SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON THE DOMESTIC VIOLENCE DRAFT BILL [B20 – 2020]

Attention: **Mr V Ramaano**

Email: Gbvbills@parliament.gov.za

9 October 2020

THE WOMEN'S LEGAL CENTRE

WLC requests the opportunity to make oral submissions to the Portfolio Committee at the public hearings on the Bill.

Adv. Bronwyn Pithey

WOMEN'S LEGAL CENTRE

Tel: 021 424 5660

bronwyn@wlce.co.za

Website: www.wlce.co.za

1. The Women's Legal Centre is an African feminist legal centre that advances women's rights and equality through strategic litigation, the provision of free legal services and advice, advocacy, education and training. We aim to develop feminist jurisprudence that recognizes and advances women's rights.

2. The Women's Right to be Free from Violence is one of the WLC's four strategic programmes. The programme's vision is the recognition and implementation of an accessible and responsive justice system that takes account of, and supports, the particular needs of women who are survivors of violence, and which provides optimal services and protection.

3. Its core objectives include ensuring that there is a legislative framework to address violence against women which is compliant with international and constitutional obligations; ensuring that the state has implementation plans in place to action legal frameworks and policies; holding the state and private entities accountable in the implementation of laws and policies; and in the development of due diligence standards relating to violence against women.

4. WLC runs a Legal Advice Unit which provides legal advice to women on a wide range of issues. In addition, WLC assists women in the magistrate's Family Court in Cape Town with applications for protection orders in terms of both the Domestic Violence Act and the Protection from Harassment Act. WLC welcomes the opportunity to make submissions on the Domestic Violence Amendment Bill [B20 – 2020] guided by the Preamble of the Act which purports to afford victims of domestic violence the maximum protection from domestic abuse that the law can provide.

Amendment of section 1 of Act 116 of 1998

5. WLC generally supports the amendments to section 1. Comments will be made to address specific aspects of the definition section where applicable.

Ad section 2(c) and 2(d):

6. WLC supports the addition of both 'coercive' and 'controlling' behaviour in the definition section and their inclusion in an expanded definition of 'domestic violence'. This expansion recognizes the various forms of domestic violence that women experience, and that domestic violence is not limited to physical violence.

Ad section 1(e):

7. WLC welcomes this amendment, in particular the removal of the requirement 'vested interest' as recommended in the WLC submissions to the Department in April 2020.

Ad section 2(h)(f):

8. Concern is raised regarding the requirement of the sharing of residence, premises or property within the preceding year. WLC submits that this specific time frame is very limited and does not take into consideration the reality of people's lives where a respondent, who may have been away from the shared property for a longer time period of a year, but still poses a danger to the complainant. An example of this may be where the respondent has been in prison for over a year but poses a real ongoing danger to the complainant when he is released from prison. WLC submits that no time restriction should apply.

9. WLC recommends the section reads as follows:

(f) they share or shared the same residence, premises or property

Ad section 2(i)(j):

10. WLC does not support the inclusion of the word 'abusive' in this subsection. The 'any other behaviour' is already qualified by the words 'harms' or 'inspires the reasonable belief that harm may be caused'; to add 'abusive' renders the inclusion of this type of behaviour in the definition of 'domestic violence' tautologous and should therefore be deleted.

Ad section 2(j)(b):

11. Concern is raised regarding the legal meaning of 'an interest' referring to the disposal of household effects or other property. The requirement of establishing 'in interest' on the part of complainant places an evidentiary burden on her to *prima facie* show that she has an interest in said property. It must be sufficient for her to merely state that she has an interest in the household effects or other property to shift the evidentiary burden onto the respondent for him to then show that she, the complainant, does not have 'an interest'.

Ad section 2(m)(b):

12. The use of the word **'to'** in the context of causing emotional plain adds the legal element of intent on the part of the respondent. We recommend that the section be redrafted to replace this element in the definition of emotional, verbal and psychological abuse:

(b) **[repeated]** threats **[to]** that cause emotional pain

Ad section 2(g):

13. WLC does not support the definition of intimidation which requires the inducement of 'imminent harm'. We recommend that the section be redrafted to reflect other amendments in the Bill which recognise that the element of harm, and not imminent harm, is sufficient for an act of domestic violence:

> the substitution for the definition of "intimidation" of the following definition: "**'intimidation'** means uttering or conveying a threat to, or causing a complainant or a related person to receive a threat, which induces fear **[of imminent**] harm;"

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

14. As a general comment applicable to section 3 of the Bill, it is important to align the language used regarding obligations on both functionaries and 'other adults'. The use of terms 'becomes aware of the fact'; 'knowledge'; 'reasonable grounds believes or suspects'; and 'a reasonable belief or suspicion' implies that there may be different meanings ascribed to 'fact' and 'knowledge'. It is recommended that the terminology is standardized to be applicable to both sections 2A and 2B of the Bill.

15. WLC recommends the use of two standards to apply to both functionaries and 'other adults': those of 'knowledge' and 'reasonable belief or suspicion'.

Obligations of functionaries relating to domestic violence

Ad 2A(1) and (2): comment on use of terminology and language:

16. In 2A(1)(a) the Bill uses the words 'becomes aware of the fact'; 2A(2)(a) cross refers to 2A(1)(a) but refers to 'knowledge'. The use of different terminology may create confusion as the nature and extent of the 'knowledge' of domestic violence in this context. To avoid this possibility, WLC recommends amending this section to read:

> **2A.** (1) A functionary, who in the course of the performance of their duties or the exercise of their functions in relation to any person—
>
> (a) **[becomes aware of the fact or on reasonable grounds believes or suspects]** has knowledge, reasonable belief or suspicion, that a child, a person with a disability or an older person, is a complainant as contemplated in section 1, must comply with subsection (2); or
>
> (b) **[becomes aware of the fact]** has knowledge that an adult person, other than an adult person with a disability or an older person as contemplated in paragraph (a), is a complainant as contemplated in section 1, must comply with subsection (3).

Ad 2A(1)(a):

17. WLC supports the inclusion of this clause in the Bill. This clause reflects similar clauses on the duty to report in the both the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Children's Act. The recognition of particularly vulnerable victims and the placement of a duty on all members of society to take responsibility for their protection is supported.

Ad section 2A(1)(b):

18. The WLC does not support the addition of this clause providing for the mandatory reporting of domestic violence by functionaries where the complainant is an adult. The effect of such a duty places service providers of domestic violence services, which may include counselling and legal advice and representation, in a position where attorney-client confidentiality would be compromised if the service provider were under a mandatory legal duty to report the domestic violence. It also undermines women's agency in making decisions as to the best mechanisms to use to manage a domestic violence situation. If women know that seeking medical, health, psycho-social and / or legal services for support and assistance in decision making will immediately result in their cases being reported to the police or social worker, this may prevent them from seeking assistance. Domestic violence is a complex phenomenon, and women must be empowered to make decisions at their own pace; to force women to engage with the police or social workers before they are ready to do so undermines the objectives of the Act. This reasoning is equally applicable to the mandatory reporting provision contained in 2B(1)(b).

Ad 2B(1)(a):

19. WLC supports the inclusion of this clause in the Bill. This clause reflects similar clauses on the duty to report in the both the Criminal Law (Sexual Offences and Related Matters) Amendment Act and the Children's Act. The recognition of particularly vulnerable victims and the placement of a duty on all members of society to take responsibility for their protection is supported.

Ad 2B(1)(b):

20. The WLC does not support the addition of this clause providing for the mandatory of reporting of domestic violence by an adult person where the complainant is an adult. The rationale for this objection is reflected above at point 18.

Ad 2A(5) and 2B(4):

21. The criminalisation of the failure to report domestic violence where the complainant is an adult is not supported by WLC. The effect of this clause is to criminalise women who offer support, refuge, and safety to adult victims of domestic violence. Very often adult women who seek assistance and support from other women do not want the matter reported; to place confidants in jeopardy of being arrested and prosecuted for providing support and safety to victims is surely an unintended consequence of the Bill. Women victims should be able to seek assistance, advice and safety from both functionaries and 'other adults' without the pressure of knowing that the people with whom they are engaging are under a legal obligation to report the domestic violence to SAPS or a social worker. An additional effect of this provision is that people will be reluctant to both formally and informally assist adult victims for fear of criminalisation should they and/or the victim not want to report the violence.

Substitution of section 4 of Act 116 of 1998 and Substitution of section 5 of Act 116 of 1998

"Application for protection order" and "Consideration of application and issuing of interim protection order"

General comment, discussion and recommendations on current sections 4 and 5 of the Act, and proposed amendments of section 4 and 5 of the Act/Bill

Informing the complainant of the outcome of the application in terms of sections 4 and 5 of the Act:

22. WLC made extensive submissions on the Department of Justice and Constitutional Development's Domestic Violence Bill in April 2020 on the lack of provisions in the Act / draft Bill (as it then was) informing the complainant of the outcome of the application in terms of sections 4 and 5 of the Act.

23. WLC therefore welcomes the amendments in sections 5(3)(a) and 5(4) which now require, respectively, the clerk of the court to inform the complainant once the interim protection order is issued or if it is not issued. This amendment is consistent with the WLC recommendations. WLC considers this one of the most important interventions in the Bill in achieving access to justice for complainants. It is essential that a process and practice of informing complainants immediately of the outcome of the application is regulated by the Regulations. This process must include telephonic or electronic communication methods to communicate the outcome to the complainant on the same day as the interim order is either issued or not issued.

24. As detailed in the WLC submissions to the Department in April 2020, the justification for this essential process of informing complainants of the outcome of the application in

terms is section 4 still applies. In terms of section 4(7) of the Act, once the application is lodged with the clerk of the court, the clerk **[shall forthwith]** must immediately submit the application to the court (magistrate). The Act (and Bill in its current version) does not require the application to be placed before or considered by (in terms of section 5 of the Act) the court on the same day as the application is lodged. Practically, many applications are not processed on the same day on which the application is lodged. This means that women who approach court often leave court without knowing if their application has been successful and whether an interim protection order has been issued by the court. They are therefore required to attend at court on a subsequent court day to determine the outcome of the application.

25. The reason that complainants must attend at court on additional days is to determine the outcome of the application. This is because the Act only makes provision for serving the interim protection order on the complainant once the interim order has been served on the respondent; this service may only be days/weeks after the application was lodged. Until that service is affected the complainant, in terms of the provisions of the Act, does not know the status of the application, nor does she know the return date for the application. Secondly, if the interim order is not granted, and the court orders that the respondent is served a notice to show cause why a final protection order should not be issued on the return date, the Act makes no provision for the manner in which the complainant will be advised/informed firstly, of the outcome of the application or secondly, the return date for the application.

26. The Act makes provision for the respondent to be informed of the outcome of the application by means of either the interim order or the notice to show cause being served on him - the serving of the interim order or the notice to show cause effectively informs the respondent of the application and the outcome thereof. The Act only makes provision for the serving of the interim protection order on the complainant once the respondent

has been served with the interim order (section 5(7)). If an interim order is not issued, the Act makes no provision for informing the complainant that the respondent has been served with a notice to show cause, not does the Act make provision for informing the complainant of the details of the return date

27. To overcome these *lacuna* in the Act the courts have developed informal mechanisms to inform complainants, very often placing unfair burdens on complainants to access the information, for example, returning or phoning the court, or contacting the police to determine the outcome of the application and / or if service has been successful on the respondent.

28. In many courts, the clerks automatically informally provide a 'return date' to the complainant at the time the application is lodged. This informal process provides a 'return date' irrespective of whether an interim order is issued or not (at the time the date is provided, the clerk has not yet submitted the application to the court (magistrate), so there is no known outcome at this stage).

29. No provision is made in the Act to inform the complainant that the interim order has not been issued in terms of section 5(4) as only the respondent is served with copies of the application and the prescribed notice to show cause. The effect is that the complainant does not know the status of the application until she attends court on the return date (a date given to her informally) in the situation where the court has not issued the interim order in terms of section 5(4). She must assume that no interim order was granted as she will not have been served with a copy of the interim order. As previously stated, the Act makes no provision for how the complainant is informed of the return date where an order is made in terms of section 5(4).

30. If the court does issue the interim order in terms of section 5(2), the respondent must be served with the interim order in terms of section 5(3)(b); only once this has happened, will the complainant be informed in terms of section 5(7) – she is served with a copy of the interim order as well as the warrant as contemplated in section 8(1)(a). This process practically results in a delay of information reaching the complainant in the situation where an interim order is issued.

31. It is for the above reason, in situations both where the interim order is issued and where it is not issued, that courts have developed their own informal practices to inform women as to the status of their applications. These court practices vary widely and are inconsistent. Practice that is informal and which is not prescribed in terms of the Act and attendant regulations cannot be monitored and the state role players responsible for implementation thereof cannot be held accountable. This is unacceptable and must be rectified by legislation.

32. Technically, in terms of the Act there are no provisions to inform complainants of the outcome of their application in terms of section 5 other than in terms of section 5(7) if an interim order is issued, and then only once it has been served on the respondent. This is a serious *lacuna* in the law. It allows for the informal practices that have developed in many courts, as well as leaving the complainant without any recourse for the time period between the lodging of the application for an interim order and either the serving of a copy of the interim order in terms of section 5(7) or the return date in terms of section 5(4).

33. This presents one of the most serious obstacles and barriers to justice for victims of domestic violence.

34. WLC therefore welcomes the proposed amendments to the Act which require the clerk of the court to notify the complainant immediately upon the court issuing of an interim protection order (section 5(3)(a)), and secondly, requiring the clerk of the court to notify the complainant immediately if the court does not issue an interim protection order (section 5(4)). This is consistent with WLC's recommendations.

35. In addition to notifying the complainant of the outcome of the application, the clerk must also inform the complainant of the provisions of the interim order as well as the return date

36. The amendments are silent on the manner in which complainants must be notified by the clerk of the court in terms of amended sections 5(3)(a) and 5(4). It is recommended that this notification is done immediately i.e. on the same day that the interim order is issued or the notice to show cause is issued, and that notification is done by telephone, SMS, and email (electronic notification), followed by the formal service in terms of section 5(3)(d)(iii).

37. In addition to the above amendment, the WLC recommends that the Act is amended to make provision for the processing of applications in terms of sections 4 and 5 to be completed on the same day as the application is lodged. Complainants must be informed while they are still attending at court as to the outcome of the application. If the interim order is issued, a copy of the order, together with the warrant in terms of section 8 must be handed to the complainant. The documentation must clearly state that the interim order has no force or effect until it has been brought to the attention of respondent in compliance with the proposed amended section 5(6). This is a process that is already utilized informally in many of the courts and negates the need for women to attend at courts / contact courts in the days following the lodging of the application. It also ensures that women are made aware immediately of the outcome of their application. If the

interim order is not issued, the complainant must be handed relevant documentation with the details of the return date.

38. The above proposed amendment by WLC also addresses the practice that often the provisions of section 5(7) are not complied with by the state actors, leaving women without information about the outcome of their application, or the protection that an interim order provides.

39. WLC proposes that, in addition to the above, once an interim order is issued in terms of section 5(2) (as amended the Bill), and service effected on the respondent in terms of section 5(3) (as amended in the Bill), the proposed amended provisions of section 5(3) are still complied with; this will provide electronic documentary proof to the complainant that the interim order has been issued by the court and served on the respondent.

40. If the interim order has not been issued in terms of section 5(4), a similar process as set out in section 5(3) for service of the application on the respondent and the complainant, and the prescribed notice must be provided for, mirroring the provisions of sections 5(3)(a), (b), (c) and (d).

41. In addition to the proposed amendment to section 5(3)(d)(iii) which provides for the complainant to be informed electronically or by hand that the interim order has been issued against the respondent, the provisions of section 5(7) must remain in place, providing for the service of a copy of the interim order and the warrant in terms of section 8(1) on the complainant. It is proposed however, that similar to the provisions in section 5(3) where provision is made for the electronic serving of the interim order on the respondent, similar provision is made for electronic serving of documents on the complainant.

Section 6 of the Bill: Specific drafting recommendations for section 4:

Substitution of section 4 of Act 116 of 1998

"Application for the protection order"

Ad section 4(3)(a):

42. WLC recommends that a definition of 'material interest' is included in the Bill

Ad section 4(7):

43. Recommendation:

> (7) The application and affidavits must be lodged with the clerk of the court who **[shall forthwith]** must **[immediately]** on the same day submit the application and affidavits to the court.".

Section 7 of the Bill: Specific drafting recommendations for section 5:

Substitution of section 5 of Act 116 of 1998

"Consideration of application and issuing of interim protection order"

Ad Section 5(1):

44. Recommendation:

> 5. (1)The court must on the same day as the application is lodged **[as soon is reasonably possible]** consider an application submitted to it in terms of section 4(7) and may, for that purpose, consider such additional evidence

as it deems fit, including oral evidence or evidence by affidavit, which **[shall]** must form part of the record of the proceedings.

Ad Section 5(3)(a):

45. Recommendation of the addition of certain words in section 5(3)(a) to provide for notification to the complainant of the outcome of the application:

> (3) *(a)* **[An]** Upon the issuing of an interim protection order **[must]** the clerk of the court must on the same day **[immediately]** notify the complainant of the outcome of the application, the contents thereof, and the return date via telephone, SMS and / or electronically, and / or hand a copy of the application with the interim protection order to the complainant, and the court must direct that copies of -

46. Recommendation of the addition of certain words in section 5(4) to provide for notification to the complainant of the outcome of the application:

> (4) If the court does not issue an interim protection order in terms of subsection (2), the clerk of the court must immediately notify the complainant that the court has not issued an interim protection order as well as providing the complainant with the prescribed notice with the return date calling on the respondent to show cause on the return date why a protection order should not be issued via telephone, SMS and / or electronically, and / or hand a notice copy of the application with the details of the return date to the complainant and the court….

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

Electronic communications service provider to furnish particulars to court

47. The addition of these provisions is generally welcomed by WLC.

Ad section 5(B)(10):

48. However, concern is raised regarding the content of section 5B(10) and liability that rests on the complainant for the costs related to furnishing of the information and the removing or disabling access to the electronic communications referred to in 5B(9).

49. Although section 5B(10) makes provision for an inquiry by the court to determine the ability of the complainant to pay said costs, the point of departure in the Bill presumes the complainant is liable for the costs, and the burden to prove that she is not able to afford the incurred costs rests on the complainant.

50. We recommend that the Department and Portfolio Committee reconsider this aspect of the Bill and that the state is responsible for any costs incurred in terms of this provision.

Substitution of section 6 of Act 116 of 1998

51. WLC supports these amendments.

Insertion of section 6A of Act 116 of 1998

52. WLC supports these amendments.

Amendments of section 7 of Act 116 of 1998

53. WLC supports these amendments.

Amendment of section 8 of Act 116 of 1998

Ad section 8(5)(c)

54. WLC does not support the continued inclusion of subsection (5)(c) as the length of time since the alleged breach of the order is irrelevant. WLC recommends that this subsection be deleted.

55. WLC does not support the addition of subsection (5)(d) as this information (the nature and extent of harm previously suffered) should be irrelevant to the consideration of whether the complainant is suffering or may suffer harm. WLC recommends that this subsection be deleted.

Substitution of section 9 of Act 116 of 1998

56. WLC supports these amendments.

Amendments to sections 10, 11, 12, 13 and 15 of Act 116 of 1998

57. WLC supports these amendments.

Amendments to section 17 of Act 116 of 1998

58. WLC supports these amendments.

Insertion of section 18A in Act 116 of 1998

Directives for clerks of the court

59. The inclusion of these sections is welcomed by WLC.

60. We recommend a time frame is added in terms of which the Director-General must issue directives; we recommend that the directives must be issued within 6 months of the amended Act coming into operation.