

REPUBLIC OF SOUTH AFRICA

PROTECTION FROM HARASSMENT BILL

*(As amended by the Portfolio Committee on Justice and Constitutional Development
(National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)



[B 1B—2010]

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BILL

To provide for the issuing of protection orders against harassment; 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 harassment 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 follows:—

Definitions and application of Act

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

“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;

“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);

“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, e-mail address with or without a corresponding IP address, web address with or without a corresponding IP address or other subscriber number);

“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 (Act No. 36 of 2005), to provide an electronic communications service;

“harassment” means directly or indirectly engaging in conduct that the respondent knows or ought to know—

- (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—

- (i) 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;
 - (ii) 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
 - (iii) 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 them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or
- (b) amounts to sexual harassment of the complainant or a related person;
- "harm"** means any mental, psychological, physical or economic harm;
- "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;
- "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 19;
- "related person"** means any member of the family or household of a complainant, or any other person in a close relationship to the complainant;
- "respondent"** means—
- (a) any person against whom proceedings are instituted in terms of this Act; and
 - (b) for the purposes of sections 4, 5 and 6, any person who is reasonably suspected of engaging in or who has engaged in harassment of the complainant or a related person;
- "sexual harassment"** means any—
- (a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;
 - (b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;
 - (c) implied or expressed promise of reward for complying with a sexually-oriented request; or
 - (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request;
- "sheriff"** means a person appointed as a sheriff in terms of the Sheriffs Act, 1986 (Act No. 90 of 1986);
- "this Act"** includes the regulations; and
- "weapon"** means—
- (a) 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); and
 - (b) any object, other than that which is referred to in paragraph (a), which is likely to cause serious bodily injury if it were used to commit an assault.
- (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.

(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 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.

(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. 5

(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. 10

(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. 15

(7) The application and affidavits must be lodged with the clerk of the court who must 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 evidence it deems fit, including oral evidence or evidence by affidavit, which must form part of the record of proceedings. 20

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

(a) the respondent is engaging or has engaged in harassment; 25

(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 protection 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 the respondent, in the prescribed manner. 30

(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. 35

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

(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. 40

(4) If the court does not issue an interim protection order in terms of subsection (2), 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. 45

(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. 50

(6) An interim protection order is of force and effect from the time it is issued by the court and the existence thereof has been brought to the attention of the 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— 55

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

(b) the original warrant of arrest referred to in section 11(1)(a), to be served on the complainant in the prescribed manner.

Electronic communications service provider to furnish particulars to court

4. (1) If an application for a protection order is made in terms of section 2 and the court is satisfied in terms of section 3(2) that a protection order must be issued as a result of the harassment of the complainant or a related person by means of electronic communications or electronic mail over an electronic communications system of an electronic communications service provider and the identity or address of the respondent is not known, 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 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 harassing electronic communications or electronic mail originated;
 - (ii) the name, surname, identity number and address of the respondent to whom the electronic communications identity number has been assigned;
 - (iii) any information which indicates that electronic communications or electronic mail were or were not sent from the electronic communications identity number of the respondent to the electronic communications identity number of the complainant; and
 - (iv) any other information that is available to an electronic communications service provider which may be of assistance to the court to identify the respondent or the electronic communications service provider which provides a service to the respondent.

(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.

(3) (a) The information referred to in subsection (1)(b)(i), (ii) and (iii) 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 either the respondent or complainant or related person; or
 - (bb) the requested information is not available in the records of the electronic communications service provider.

(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 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)(i) and (ii), consider the issuing of an interim protection order in terms of section 3(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)(iii) forms part of the evidence that a court may consider in terms of section 3(1).

(6) An electronic communications service provider must, at least 48 hours before 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.

(7) (a) The Director-General: Justice and Constitutional Development must, in consultation with the Director-General: Communications and the electronic communications service providers, compile and maintain a list of electronic communications service providers that can provide the courts with the information referred to in subsection (1)(b) and must contain the following particulars of each such electronic communications service provider: 5

- (i) The name and address (physical and postal address);
- (ii) the e-mail address;
- (iii) a telephone and facsimile number; and
- (iv) the names of persons who are responsible for providing the information referred to in subsection (1)(b). 10

(b) 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: Justice and Constitutional Development. 15

(c) The Director-General: Justice and Constitutional Development 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.

(8) The Minister may, after consultation with the electronic communications service providers, by notice in the *Gazette*, prescribe reasonable tariffs of compensation payable to electronic communications service providers for providing the information referred to in subsection (1)(b). 20

Court may order investigation to ascertain name and address of respondent

5. (1) If an application for a protection order is made in terms of section 2 and the court is satisfied in terms of section 3(2) that a protection order must be issued as a result of the harassment of the complainant or a related person and the identity or address of the respondent is not known, the court may— 25

- (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 the station commander of the relevant police station to investigate the matter with a view to determining the name and address of the respondent or obtaining any other information which may be required in order to identify or trace the respondent. 30

(2) If the court issues a direction in terms of subsection (1) the court must direct that the direction be served on the station commander of the relevant police station in the prescribed manner by the clerk of the court or sheriff identified by the court. 35

(3) (a) The information referred to in subsection (1)(b) must be provided to the court by means of an affidavit in the prescribed form within the time period indicated by the court.

(b) A station commander 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— 40

- (i) an extension of the period referred to in paragraph (a) on the grounds that the information cannot be provided timeously; or
- (ii) the cancellation of the direction on the grounds that, after a reasonable investigation of the matter, the South African Police Service is not in a position to determine the name and address of the respondent or obtain any other information which is required in order to identify or trace the respondent. 45

(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 affidavit from the station commander as it deems fit;
- (c) must give a decision in respect thereof; and
- (d) must inform the station commander, in the prescribed form and in the prescribed manner, of the outcome of the application. 50 55

(5) The court may, on receipt of an affidavit in terms of subsection (3)(a) which contains the information provided for in subsection (1)(b), consider the issuing of an interim protection order in terms of section 3(2) against the respondent on the date to which the proceedings have been adjourned.

Powers of members of South African Police Service to ascertain name and address of respondent

6. (1) A member of the South African Police Service—

- (a) may—
 - (i) if the complainant states under oath or affirmation that he or she intends applying for a protection order; and
 - (ii) if it appears from the information stated under oath or affirmation that there are reasonable grounds for believing that a respondent whose name and address are unknown to the complainant or a related person is engaging or has engaged in harassment of the complainant; or
- (b) must, in terms of a direction issued in terms of section 5(1)(b), in the manner set out in the national instructions issued in terms of section 20(2), investigate the matter with a view to determining the name and address of the respondent.

(2) A member of the South African Police Service may, in the manner set out in the national instructions issued in terms of section 20(2), request the respondent to furnish such member with his or her full name and address and any other information which the member may require in order to identify or trace the respondent.

(3) Information obtained by a member of the South African Police Service pursuant to an investigation in terms of subsection (1) must—

- (a) be kept by the member in the manner set out in the national instructions issued in terms of section 20(2); and
- (b) be provided to the court by means of an affidavit in the prescribed form when an application for a protection order is made by the complainant in terms of section 2.

Attendance of witnesses

7. (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 or object, if the evidence of that person or book, document or object appears to the court essential to the just decision of the case.

(2) A person 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.

(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 or object specified in the subpoena,
- is guilty of an offence referred to in section 18(3).

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

8. (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.

(4) Before the court acts in terms of subsection (1), (2) or (3), it may give any person who has an interest in the matter the opportunity to apply to the court—

- (a) to be present at the proceedings; or
- (b) to publish—
 - (i) the identity of any person involved in such proceedings; or
 - (ii) any information relating to such proceedings.

Issuing of protection order

9. (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—

- (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 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 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 directly cross-examine 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 the court is to repeat the question accurately to the person.

(4) Subject to subsection (5), 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) For the purpose of deciding whether the conduct of a respondent is unreasonable as referred to in paragraph (a) of the definition of “harassment”, the court must, in addition to any other factor, take into account whether the conduct, in the circumstances in question, was engaged in—

- (a) for the purpose of detecting or preventing an offence;
- (b) to reveal a threat to public safety or the environment;
- (c) to reveal that an undue advantage is being or was given to a person in a competitive bidding process; or
- (d) to comply with a legal duty.

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

- (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 11(1)(a), must be served on the complainant,

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

(7) The clerk of the court must immediately, in the prescribed manner, forward certified copies of any protection order and of the warrant of arrest referred to in section 11(1)(a) to the police station of the complainant’s choice.

(8) Subject to section 10(5), a protection order issued in terms of this section remains in force for a period of five years or such further period as the court may determine on good cause shown unless it is set aside, and the execution of that order is not automatically suspended upon the noting of an appeal against the order.

Court’s powers in respect of protection order

10. (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 on the respondent which it deems reasonably necessary to protect and provide for the safety or well-being of the complainant or related person.

(3) The court may order—

- (a) a member of the South African Police Service to—
 - (i) seize any weapon in the possession or under the control of the respondent as provided for in section 12;
 - (ii) accompany the complainant or related person to a specified place to assist with arrangements regarding the collection of personal property identified in the application for a protection order; or
- (b) the station commander of the relevant police station to investigate the matter with the view to the possible institution of a criminal prosecution against the respondent.

(4) (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.

(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.

(5) (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), 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, 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.

Warrant of arrest upon issuing of protection order

11. (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 that warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 10.

(2) The warrant referred to in subsection (1)(a) remains in force unless the protection order expires in terms of section 9(8), is set aside, or is cancelled after execution.

(3) The court may issue the complainant with a second or further warrant of arrest, if the complainant files an affidavit in the prescribed form in which it is stated that 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.

(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, subject to subsection (5), there are reasonable grounds to suspect that the complainant or related person is suffering harm 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 18(1)(a).

(c) If the member of the South African Police Service concerned is of the opinion that 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; 5
- (ii) calls upon the respondent to appear before a court on the date and at the time specified in the notice, on a charge of committing the offence referred to in section 18(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. 15

(5) In considering whether or not the complainant or related person is suffering harm or may 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; 20
- (b) seriousness of the conduct comprising an alleged breach of the protection order;
- (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. 25

(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 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. 30

Seizure of weapons

12. The court may order a member of the South African Police Service to seize any 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). 35

Variation or setting aside of protection order

13. (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 9 in the prescribed manner. 40

(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 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. 45

(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 (1).

Jurisdiction

14. (1) Any court within the area in which— 50

- (a) the complainant permanently or temporarily resides, 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, 55

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

Service of documents

15. 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), section 4(2), section 5(2) or section 9(6); or
 - (b) as decided by the clerk of the court in terms of section 3(7).

Costs

16. 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

17. 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. 15

Offences

18. (1) Notwithstanding the provisions of any other law, any person who—
- (a) contravenes any prohibition, condition, obligation or order imposed in terms of section 10(1) or (2); or
 - (b) in an affidavit referred to in section 11(4)(a), 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 8(1)(b) or who publishes any information in contravention of section 8(1)(c), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years. 25
- (3) Any person who contravenes or fails to comply with section 7(3) is guilty of an offence and is liable on conviction to a fine or to imprisonment not exceeding three months. 30
- (4) (a) Any electronic communications service provider or employee of an electronic communications service provider who—
- (i) 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 section 4(3)(a) or such extended period allowed by the court in terms of section 4(3)(b); 35
 - (ii) makes a false statement in an affidavit referred to in section 4(1)(b), (3)(b) or (4)(b) in a material respect; or
 - (iii) fails to comply with section 4(6), 40
- is guilty of an offence.
- (b) Any electronic communications service provider or employee of an electronic communications service provider who is convicted of an offence referred to in paragraph (a), is liable, in the case of—
- (i) an electronic communications service provider, to a fine not exceeding R10 000; or 45
 - (ii) an employee of an electronic communications service provider to a fine or to imprisonment for a period not exceeding six months.
- (5) Any person who in terms of section 6(2) is requested to furnish his or her name and address or any other information to a member of the South African Police Service and who fails to do so or who furnishes a false or incorrect name and address or other information, is guilty of an offence and is liable on conviction to a fine or imprisonment not exceeding six months. 50

Regulations

19. (1) The Minister may make regulations regarding—
- (a) any form required to be prescribed in terms of this Act;
 - (b) financial assistance to be provided by the State—
 - (i) to a complainant who does not have the means to pay the fees of any service in terms of this Act; or
 - (ii) to a witness who attends any proceedings in terms of this Act;
 - (c) any matter required to be prescribed in terms of this Act; and
 - (d) 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 be liable to a fine or to imprisonment for a period not exceeding one year.

Policy directives

20. (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 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.
- (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*.
- (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 in terms of this Act, and any directives so issued must be published in the *Gazette*.
- (b) The Minister 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 adequate disciplinary steps will be taken against a prosecutor, clerk of the court 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.

Amendment of section 102 of Act 60 of 2000, as amended by section 30 of Act 28 of 2006

21. Section 102 of the Firearms Control Act, 2000, is hereby amended by the insertion after paragraph (a) of subsection (1) of the following paragraph:

“(aA) a final protection order has been issued against such person in terms of the Protection from Harassment Act, 2011;”.

Amendment of Schedule 2 to Act 60 of 2000

22. Schedule 2 to the Firearms Control Act, 2000, is hereby amended by the insertion after paragraph (d) of item 7 of the following paragraph:

“(e) in terms of section 18(1)(a) of the Protection from Harassment Act, 2011.”.

Short title and commencement

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23. This Act is called the Protection from Harassment Act, 2011, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE PROTECTION FROM HARASSMENT BILL, 2010

1. PURPOSE OF BILL

The Protection from Harassment Bill, 2010, provides primarily for the granting of a protection order against harassment. The strategic focus of the Bill is transforming justice, state and society and access to justice. The Bill will also contribute to the fight against violence against women and children.

2. BACKGROUND

The Bill emanates from an investigation by the South African Law Reform Commission (SALRC) into stalking behaviour. The SALRC report on the matter contains legislative proposals (Project 130). According to the SALRC, the existing civil law framework, namely an interdict, and criminal law framework, namely the punishing of stalking conduct as a crime or the prohibition thereof by means of a binding over of a person to keep the peace in terms of section 384 of the Criminal Procedure Act, 1955, may not provide adequate recourse to victims of stalking who are not in a domestic relationship. The SALRC was therefore of the view that legislation should be enacted to specifically cater for a civil remedy against stalking.

3. OBJECTS OF BILL

3.1 **Clause 1(1)** contains a few self explanatory definitions. Of importance is the definition of "harassment" which means to directly or indirectly engage 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 following, watching or pursuing the complainant or a related person, or 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 sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person; or
 - amounts to sexual harassment of the complainant or a related person.
- "Harm" is widely defined to mean any mental, psychological, physical or economic harm.

Clause 1(2) spells out the concurrent application of the Bill with the Domestic Violence Act, 1998, by providing that the Bill does not prevent a person who may apply for relief against harassment or stalking in terms of the Domestic Violence Act, 1998, from applying for relief in terms of the Bill.

3.2 **Clause 2**, *inter alia*, provides that an application for a protection order must be brought in the prescribed manner to a magistrate's court by lodging the application and supporting affidavits with the clerk of the court. The complainant himself or herself may bring the application for a protection order. Another person who has a material interest in the well-being of the complainant may bring the application on behalf of the complainant, with the complainant's written consent. An application may also be brought on behalf of a child without the parent's or guardian's consent. Provision is also made for the clerk of the court to assist a complainant who is not legally represented, with his or her application, and to inform the complainant, where applicable, of his or her right to lodge a criminal complaint against the respondent. An application for a protection order may be brought outside ordinary court hours if the court is satisfied that the complainant may suffer harm if the matter is not dealt with immediately.

3.3 **Clause 3** makes provision for the issuing of an interim protection order by a magistrate's court against the respondent notwithstanding the fact that the respondent has not been given notice of the proceedings. The court must be satisfied that there is *prima facie* evidence that—

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

This interim protection order, together with the record of evidence, must be served on the respondent and must call on the respondent to show cause on the return date why a final protection order should not be issued against him or her. An interim protection order takes effect the moment it is issued by the court and the existence thereof has been brought to the attention of the respondent. The clerk of the court must ensure that a certified copy of the interim protection order and the original warrant of arrest are served on the complainant. If the court decides not to issue an interim protection order, the clerk of the court must cause certified copies of the application and supporting affidavits to be served on the respondent, together with a notice calling on the respondent to show cause on the return date specified in the notice why a protection order should not be issued.

3.4 **Clause 4** makes provision for a mechanism to determine the identity and address of a respondent who uses electronic communications to harass the complainant or a related person. If an application for an interim protection order has been made and if the court is satisfied that the complainant or related person is being harassed by means of electronic communications or electronic mail over an electronic communications system of an electronic communications service provider and the identity or address of the respondent is not known, the court may issue a direction directing an electronic communications service provider to furnish the court, within five ordinary court days, with—

- the electronic communications identity number from where the harassing electronic communications or electronic mail originated;
- the name, surname, identity number and address of the respondent to whom the electronic communications identity number has been assigned; and
- any other available information that will corroborate the harassment of the complainant or related person which may be of assistance to the court to identify the respondent.

In terms of the clause an electronic communications service provider may apply for an extension of the period within which the information must be furnished to the court or for the cancellation of the direction under certain circumstances. The clause further obliges an electronic communications service provider to inform the respondent of the information that is to be provided to the court at least 48 hours before it is submitted to the court. On receipt of the information the court may consider the issuing of an interim protection order. Provision is further made for the compilation of a list of electronic communications service providers that can provide the courts with the information that is necessary to trace respondents who harass persons in the cyber world. This list must be made available to all courts.

3.5 **Clause 5** creates a mechanism in terms of which the court may order the South African Police Service (the SAPS) to investigate instances of harassment in order to ascertain the name and address of respondents whose particulars are not known by the complainant. This clause provides that if the court is satisfied that a protection order must be issued as a result of the harassment of a complainant or a related person and the identity or address of the respondent is not known, the court may issue a direction directing the station commander of the relevant police station to investigate the matter with a view to determining the name and address of the respondent or obtaining any other information which may be required in order to identify or trace the respondent. The direction must be served on the station commander of the relevant police station who must ensure that the matter is investigated. If the SAPS ascertains the name and address of the respondent the information must be provided to the court. The clause also provides that the SAPS may apply—

- for an extension of the period of time within which the information needs to be furnished to the court; or
- for the cancellation of the direction in certain circumstances.

If the name and address of the respondent are furnished to the court, the court may issue an interim protection order.

3.6 **Clause 6**, firstly, gives a discretionary power to the SAPS to investigate a complaint of harassment made directly to the SAPS if the identity or address of the respondent is not known and secondly, to regulate the powers of the SAPS to investigate instances of harassment in terms of a direction that a court may issue in terms of clause 5. The manner in which the SAPS must investigate a complaint of harassment is to be regulated by means of the national instructions that must be issued by the National Commissioner of the SAPS in terms of clause 20(2) of the Bill. The aim of such an investigation is to assist complainants in determining the name and address of their harassers and to provide the information to the court.

3.7 **Clause 7** creates a mechanism in terms of which the court may subpoena or warn a person to appear as a witness at court proceedings or subpoena a person to produce any book, document or object at such proceedings. The failure of a person to comply with a subpoena or a warning is criminalised.

3.8 The court may, in terms of **clause 8**, of its own accord or at the request of a complainant, order that proceedings be held behind closed doors and may also exclude persons from attending proceedings where the witness is a child. Before a court exercises any of its powers in terms of this clause it may give any person who has an interest in the matter the opportunity to apply to the court to be present at the proceedings or to publish the identity of any person involved in such proceedings or any information relating to such proceedings.

3.9 **Clause 9** provides for the issuing of a final protection order. If the respondent does not appear on the return date and there is *prima facie* evidence that the respondent has harassed the complainant, the court must issue a final protection order. If the respondent appears on the return date in order to oppose the issuing of a final protection order, the court must hear the matter and issue a final protection order if it finds, on a balance of probabilities, that the respondent has engaged or is engaging in harassment. If a court issues a final protection order, the clerk of the court, sheriff or peace officer identified by the court, must cause the original of such order to be served on the respondent and a certified copy of such order and the original warrant of arrest must be served on the complainant. Provision is further made that a final protection order will remain in force for a period of five years or such further period as the court may determine on good cause shown.

3.10 **Clause 10** provides for the court's powers in respect of a protection order. A protection order by a court must prohibit harassment of the complainant. The court may also impose additional conditions on the respondent that are necessary to provide for the safety and well-being of the complainant. In order to provide further for the safety and well-being of the complainant the court may order that a weapon in the possession of or under the control of the respondent be seized or that a complainant be accompanied by a member of the SAPS to collect personal property or that the harassment be investigated by the SAPS with the view to the possible institution of a criminal prosecution. Provision is further made that the physical, home and work address of the complainant may be omitted from the protection order.

3.11 In terms of **clause 11**, when an interim or final protection order is granted, a warrant of arrest will be issued for the respondent. The execution thereof will be suspended, pending non-compliance with a condition of the protection order. If a condition of the protection order is contravened the complainant may hand the warrant of arrest, together with an affidavit in which the contravention is set out, to a member of the SAPS. The warrant must then be executed by the member who must arrest the harasser if imminent harm to the complainant may result from a breach of a condition of the protection order. A warrant may also, in certain instances, be executed by handing over a written notice to the harasser to appear in court.

3.12 **Clause 12** makes provision that the court may order a member of the SAPS to seize any weapon in the possession of or under the control of the respondent and that a copy of the evidence so recorded be submitted to the National Commissioner of the SAPS for consideration in terms of the Firearms Control Act, 2000 (Act No. 60 of 2000).

3.13 **Clause 13** makes provision for the procedure for the variation or setting aside of the protection order.

3.14 **Clause 14** provides that any court within the area in which the complainant or respondent permanently or temporarily resides, carries on business or is employed or where the cause of action arose, has jurisdiction to issue a protection order. The clause also provides that a protection order is enforceable throughout the Republic.

3.15 **Clause 15** provides for the service of documents to take place in a manner prescribed by regulation, by a clerk of court, a sheriff or a peace officer or in a manner as the court may direct.

3.16 **Clause 16** provides that cost orders can be made against a person if such person acted frivolously, vexatiously or unreasonably.

3.17 **Clause 17** provides that the proceedings contemplated in the proposed Bill are subject to appeal and review.

3.18 **Clause 18** criminalises the following conduct, among others:

- (a) A contravention by a respondent of the conditions of a protection order;
- (b) the making of a false statement in respect of a contravention of a protection order;

- (c) the revealing of information of the complainant in contravention of a direction of a court;
- (d) the failure by an electronic communications service provider or an employee of an electronic communications service provider —
 - to furnish information that is necessary to identify the respondent within five ordinary court days from the time that a direction is served on such electronic communications service provider or the extended period allowed by the court; or
 - to inform the respondent of the fact that his or her particulars are to be provided to the court pursuant to a direction;
- (e) the making of a false statement in any affidavit that is required to be furnished in terms of clause 4 by an electronic communications service provider or an employee of an electronic communications service provider; and
- (f) the failure of a person to comply with a request of the SAPS when investigating any incident of harassment as provided for in clause 6.

3.19 **Clause 19** empowers the Minister to make regulations to regulate matters relevant to the implementation of the Bill.

3.20 **Clause 20**, inter alia, makes provision for the issuing of policy directives by the National Director of Public Prosecutions regarding the prosecution of offences, for the issuing of national instructions by the National Commissioner of the SAPS to regulate the conduct of police officials in terms of the proposed legislation and for the issuing of directives by the Director-General: Justice and Constitutional Development to regulate the functions of clerks of court in terms of the proposed legislation. The directives and instructions must provide for disciplinary steps to be taken against a police official, a clerk of the court or a prosecutor for non-compliance therewith.

3.21 **Clause 21** and **clause 22** effect consequential amendments to the Firearms Control Act, 2000, to further regulate the fitness of a person to possess a firearm if a final protection order is granted against such person or where such person contravenes the provisions of a protection order.

4. IMPLEMENTATION PLAN

The implementation of the Bill does not require detailed implementation plans.

5. DEPARTMENTS AND PARTIES CONSULTED

5.1 The SALRC published its Issue Paper and Discussion Paper on the Bill and invited comments. Responses were received from numerous stakeholders, among others, from individual magistrates, the SAPS, the Department of Social Development, the National Prosecuting Authority, the Commission on Gender Equality, academics, members of the legal fraternity and representatives of various NGO's.

5.2 The Bill was also published for public comment in the *Gazette*. Comments were, inter alia, received from the South African Catholic Bishops' Conference, the organization Ilitha Labantu, the Women's Legal Centre, the Justice Alliance of South Africa, the Commission for Gender Equality, the South African National Editors' Forum and various individuals.

6. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

An increase in the workload for clerks of the court and magistrates may be expected. Although there are similarities between the procedures envisaged in the Bill and those of the Domestic Violence Act, 1998, training initiatives for clerks of the court and police officials will have to be introduced.

7. FINANCIAL IMPLICATIONS

Funds will be required for the training of clerks of the court and police officers. This will be covered within the existing budgetary frameworks of the Departments concerned.

8. COMMUNICATION IMPLICATIONS

The Public Education and Communication component of the Department will assist with public awareness initiatives.

9. CONSTITUTIONAL IMPLICATIONS

The State Law Advisers are of the view that the provisions of the Bill are consistent with the Constitution.

10. PARLIAMENTARY PROCEDURE

10.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

10.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.