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Proposed Amendments to the Domestic Violence Act

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Domestic violence – and gender-based violence in particular – is arguably the most significant societal plague of modern South Africa. To highlight the nature and effect of domestic violence on society, the Constitutional Court has stated that: *"All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished"* (***S v Baloyi*** 86 2000 (1) BCLR 86 (CC), para 11).

In response to this scourge, government recently initiated processes to refine the laws regulating gender-based violence and the procedures for obtaining protection orders. This included introducing the Domestic Violence Amendment Bill [B20-2020] ("the Bill"), which aims to amend the Domestic Violence Act 116 of 1998 ("the Act"), and inviting stakeholders and interested persons to submit written comments on the suitability (or lack thereof) of the proposed amendments.

A first iteration of the Bill was published for public comment in March 2020, after which a second iteration of revised proposed amendments was published in September 2020. On both occasions, Werksmans' pro bono department made written submissions on behalf of existing clients of the firm.

The most controversial proposed amendment in the Bill is a provision that would make it mandatory for adults who become aware that an act of domestic violence has been committed against another adult, to report such knowledge to either a social worker or the police, failing which they will be guilty of a criminal offence. While the introduction of this provision is undoubtedly well-intended, it has unsurprisingly been met with criticism from various quarters. The concerns about the proposed amendment are varied, but some of the common critiques are that adult victims of domestic violence would be: (i) denuded of their discretionary capacity or agency to make their own choices and exercise their independent freewill (i.e. by choosing to either report or not report any instance of domestic violence); (ii) inadvertently exposed to possible retaliatory harm by the perpetrator (who would likely blame the victim for making the report); and (iii) less inclined to report instances of domestic violence, if the person to whom they make the report is obliged to report and share the confidential information shared as part of the report. Given the widespread concerns, it is important that Parliament thoroughly consider the possible implications of passing this provision as law.

A welcome inclusion in the Bill is the proposed introduction of secure online submissions of applications for protections orders and an integrated electronic repository. This inclusion is useful in that it aligns with the general technological move to digitised systems. More importantly, however, it allows victims of domestic violence to apply for protection orders remotely, which is especially crucial where, for example, the mobility of victims is limited by their abuser, or where victims are otherwise prevented from leaving a residence shared with the abuser. In further recognition of digitisation – and in particular, the increasing incidences of domestic violence in the online and social media landscapes – the Bill also introduces a provision that requires electronic communications service providers to furnish particulars to court in specified circumstances.

Further welcome inclusions are the expanded definitions of what constitutes domestic violence. The Bill introduces novel forms of domestic violence, such as *"coercive behaviour"*, *"controlling behaviour"*, *"elder abuse"* and *"spiritual abuse"*; whilst refining the meaning of some pre-existing definitions such as *"emotional, verbal or psychological abuse"*, *"harassment"* and

"intimidation". The importance of the inclusion and expansion of these definitions in the Bill is the Legislature's recognition of the reality that domestic violence goes beyond physical abuse. Oftentimes, abuse manifests in the form of manipulative conduct by an abuser that aims to control or disempower a victim to their detriment, without any physicality being involved. This could be the case in various instances, for example, in cases of *"controlling behaviour"* or *"spiritual abuse"*, amongst others. With particular reference to *"spiritual abuse"*, the introduction of this definition is important because abuses of people's belief systems in South Africa have explicitly been recognised as problematic in the 2017 report of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities titled *"The Commercialisation of Religion and Abuse of People's Belief Systems"*.

An inexplicable revision introduced by the Bill is the proposed deletion of *"stalking"* as a standalone form of domestic violence. Technically, however, the definition of *"stalking"* has been incorporated into the revised definition of *"harassment"*. No explanation is provided for this amendment. The problem with deleting a standalone definition of *"stalking"* (a word and concept which is easily understood by the general public) is that lay persons will have a more difficult time identifying it in the Act if it is no longer a standalone provision and is rather an incidental aspect of another definition. In fact, it has actually been the case that numerous legal practitioners and researchers who have commented on the Bill, are under the mistaken impression that the concept of *"stalking"* has been wholly deleted by the Bill and that any victim of stalking would have to seek recourse by relying on the Protection from Harassment Act 17 of 2011 instead. To curb unnecessary confusion, it is hoped that this proposed amendment is reversed and that the final version of the Bill or Act re-introduces *"stalking"* as a standalone definition.

It remains to be seen what the final version of the proposed amendments will look like once they have been considered and adopted by Parliament. Hopefully, the numerous written and verbal submissions that have been made by civil society organisations and the general public will be given due and proper consideration and the (understandable) rush by government to refine the Act does not lead to the promulgation of flawed laws.



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