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**B I L L**

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**To provide that a person can be convicted of the stalking of another person; to provide for the granting of protection orders with regard to stalking; and to provide for matters connected therewith.**

**PREAMBLE**

**WHEREAS** the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 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

**WHEREAS** the freedom from fear is one of the fundamental rights identified in the preamble of the Universal Declaration of Human Rights (1948);

**IT IS THE PURPOSE** of this Act to afford complainants of stalking behaviour an effective remedy in terms of the criminal and civil law, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to give effect to the state's commitment to intercept and eradicate violence committed against persons in the Republic or elsewhere by its citizens.

**B E IT THEREFORE ENACTED** by the Parliament of the Republic of South Africa, as follows:—

**Definitions**

1. In this Act, unless the context indicates otherwise-  
“**firearm**” means any firearm or any handgun or airgun or ammunition as defined in section 1(1) of the Firearms Control Act, 2000 (Act No. 60 of 2000);

**“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”** refers to any person who is or has been subjected or allegedly subjected to stalking as contemplated in this Act;

**“conduct”** means a single act or a number of acts that form part of a pattern of behaviour of the following or similar type –

- (a) following, loitering near, watching or approaching a person;
- (b) making contact with a person in any way, including by telephone, mail, facsimile, electronic mail or through the use of any technology, whether or not conversation ensues;
- (c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects;
- (d) loitering near, watching, approaching or entering a place where a person lives, works or visits;
- (e) leaving offensive material to a person, directly or indirectly;
- (f) an intimidating, harassing or threatening act or the causing of such an act against a person, whether or not involving violence or a threat of violence;
- (g) an act or threat of violence against a person or against property of a person;
- (h) keeping a person under surveillance; or
- (i) any other controlling or abusive behaviour towards a person, where such conduct harms, or may cause imminent harm to, the safety, health or well-being of a person.

**“court”** means any court contemplated in the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

**“dangerous weapon”** means any weapon as defined in section 1 of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968);

**“detriment”** includes the following –

- (a) apprehension or fear of violence towards, or against property of any person;
- (b) mental, psychological or emotional harm;
- (c) prevention or hindrance from doing an act which a person is lawfully entitled to do;
- (d) compulsion to do an act which a person is lawfully entitled to abstain from doing.

The inclusion of “detriment” flows from the Queensland model, pertinently addressing behaviour which impacts on the manner in which the victim goes about his or her business.

*Examples of paragraph (c) –*

*A person no longer walks outside his or her place of residence or employment.*

*A person significantly changes the route or form of transport which he or she would ordinarily use to travel to work or other places.*

*Example of paragraph (d) –*

*A person sells a property which he or she would not otherwise sell.*

**Comment is invited on whether “detriment” should be included in the Bill.**

“**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);

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

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

“**protection order**” means an order issued in terms of a regulation made under section 5 or 6 but, in section 5 excludes an interim protection order;

“**sheriff**” means a sheriff appointed in terms of section 2(1) of the Sheriffs Act, 1986 (Act No. 90 of 1986), or an acting sheriff appointed in terms of section 5(1) of the said Act;

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

## **Stalking**

2. (1) Any person who unlawfully and intentionally engages or attempts to engage or causes another to engage in conduct –

- (a) on any one occasion if the conduct is protracted or on more than one occasion;
- (b) directed at a complainant or the complainant's relatives, acquaintances, work colleagues or property; and
- (c) that –

- (i) is, reasonably arising in all the circumstances, likely to cause apprehension or fear of violence to, or against property of, the complainant or another person; or
- (ii) causes detriment or distress, reasonably arising in all the circumstances, to the complainant or another person

is guilty of the offence of stalking, and is liable upon to conviction to . . .

**The Commission requests comments regarding which sentence(s) would be appropriate, for example a reprimand; a fine; imprisonment; submission to instruction or treatment; or a suspended sentence.**

(2) A determination of mental illness and criminal responsibility of the person against whom a charge has been brought in terms of subsection (1) must be made in accordance with section 78 of the Criminal Procedure Act, 1977 (Act No.51 of 1977).

(3) For the purposes of subsection (1) it is immaterial whether the person engaging in the conduct—

- (a) intends that the complainant should be aware that the conduct is directed at himself or herself;
- (b) has a mistaken belief about the identity of the person at whom the conduct is intentionally directed;
- (c) intended to cause apprehension, fear, detriment or distress; or
- (d) actually causes the apprehension or fear of violence.

#### **Arrest by peace officer without warrant**

3. A peace officer may without warrant arrest anyone whom he or she reasonably believes of having committed an offence of stalking containing an element of violence or threat to imminent violence against a complainant.

#### **Application for protection order**

4. (1) Notwithstanding the provisions of section 2, any complainant may in the prescribed manner apply to the court for a protection order.

(2) If the complainant is not represented by a legal representative, the clerk of the court must inform the complainant, in the prescribed manner –

- (a) of the relief available in terms of this Act; and

(b) of the right to lodge a criminal complaint against the respondent.

(3) Notwithstanding the provisions of any other law, the application may be brought on behalf of the complainant by another person who has a material interest in the well-being of the complainant: Provided that the application must be brought with the written consent of the complainant, except in circumstances where the complainant is –

- (a) a minor;
- (b) mentally ill as defined in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973);
- (c) unconscious; or
- (d) a person who, in the opinion of the court, is unable to provide the required consent.

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

(5) The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court is satisfied that the complainant may suffer detriment or distress if the application is not dealt with immediately.

(6) Supporting affidavits by persons who have knowledge of the matter concerned may accompany the application.

(7) The application and affidavits must be lodged with the clerk of the court who shall forthwith submit the application and affidavits to the court.

### **Consideration of application and issuing of interim protection order**

5. (1) The court must as soon as 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 form part of the record of proceedings.

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

- (a) the respondent is committing, or has committed any act of stalking; and
- (b) detriment or distress may be suffered by the complainant as a result of such stalking if a protection order is not issued immediately,

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

(3) (a) An interim protection order must be served on the respondent in the prescribed manner and must call upon the respondent to show cause on the return date specified in the order why a protection order should not be issued.

(b) A copy of the application referred to in section 4(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.

(4) If the court does not issue an interim protection order in terms of subsection (2), the court must direct the clerk of the court to cause certified copies of the application concerned and any supporting affidavits to be served on the respondent in the prescribed manner, 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.

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

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

(7) Upon service or upon receipt of a return of service of an interim protection order, the clerk of the court must forthwith cause –

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

(b) the original warrant of arrest contemplated in section 8(1)(a).

to be served on the complainant.

### **Issuing of protection order**

6. (1) If the respondent does not appear on a return date contemplated in section 5(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 committed or is committing an act of stalking,

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

(2) If the respondent appears on the return date in order to oppose 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 5(1); and

(b) consider such further affidavits or oral evidence as it may direct, which shall form part of the record of the proceedings.

(3) The court may, on its own accord or on the request of the complainant, if it is of the opinion that it is just or desirable to do so, order that in the examination of witnesses, including the complainant, a respondent who is not represented by a legal representative –

(a) is not entitled to cross-examine directly a person whom he or she is alleged to have stalked; and

(b) shall put any question to such witness by stating the question to the court, and the court is to repeat the question accurately to the respondent.

(4) The court must, after a hearing as contemplated in subsection (2), issue a protection order in the prescribed form if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of stalking.

(5) Upon the issuing of a protection order the clerk of the court must forthwith in the prescribed manner cause –

(a) the original of such order to be served on the respondent; and

(b) a certified copy of such order, and the original warrant of arrest contemplated in section 8(1)(a), to be served on the complainant.

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

(7) Subject to the provisions of section 7(6), a protection order issued in terms of this section remains in force until it is set aside, and the execution of such order shall not be automatically suspended upon the noting of an appeal.

### **Court's powers in respect of protection order**

7. (1) The court may, by means of a protection order referred to in sections 5 and 6, prohibit the respondent from –

(a) committing or attempting to commit any act of stalking;

(b) enlisting the help of another person to commit any such act;

(c) entering a residence shared by the complainant and the respondent: Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;

(d) entering the complainant's residence;

(e) entering the complainant's place of employment; or

(f) committing any other act as specified in the protection order.

(2) The court may, by means of a protection order referred to in sections 5 and 6 order the respondent to submit to -

- (a) psychological treatment,
- (b) anger management instruction;
- (c) counselling or instruction;
- (d) treatment;
- (e) the compulsory attendance or residence at some specified centre for a specified purpose; or
- (f) any other appropriate behavioural intervention mechanism.

(3) If the magistrate, upon consideration of all the evidence relating to the mental condition of the person concerned, including his own observations with regard to such condition, is satisfied that such person is mentally ill to such a degree that he should be detained as a patient, he may issue a reception order in the form prescribed in the Mental Health Act 1973 (Act No. 18 of 1973) authorising the patient to be received, detained and treated at an institution specified in the order, or directing that the patient be received and detained as a single patient under section 10(1) of the said Act.

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

- (a) to seize any firearm or dangerous weapon in the possession or under the control of the respondent, as contemplated in section 9; and
- (b) that a peace officer must accompany the complainant to a specified place to assist with arrangements regarding the collection of personal property.

(5) (a) The physical address of the complainant must be omitted from the protection order, unless the nature of the terms of the order necessitates the inclusion of such address.

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

(6) (a) 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 such a provision shall be in force for such limited period as the court determines, in order to afford the party concerned the opportunity to seek appropriate relief in terms of such law.

### **Warrant of arrest upon issuing of protection order**

8. (1) Whenever a court issues a 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 such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7.

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

(3) The clerk of the court must 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 such warrant is required for her or his 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 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 concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent, the member must forthwith arrest the respondent for allegedly committing the offence referred to in section 15(a).

(c) If the member concerned is of the opinion that there are insufficient grounds for arresting the respondent in terms of paragraph (b), he or she must forthwith hand a written notice to the respondent which-

- (i) specifies the name, the residential address and the occupation or status of the respondent;

- (ii) calls upon the respondent to appear before a court, and on the date and at the time specified in the notice, on a charge of committing the offence referred to in section 15(a); and
- (iii) contains a certificate signed by the member concerned to the effect that he or she handed the original notice to the respondent and that he or she explained the import thereof to the respondent.

(d) The member must forthwith 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 shall be *prima facie* proof that the original thereof was handed to the respondent specified therein.

(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account-

- (a) the risk to the safety, health or well-being of the complainant;
- (b) the seriousness of the conduct comprising an alleged breach of the protection order; and
- (c) the length of time since the alleged breach occurred.

(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 must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

### **Seizure of arms and dangerous weapons**

9. The court must order a member of the South African Police Service to seize any arm or dangerous weapon in the possession or under the control of a respondent and declare such person unfit to possess a firearm in accordance with section 103 of the Firearms Control Act, 2000 (Act No. 60 of 2000) 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 chapter 12 of the said Act.

### **Variation or setting aside of protection order**

**10.** (1) A complainant or a respondent may, upon written notice to the other party and the court concerned, apply for the variation or setting aside of a protection order referred to in section 6 in the prescribed manner.

(2) If the court is satisfied that 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 shall not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.

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

### **Jurisdiction**

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

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

has jurisdiction to grant a protection order as contemplated in this Act.

(2) No specific minimum period is required in relation to subsection (1)(a).

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

### **Service of documents**

**12.** Service of any document in terms of this Act must forthwith be effected in the prescribed manner by the clerk of the court, the sheriff or a peace officer, or as the court may direct.

### **Costs**

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

## Appeal and review

**14.** The provisions in respect of appeal and review contemplated in the Magistrate's Courts Act, 1944 (Act No. 32 of 1944), and the Supreme Court Act, 1959 (Act No. 59 of 1959), apply to any proceedings in terms of this Act.

## Offences

- 15.** Notwithstanding the provisions of any other law, any person who-
- (a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7; or
  - (b) in an affidavit referred to in section 8(4)(a), wilfully makes a false statement in a material respect,

is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and in the case of an offence contemplated in paragraph (b), to a fine or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

## Regulations

- 16.** (1) The Minister of Justice may make regulations regarding-
- (a) any form required to be prescribed in terms of this Act;
  - (b) any matter required to be prescribed in terms of this Act; and
  - (c) any other matter which the Minister deems necessary or expedient to be prescribed in order to achieve the objects of this Act.

- (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 Minister of Finance; and
  - (c) may provide that any person who contravenes a provision thereof fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding one year.

**Amendment of section 40 of Act 51 of 1977, as amended by section 41 of Act 129 of 1993 and section 4 of Act 18 of 1996**

17. Section 40 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for paragraph (q) of subsection (1) of the following paragraph:

“(q) who is reasonably suspected of having engaged in stalking conduct as contemplated in section (1) of the Domestic Violence Act, 1998, or the Stalking Act, 200X, which constitutes an offence in respect of which violence is an element.”

**Amendment of section 102 of Act 60 of 2000**

18. Section 102 of the Firearms Control Act, 2000, is hereby amended by the substitution for paragraph (a) of subsection (1) of the following paragraph:

“(a) a final protection order has been issued against such person in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) or the Stalking Act, 200X;”

**Amendment of section 103 of Act 60 of 2000**

19. Section 103 of the Firearms Control Act, 2000, is hereby amended by-  
(a) the insertion, after paragraph (i) of subsection (1), of the following paragraph:

“(iA) any offence involving violent conduct as contemplated in section 1 of the Stalking Act, 200X;” and

(b) the substitution for paragraph (l) of subsection (1) of the following paragraph:

“(l) any offence in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) or the Stalking Act, 200X in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;”

**Short title and commencement**

**20.** This Act shall be called the Stalking Act, 200X, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.