CALS
Centre for Applied Legal Studies

DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

Submission

to the

Department of Justice and Correctional Services

on the

Domestic Violence Amendment Bill [B – 2020]

24 April 2020

c/o Mr H du Preez
Tel: 012 406 4765
Per Email: hdupreez@justice.gov.za
Ms V Letswalo
Tel: 012 406 4760
Per Email: Vletswalo@justice.gov.za

Sheena Swemmer
Head of Gender Justice
Centre for Applied Legal Studies
Direct Tel: 011 717 8609
Email: Sheena.Swemmer@wits.ac.za

Basetsana Koitsioe
Candidate Attorney Gender Justice
Centre for Applied Legal Studies
Direct Tel: 011 717 8627
Email: Basetsana.Koitsioe@wits.ac.za

TABLE OF CONTENTS

1. Introduction

1.1. The Centre for Applied Legal Studies (CALS) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALS is also a law clinic, registered with the Legal Practice Council. As such, CALS connects the worlds of academia and social justice and brings together legal theory and practice. CALS operates across a range of programme areas, namely: civil and political justice, basic services, business and human rights, environmental justice, and gender justice.

1.2. The Gender Justice programme at CALS focuses on notion that when a person experiences gender-based violence there must be different processes in place in order for individuals to attain a sense of justice. The programme believes that a sense of justice for victims and survivors is attained through the following means: the accountability of both the state and private actors, criminal sanctions for perpetrators, support and space for victims and survivors to begin healing and rehabilitative processes for offenders.

1.3. The Gender Justice Programme at CALS has consistently engaged in various gender-related issues through numerous submissions to Parliament. Most recently, these have included submissions on the South African Law Reform Commission Issue Paper on a Single Marriage Statute (August 2019); the Prescription in Civil and Criminal Matters (Certain Sexual Offences) Amendment Bill (April 2019) and the Cybercrimes Bill (March 2019).

1.4. Furthermore, the day-to-day work of the Gender Justice Programme at CALS centers around assisting victims and survivors of gender-based violence to attain justice. This is done through strategic litigation focusing on accountability around gender-based violence of both state and private actors. Examples of the Gender Justice programme's work includes: assisting women and children who have been unlawfully evicted from

gender-based violence shelters regain occupation, representing women in holding their workplaces liable for failure to act against sexual harassment, representing children in instances where schools have failed to protect them from sexual violence on school grounds and representing women who have been accused of killing their abusive partners.

1.5. We would like to thank the Department of Justice and Correctional Services for providing this opportunity to comment on the Domestic Violence Amendment Bill ('the Bill'). Briefly, our submission is focused on removing possible barriers of access for victims and survivors of violence in the home as well as attempting to reflect on some of the everyday experiences of victims and survivors and show how parts of the Bill may not be adequately cognizant of these experiences.

2. Reflections on the Bill

2.1. Amendment of section 1 of Act 116 of 1998 (**Definitions**)

1(b) **Coercive behaviour and controlling behaviour** – With regards to behaviour, it must be added that perpetrators might be aware or unaware of the effect of their actions and this may take the form of conscious and unconscious coercion and/or control. Coercive and controlling behaviour may not necessarily be an objective list of factors but rather how the victim or survivor experiences these acts.

We further submit that the abuse of companion animals be included as a form of controlling and coercive behaviour. The use of threat or violence against a companion animal by an abusive partner is very often focused around dominance and control. On this, Walker has recognised that abuse or threat of a companion animal can be used by perpetrators to 'intimidate, terrorize, and control their female partners'.[1] Other forms of coercive control include cases where perpetrators have prevented victims/survivors from

[1] M, Loring & T, Bolden-Hines 'Pet abuse by batterers as a means of coercing battered women into committing illegal behavior', *Journal of Emotional Abuse,* (2004), 29.

leaving the relationship by threatening to deprive animals of food. In one instance a perpetrator punished a woman for getting home late by putting her cat in the microwave.[2]

1(f) **Domestic relationship** – Section 1(f)(f) states that a domestic relationship can be based on whether individuals 'share or **[recently]** shared the same residence, premises or property within the preceding year'. The inclusion and limitation of time shared at a premise or property to a preceding year is entirely arbitrary and does not appear to be based on any form of research whatsoever. Although likely intended to broaden the scope of the time that persons could have resided together this provision creates a barrier for assistance.

1(g) **Domestic violence**

(g) **Stalking –** there is no reason for stalking to be removed from the Act. Stalking can be part of an act of domestic violence. Removing stalking from the Act and wholly placing it under the Protection from Harassment Act 17 of 2011 shows a failure to acknowledge the various forms domestic violence can take and how it occurs on a continuum. A victim or survivor who experiences their partner stalking them should not have to duplicate processes and also apply under the Harassment Act for an action which is part of domestic violence.

(hD) **Exposing or subjecting children, to behaviour listed in (*a*) to (*hD*)** – we suggest that this definition include other related persons and in certain instances companion animals.

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

[2] M, Loring & T, Bolden-Hines, 29.

wellbeing of] the complainant or a related person – We suggest that the above definition include both related persons as well as companion animals.

We must be cognizant that the definition of 'reasonable belief' may be different for a person who has experienced abuse and especially a continuum of abuse over a period of time. Goosen (who deals with the subject of the issue around lack of imminence of violence for some women who allege that they killed their partner in self-defense) states that women who have suffered from prolonged abuse may have a distorted perspective around degree and imminence of violence.[3] Thus, reasonableness is a difficult term to give weight to as it differs from those who experience abuse and those who do not.

(h) **Economic abuse** – this section must include related persons and companion animals as well as requiring provision for educational necessities.

(j) **Emergency monetary relief** - should include related persons. This should also include under subsection (c) travel expenses and under subsection (d) educational necessities.

2.2. Insertion of section 2A in Act 116 of 1998 (**Services for complainants relating to domestic violence**)

We commend the Department for outlining the need for victims and survivors of domestic violence to be able to access services such as medical treatment and shelters. We also note that under section 20 of the Bill, there are Directives for the Department of Social Development to 'set standards and minimum conditions for provision of services in accredited shelters'. We would, however, like to emphasise the importance of having sufficient, specialised gender-based violence shelters to address the needs of victims/survivors.

[3] S, Goosen, 'Battered Women and the Requirement of Imminence in Self-Defence', *PER*, (2016), 71.

Gender-based violence shelters are an essential service, providing not only a place to stay, but a safe space for women and children to recover from trauma. Victims and survivors need more than a roof over their heads: they need effective legal, medical and psychosocial support. Many have also suffered economic abuse and need assistance in finding jobs or developing marketable skills through accredited courses. They often also need quality childcare facilities to be able to take proper advantage of these services.

Since 2018, CALS has worked with a number of women who have accessed state-run gender-based violence shelters in Gauteng and Limpopo claiming to be 'flagship' shelters or 'one-stop-shops' offering these services and more. However, our clients and their children have faced numerous evictions after remaining in the shelters for over six months – an arbitrary time limit that has no basis in law and may not be adequate for every person to be able to move on from the shelter. We have also had a report from a woman whose child had a physical disability, and from a transwoman that they were not able to access gender-based violence facilities.

There is a desperate need for the state not only to set minimum standards for gender-based violence shelters, but to ensure there are long-term measures in place for the victims and survivors who need more than temporary housing. These minimum standards also need to take an intersectional approach and accommodate people with disabilities and members of the LGBT+ community.

Finally, the state needs to ensure that there are enough places in these shelters to accommodate all victims and survivors who have need of them. The Department of Social Development has acknowledged that the current numbers are inadequate. It would be meaningless if we have set standards and a referral system if there are simply not enough resources to access.[4]

[4] Department of Social Development, *Comprehensive Report on the Review of the White Paper for Social Welfare*, 1997. Available at https://www.gov.za/sites/default/files/gcis_document/201610/comprehensive-report-white-paper.pdf.

2.3. Insertion of section 2A in Act 116 of 1998 (**Duty to report Commission of acts of domestic violence**)

Immunity from civil and criminal proceedings for reporting

There must be a provision in this section providing for immunity for reporting domestic violence. This should reflect section 54(2)(c) of SORMA which states '[a] person who in good faith reports such reasonable belief or suspicion shall not be liable to any civil or criminal proceedings of making such report'.

2.4. Substitution of section 3 of the Act 116 of 1998 (**Arrest by peace officer without warrant**)

Need for clarity around certain provisions

Section 2(a) of the Bill states that a peace officer must arrest a person whom they reasonably suspect had committed an 'offence where physical violence is involved'.

The issue with this provision is that it is not clear what an *offence where physical violence is involved* actually is. Presumably these offences include common law offences of violence such as assault. However, are sexual offences under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 included as an act of physical violence? And if so, are these only offences that may cause physical harm, such as rape or sexual assault, or does this include offences such as grooming or exposing a minor to pornography?

Ultimately this section is too vague and leaves wide discretion to a peace officer to decide what constitutes an offence which is physically violent.

2.5. Substitution of section 4 of Act 116 of 1998 (**Application for protection order**)

Broadening the scope of those who can apply on behalf of a victim/survivor of domestic violence

Section 4(3)(a) of the Bill has been amended to expand on who can apply for a protection order on behalf of a victim or survivor of violence in the home. The wording in the Bill is very similar to the Act, where the Bill replaces that an order can be brought by '*any person'*, to read that '*another person'* can apply on behalf of a victim or survivor. The Bill does away with references to specific categories of professions that can apply and can be read to be attempting to broaden the scope of those who can apply by doing so.

The above is a commendable addition, however, the problematic phrase that *ought* to be amended is *'material interest'* in the wellbeing of the complainant or related person. It is not clear what a *'material interest'* would include and this threshold could be read to require a very close relationship with the complainant or a related person. Instead, there should only be an '*interest*' in the complainant or related person's wellbeing. This keeps what seems to be the intended scope of this section as applying more broadly. More people, and not fewer, should be permitted to apply for protection orders on behalf of an adult (who gives consent) and on behalf of a child. This section needs to be able to include members of communities, neighbours, friends, fellow church members and others.

Issues around written consent

Section 4(3)(a) of the Bill states that someone who is a victim or survivor of domestic violence must provide written consent in order for another person to apply for a protection order on their behalf. This requirement is not necessarily sufficient to achieve the purpose of this section and may in fact be a barrier to access.

The Bill fails to acknowledge that some persons are unable to give '*written'* consent and not in the way most likely foreseen by section 4(3)(b) which seems to include instances where an individual cannot consent rather than cannot give written consent. The complainant may not be able to give '*written'* consent due to

being illiterate, having a physical disability or simply not being able to write. This does not mean that this individual cannot consent and their inability to write should not be seen an inability to consent.

Furthermore, the Bill does not set out what written consent would look like, or what form it should take. Would it need to be an affidavit or would a piece of paper with the message 'Help me' suffice? Furthermore, could written consent be in the form of a text message or an email?

In light of the above, we suggest that *'written'* consent should not be a requirement in terms of the Bill. However, consent itself should be given a broader definition. Instead the scope of consent could be extended to encompass verbal consent, implied consent and even consent after instituting proceedings.

2.6. Substitution of section 5 of Act 116 of 1998 (**Consideration of application and issuing interim protection order**)

Including animals in the Bill and investigations by the NSPCA

Section 5(1A) inserts a discretion for the court to decide whether an investigation by the Family Advocate or a social worker should be undertaken to explore the wellbeing of minor children in the home where domestic violence may have been committed.

This section is commendable and an important insertion into the Act. We would extend this to allow a presiding officer to have the discretion to request that the NSPCA investigate any potential abuse against animals in the home. The intersection between animal abuse, child abuse and domestic violence in the home (often referred to as 'the link') shows that protecting one individual from violence in the home could potentially protect others.[5] The need for the inclusion of animals

[5] S, Swemmer 'International Law, Domestic Violence, and the Intersection with Nonhuman Animal Abuse', *Society and Animals,* (2019), 15.

and ‘the link’ is expanded upon under this submission under ‘Further Recommendations’.

The need to eradicate delays in issuing protection orders

According to the South African Police Services, the purpose of the interim protection order is to provide immediate protection to the complainant.[6] Yet, currently complainants may have to wait a whole day or a few days to hear whether an interim order has been granted. Complainants then have to wait a few weeks for the return date to appear in court to hear if the final order has been granted. Continuous postponements are a problem when individuals have a job and have to stay away from work each time the court hearing is postponed. These types of delays and untended timelines create a situation where individuals are not truly benefitting from the purpose of the Act and ultimately face a delay in accessing justice.

We suggest that there must be an expedited system for dealing with interim protection orders for persons who are sharing or living on the same property (same residence or same room) and those who do not share property to enable these orders to be meaningful. We submit that if the return date to hear the final protection is often too long, whilst the victim is waiting for the date they continue to share a residence and space with their abuser and might be subjected to further abuse. We submit that when the complainant and the perpetrator live in the same house the matter should be expedited and be heard within one week. Furthermore, presiding officers must not avoid using their discretion to order that respondents permanently leave the residence so as to avoid escalating violence and potentially an instance of intimate partner femicide.

2.7. Insertion of sections 5A, 5B and 5C in Act 116 of 1998 (**Duty in respect of existing orders or reciprocal orders**)

[6] South African Police Service, *Applying for a protection order*. Available at https://www.saps.gov.za/services/protection_order.php.

Creating further barriers to access

The title of Section 5C includes two primary subjects, the first is consideration of existing orders outside of protection orders by the court and the second is the issue of reciprocal protection orders.

It is not clear from section 5C that *awareness* of other orders is in fact sufficient in order to obtain a protection order. Instead it appears from the text that *awareness* must be accompanied with verification, for an order (other than those deemed urgent) to be granted. Section 5C(1) states that the applicant/complainant should make the court aware of other orders against the respondent, yet in terms of 5C(2)(b) it is stated that where a first time applicant is applying for an urgent order for temporary relief from domestic violence this can be provided while the original order is amended or varied.

This, on the face of it, seems progressive, yet it actually ignores the fact that domestic violence applications are inherently *urgent*. Thus, it creates a situation where some forms of violence are deemed *urgent* and relief will be given immediately, while some will be deemed *not urgent* and would have to be delayed while the original order is amended or varied.

It is not clear from 5C(2)(b) what *original order* will be amended or varied. Is this an order from another court, such as a maintenance order? If so, in instances of '*non-urgent'* applications the prolonged waiting period for this order to be varied or amended is entirely inappropriate due to the nature of domestic violence applications being inherently urgent, this would effectively be a denial of the individual applicant/complainant's rights under the Act.

Ultimately, this section aims to assist the court in providing awareness around all court orders between the parties and using this information to make a decision that is based on an informed understanding of the entire legal situation between the two individuals. However, this section inadvertently creates a new barrier for speedy access to protection orders for victims and survivors of violence in the

home by creating a delay in access pending verification and amendment as well as only accepting a threshold of *awareness* in 'urgent' cases and raised threshold in all other cases.

The issue of the existence of reciprocal protection orders / counter protection orders

According to Artz, a reciprocal or counter protection order is one where the respondent to an initial application or order applies for their own order against the complainant/applicant.[7] These are inherently problematic as they are very often used by the respondent as a mechanism of projecting blame around what is often an act of defense by the victim. It entirely acts in negating a victim's experiences of domestic violence. On this, Topliffe states that:

> '[j]udicial behavior strongly influences the possibility of future violence, and issuing a mutual protection order can send a message both to the batterer and to the victim regarding violence… The issuing of a mutual protection order can reinforce the batterer's belief that the problem is not his but is the result of external factors… he could easily understand a mutual protection order to mean that the court blames the victim as much as it blames him'.[8]

Artz notes that magistrates estimate between 5% – 30% of applications are counter applications and that these applications are on the increase. Magistrates further acknowledge that current filing systems do not lend themselves to accurate tracking of these cases.[9] In another study by L Artz in 2006, she made the following observation about reciprocal protection orders:

> '[n]ot surprisingly, most applicants in the study were female (75%), with about 12% being males applying for orders, many of which seemed to be either reciprocal orders or orders against other male family members'.[10]

---

[7] L, Artz, 'Better Safe than Sorry – Magistrates' views on the Domestic Violence Act' *SA Crime Quarterly,* (2004), 6.
[8] E Topliffe, 'Why Civil Protections Orders are Effective Remedies for Domestic Violence but Mutual Protection Orders are Not', *Indiana Law* Journal, (1992), 1060 – 1061.
[9] L, Artz, 'Better Safe than Sorry, 6.
[10] L, Artz, 'An Examination into the Attrition of Domestic Violence Cases: Preliminary Findings', *Mosaic*, (2006), 3. Available at https://www.academia.edu/32663358/An_Examination_Into_the_Attrition_of_Domestic_Violence_Cases_Preliminary_Findings.

On the issue of these types of orders a magistrate, interviewed by Artz, stated that:

> 'You see more and more of these things. One party gets an order then the other party gets another order to retaliate. It's not that uncommon, but the courts are quickly wising up to it. It is very difficult to track if you don't have good record-keeping systems at the court and the second applicant is very hesitant to say that the reason he is applying for a protection order is because his wife got one against him. My tolerance for these cases is limited. It wastes the court's time and it undermines the real purpose for the DVA. These people need to learn to play these games outside of my court.'[11]

We would thus suggest that a provision such as the one contained in the Arkansas Domestic Violence Act be considered for inclusion here as it creates a higher threshold for counter applications for domestic violence orders.

The Arkansas Code section 9 – 15 – 216 has the following criteria for issuing counter applications:

> **(a)** Except as provided in subsection (b) of this section, a circuit court shall not grant a mutual order of protection to opposing parties.
>
> **(b)** Separate orders of protection restraining each opposing party may only be granted in cases in which each party:
>
> **(1)** Has properly filed and served a petition for an order of protection;
>
> **(2)** Has committed domestic abuse as defined in § 9-15-103;
>
> **(3)** Poses a risk of violence to the other; and
>
> **(4)** Has otherwise satisfied all prerequisites for the type of order and remedies sought.

2.8. Amendment of section 11 of Act 116 of 1998 (**Publishing**)

Complainants and publication of their accounts

As it stands, section 11 2 (a) may be read to mean that victims and survivors of domestic violence do not have the right to publish accounts of their own experiences. It is, however, unclear why they should be silenced in this manner or why this information could not be published should the complainant give their

[11] L, Artz, 'Better Safe than Sorry – Magistrates' views on the Domestic Violence Act' *SA Crime Quarterly,* (2004), 7.

permission, assert their right to freedom of expression and/or waive their right to privacy. These publications could not only have a personal benefit for them by giving them a sense of empowerment and control over their own story, but have a far-reaching impact on other victims and survivors and potentially on the culture of silence around gender-based violence generally and domestic violence in particular.

2.9. Substitution of section 15 of Act 116 of 1998 (**Orders as to costs of service and directions**)

Costs orders in relation to services

Section 15(2) of the Bill states that a court may make an order of costs against either party for service of process or documents and/or electronic service. It is important that legal processes for the most part remain free in South Africa as access must be available to every person despite economic status.

It is a strange addition to include potential cost orders against complainants/applicants when one bears in mind the level of economic disadvantage and vulnerability of many people in South African but more so when one looks at feminisation of poverty and its intersection with violence.

This section should not exist as it is not a rational response to domestic violence and ignores the economic disadvantage of many complainants/applicants and respondents in the country. Domestic violence matters are not akin to civil cases and cost orders, other than vexatious ones, should not be imposed.

3. **Further recommendations**

3.1. Inclusion of companion animals in the Act

Domestic violence is the most common form of violence between partners in South Africa, with violence against young children also being concentrated to occurring within the home. What is not commonly noted, however, is that violence in the home is also

committed against companion animals. For example, Ascione *et al* found that of women who were present at a domestic violence shelter (DV shelter), 74% of women reported having a companion animal 12 months before entering the shelter and of those individuals 71% of women reported that their intimate partner either threatened violence or committed violence (including killing) against their companion animal during that time.[12]

Studies show that there is an intersection that exists between intimate partner violence (domestic violence), child abuse and the abuse of companion animals in the home. A study conducted by DeViney found that in 88 percent of cases where there was the occurrence of child abuse in a household there was also the report of abuse of the family's companion animal.[13] Furthermore, where there was no child abuse, animal abuse was only seen in 34 percent of cases. Ascione also states that a facet of this triad of violence (where domestic violence, child abuse and companion animal abuse are present) is where the perpetrator will torture or kill a partner's animal as a form of abuse. This intersection is commonly referred to as 'the link'.

From the above, we argue that companion animals must be included in the Bill and Act not only for the interest of animals but for the interest of other family members because being aware of abuse against one victim may save the life of another. The inclusion of companion animals in protection orders is not novel and the link between violence against women, children and animals has been acknowledged in 27 states in the US as well as 5 jurisdictions in Australia.

[12] F Ascione *et al*, 'Battered Pets and Domestic Violence', *Violence Against Women* 13(4) (2007), 354.
[13] E, Deviney *et al,* 'The Care of Pets with Child Abusing Households' in R, Lockwood & F, Ascione (eds) *Cruelty to Animals and Interpersonal Violence* (1998) 310.