must remain in attendance at the proceedings, unless he or she is excused by the court. 45

(3) Any person who is subpoenaed to attend proceedings as provided for in subsection (1) 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; or 50
- (c) remain in attendance at those proceedings as so adjourned,

is guilty of an offence referred to in section 15(3).8

Circumstances in which proceedings may not take place in open court and publication of information

5. (1) The court may, of its own accord or at the request of the complainant or related person, if it is of the opinion that it would be in the interests of the administration of justice that the proceedings in question be held behind closed doors, direct that, subject to an application as contemplated in (5) below— 5

- (a) the public or any class thereof may not be present at those proceedings or any part thereof;
- (b) the identity or address of any person may not be revealed; or
- (c) no information relating to the proceedings be published in any manner whatsoever. 10

(2) The court may consider the oral or written submissions of any interested party (including the media) in considering whether to make a direction as contemplated in (1) above.

~~(1)~~(3) Where a witness in proceedings under this Act is a child, the court may direct that no person, other than the witness and his or her parent or guardian or a person *in loco parentis*, may be present at the proceedings, unless that person's presence is necessary in connection with the proceedings or that person is authorised by the court to be present. 15

(4) Nothing in this section limits any other power of the court to hear proceedings *in camera* or to exclude any person from attending those proceedings.

(5) Any person may apply to the court for an order entitling that person to be present at the proceedings and to publish the identity of any person involved in such proceedings and any information relating to such proceedings.-

Issuing of protection order

6. (1) If the respondent does not appear on a return date referred to in section 3(3) or (4), and if the court is satisfied that— 20

- (a) proper service has been effected on the respondent; and
- (b) the application contains *prima facie* evidence that the respondent has engaged or is engaging in harassment,

the court must issue a protection order in the prescribed form.

(2) If the respondent appears on the return date and opposes the issuing of a protection 25 order, the court must proceed to hear the matter and—

- (a) consider any evidence previously received in terms of section 3(1); and
- (b) consider any further affidavits or oral evidence as it may direct, which must form part of the record of proceedings.

(3) The court may, of its own accord or at the request of the complainant or related 30 person, order that in the examination of those 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 whom he or she is alleged to have harassed; and
- (b) must put any question to the person by stating the question to the court, and 35 the court is to repeat the question accurately to the person.

(4) The court must, after a hearing as provided for in subsection (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has engaged or is engaging in harassment.

(5) On issuing a final protection order, the court must direct that— 40

- (a) the original of that order must be served on the respondent; and
- (b) a certified copy of that order, and the original warrant of arrest referred to in section 8(1)(a), must be served on the complainant,

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

(6) The clerk of the court must immediately, in the prescribed manner, forward 45 certified copies of any protection order and of the warrant of arrest referred to in section 8(1)(a) to the police station of the complainant's choice.

(7) Subject to section 7(4), a protection order issued in terms of this section remains in force until it is set aside, and the execution of that order is not automatically suspended upon the noting of an appeal against the order. 50

Court's powers in respect of protection order

7. (1) The court may, by means of a protection order, including an interim protection order, prohibit the respondent from—

- (a) engaging in or attempting to engage in harassment;
- (b) enlisting the help of another person to engage in harassment; or
- (c) committing any other act as specified in the protection order.

(2) The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety or well-being of the complainant or related person, including an order—

- (a) to seize any arm or dangerous weapon in the possession or under the control of the respondent as provided for in section 9;
- (b) that a peace officer must accompany the complainant or related person to a specified place to assist with arrangements regarding the collection of personal property; or
- (c) directed to the station commissioner of the relevant police station that the matter be investigated with the view to the possible institution of a criminal prosecution against the respondent.

(3) (a) The physical, home and work address of the complainant or related person must be omitted from the protection order, unless the nature of the terms of the order necessitates the inclusion of the address. 15

(b) The court may issue any directions to ensure that the complainant's or related person's physical address is not disclosed in any manner which may endanger the safety or well-being of the complainant or related person.

(4) (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 20 Domestic Violence Act, 1998 (Act No. 116 of 1998), 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. 25

(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, the court must order that that provision remains in force for the limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of that law. 30

Warrant of arrest upon issuing of protection order

8. (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 35
- (b) suspending the execution of that warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.

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

(3) The court may issue the complainant with a second or further warrant of arrest, if 40 the complainant files an affidavit in the prescribed form in which it is stated that the warrant is required for his or her protection and that the existing warrant of arrest has been—

- (a) executed and cancelled; or
- (b) lost or destroyed. 45

(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 specified 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 of the South African Police Service concerned that, 50 subject to subsection (5), there are reasonable grounds to suspect that the complainant or related person is suffering or may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must immediately arrest the respondent for allegedly committing the offence referred to in section 15(1)(a).

(c) If the member of the South African Police Service concerned is of the opinion that 55 there are insufficient grounds for arresting the respondent in terms of paragraph (b), he

or she must immediately hand to the respondent a written notice in the prescribed form, 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 on the date and at the time 5 specified in the notice, on a charge of committing the offence referred to in section 15(1)(a); and
- (iii) contains a certificate signed by the member of the South African Police Service concerned to the effect that he or she handed the original notice to the respondent and that he or she explained its import to the respondent. 10

(d) The member of the South African Police Service must 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 is *prima facie* proof that the original was handed to the respondent specified therein.

(5) In considering whether or not the complainant or related person is suffering or may 15 suffer imminent harm, as provided for in subsection (4)(b), the member of the South African Police Service must take into account the—

- (a) risk to the safety or well-being of the complainant or related person;
- (b) seriousness of the conduct comprising an alleged breach of the protection order; 20
- (c) length of time since the alleged breach occurred; and
- (d) nature and extent of the harm previously suffered by the complainant or related person.

(6) Whenever a warrant of arrest is handed to a member of the South African Police Service in terms of subsection (4)(a), the member of the South African Police Service 25 must inform the complainant of his or her right simultaneously to lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

Seizure of arms and dangerous weapons

9. The court may order a member of the South African Police Service to seize any arm 30 or dangerous weapon in the possession of or under the control of a respondent and direct the clerk of the court to refer a copy of the record of the evidence concerned to the National Commissioner of the South African Police Service for consideration in terms of the Firearms Control Act, 2000 (Act No. 60 of 2000).

Variation or setting aside of protection order

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10. (1) A complainant or a respondent may, upon 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.

(2) If the court is satisfied that circumstances have materially changed since the granting of the original protection order and that good cause has been shown for the 40 variation or setting aside of the protection order, it may issue an order to this effect: Provided that the court may not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.

(3) The clerk of the court must forward a notice as prescribed to the complainant and the respondent if the protection order is varied or set aside as provided for in subsection 45 (1).

Jurisdiction

11. (1) Any court within the area in which—

- (a) the complainant permanently or temporarily resides, carries on business or is employed; 50
- (b) the respondent permanently or temporarily resides, carries on business or is employed; or
- (c) the cause of action arose,

has jurisdiction to issue a protection order as provided for in this Act.

- (2) No specific minimum period is required in relation to subsection (1)(a).
~~(1)(3)~~ A protection order is enforceable throughout the Republic.

Service of documents

- 12.** Service of any document in terms of this Act must be effected immediately in the prescribed manner by the clerk of the court, the sheriff or a peace officer— 5
- (a) as directed by the court in terms of section 3(3)(a) or (4) or section 6(5); or
 - (b) as decided by the clerk of the court in terms of section 3(7).

Costs

- 13.** The court may only make an order as to costs against any party if it is satisfied that the party in question has acted frivolously, vexatiously or unreasonably. 10

Appeal and review

- 14.** The provisions in respect of appeal and review as provided for in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and the Supreme Court Act, 1959 (Act No. 59 of 1959), apply to any proceedings in terms of this Act.

Offences 15

- 15.** (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; or
 - (b) in an affidavit referred to in section 8(4)(a), willfully makes a false statement in a material respect, 20
- is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.
- (2) Any person who reveals the identity or address of any person in contravention of section 5(1)(b) or who publishes any information in contravention of section 5(1)(c), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not 25 exceeding two years.
- (3) Any person who contravenes or fails to comply with section 4(3) is guilty of an offence and is liable on conviction to a fine or to imprisonment not exceeding three months.

Regulations 30

- 16.** (1) The Minister 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. 35
- (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 40 comply therewith is guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

Policy directives

- 17.** (1) (a) The National Director of Public Prosecutions referred to in section 10 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), in consultation with 45

the Minister and after consultation with the Directors of Public Prosecutions referred to in section 13 of that Act, must issue directives regarding the institution of prosecutions in respect of any offence arising out of this Act.

(b) The Minister must submit any directives issued in terms of paragraph (a) to Parliament before those directives take effect. 5

(2) (a) The National Commissioner of the South African Police Service referred to in section 6 of the South African Police Service Act, 1995 (Act No. 68 of 1995), must issue national instructions as provided for in section 25 of that Act, with which its members must comply in the execution of their functions in terms of this Act, and any instructions so issued must be published in the *Gazette*. 10

(b) The Cabinet member responsible for policing must submit any national instructions issued in terms of paragraph (a) to Parliament before those instructions take effect.

(3) (a) The Director-General: Justice and Constitutional Development must issue directives which clerks of the court must comply with in the execution of their functions 15 in terms of this Act, and any directives so issued must be published in the *Gazette*.

(b) The Director-General: Justice and Constitutional Development must submit any directives issued in terms of paragraph (a) to Parliament before those directives take effect.

(4) The directives and instructions referred to in this section must provide that 20 adequate disciplinary steps will be taken against a prosecutor or police official who fails to comply with any directive or instruction, as the case may be.

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

Repeal and amendment of laws

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18. The laws specified in the Schedule are hereby amended to the extent set out in the third column of the Schedule.

Short title and commencement

19. This Act is called the Protection from Harassment Act, 2010, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 3

