

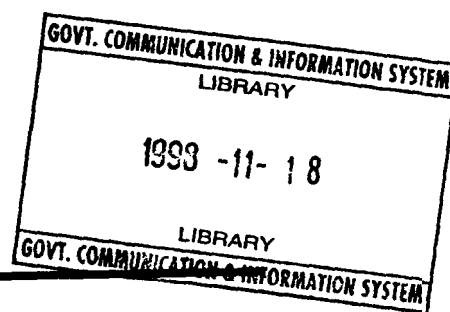
REPUBLIC OF SOUTH AFRICA

WITNESS PROTECTION BILL

(As amended by the Portfolio Committee on Justice (National Assembly))

(MINISTER OF JUSTICE)

[B 130B—98]



REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP GETUIEBESKERMING

(Soos gewysig deur die Portefeuljekomitee oor Justisie (Nasionale Vergadering))

(MINISTER VAN JUSTISIE)

[W 130B—98]

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GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To provide for the establishment of an Office for the protection of witnesses; to regulate the powers, functions and duties of the Director: Office for Witness Protection; to provide for temporary protection pending placement under protection; to provide for the placement of witnesses and related persons under protection; to provide for services related to the protection of witnesses and related persons; to amend the Criminal Procedure Act, 1977, so as to make provision for witness services at courts; and to provide for incidental matters.

BE IT ENACTED by the Parliament of [he Republic of South Africa, as follows:—

Definitions

1. (I) In this Act, unless the context otherwise indicates—
- (i) “commission” means any commission of inquiry appointed in terms of an Act 5 of Parliament; (xv)
 - (ii) “Complaints Directorate” means the Independent Complaints Directorate, established under section 50 of the South African Police Service Act, 1995 (Act No. 68 of 1995); (xiv)
 - (iii) “Constitution” means the Constitution of the Republic of South Africa, 1996 10 (Act No. 108 of 1996); (xi)
 - (iv) “Department” means the Department of Justice; (v)
 - (v) “Director” means the Director: Office for Witness Protection, appointed in terms of section 3(1); (vi)
 - (vi) “Director-General” means the Director-General: Justice; (vii) 15
 - (vii) “Director of Public Prosecutions” means any Director of Public Prosecutions appointed under section 13(1) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998); (viii)
 - (viii) “interested functionary” means—
 - (a) the Director of Public Prosecutions responsible for the institution and 20 conducting of criminal proceedings in respect of any offence referred to in the Schedule to this Act, in respect of which a witness is or may be required to give evidence or has given evidence on behalf of the State;
 - (b) any person designated thereto in writing by—
 - (i) the chairperson of a commission or the person presiding at 25 proceedings before a commission;
 - (ii) the person presiding at proceedings before a Tribunal;
 - (iii) the judicial officer presiding at inquest proceedings under the Inquests Act, 1959 (Act No. 58 of 1959); or

- (iv) the Executive Director of the Complaints Directorate or the person presiding at or heading an investigation conducted by the Complaints Directorate.
before whom a witness is or may be required to give evidence or has given evidence; or (i) 5
- (c) for the purposes of Chapters 5 and 6 of the Prevention of Organised Crime Act, 1998, the National Director as contemplated in section I of that Act;
- (ix) “law enforcement officer”, for the purposes of the Schedule to this Act, includes— 10
- (a) a member of the National Intelligence Agency or the South African Secret Service, established under the Intelligence Services Act, 1994 (Act No. 38 of 1994); and
- (b) a correctional official in the employ of the Department of Correctional Services; (xxv) 15
- (x) “member of the Office” means the Director, Deputy Director and any other person contemplated in section 3(5)(a); (xvi)
- (xi) “Minister” means the Minister of Justice; (xvii)
- (xii) “National Director” means the National Director of Public Prosecutions, referred to in section I 79(1)(a) of the Constitution; (xviii) 20
- (xiii) “Office” means the Office for Witness Protection, established by section 2, including any branch office established in terms of section 2(2); (xiii)
- (xiv) “place of safety” means a place of safety as designated by the Director; (xix)
- (xv) “prescribed” means prescribed by regulation made under section 23; (xxiv)
- (xvi) “proceedings” mean any— 25
- (a) criminal proceedings in respect of any offence referred to in the Schedule to this Act;
- (b) proceedings before a commission or a Tribunal;
- (c) proceedings under the Inquests Act, 1959 (Act No. 58 of 1959);
- (d) proceedings relating to an investigation conducted by the Complaints Directorate; or (xxii) 30
- (e) proceedings referred to in Chapters 5 and 6 of the Prevention of Organised Crime Act, 1998;
- (xvii) “protected person” means any person who has been placed under protection; (ii) 35
- (xviii) “protection” means any protection in terms of this Act, excluding temporary protection as contemplated in section 8, and may include the relocation or change of identity of, or other related assistance or services provided to, a protected person, as prescribed; (iii)
- (xix) “protection agreement” means an agreement referred to in section I I: (iv) 40
- (xx) “related person” means any member of the family or household of a witness, or any other person in a close relationship to, or association with, such witness; (xxiii)
- (xxi) “security officer” means any security officer seconded in terms of section 6(1); (xx) 45
- (xxii) “this Act” includes the regulations; (xii)
- (xxiii) “Tribunal” means any Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996); (xxi)
- (xxiv) “witness” means any person who is or may be required to give evidence, or who has given evidence in any proceedings; (ix) and 50
- (xxv) “witness protection officer” means any witness protection officer appointed in terms of section 5(I). (x)
- (2) For the purposes of sections IS, 16, 17, 18, 19, 21 and 22, and where applicable, any witness or related person who has been placed under temporary protection in terms of section 8(1) and who, at the expiry of such temporary protection, is— 55
- (a) placed under protection, shall be deemed to have been a protected person from the date of his or her placement under temporary protection: or

- (b) discharged from temporary protection without being placed under protection, shall be deemed to have been a protected person only for the period during which he or she was under temporary protection.

Establishment of Office for Witness Protecting

2. (1) There is hereby established an office within the Department called the Office for Witness Protection,

(2) The Minister may, after consultation with the Minister for Safety and Security and the National Director, by notice in the *Gazette*—

- (a) establish a branch office of the Office in any defined area for the purposes of the administration of this Act; 10
- (b) abolish any branch office or incorporate it with any other such office, and may for this purpose make any administrative or other arrangements as he or she may deem necessary; or
- (c) amend or withdraw a notice issued in terms of this subsection.

Director and members of Office

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3. (1) The Minister must, subject to the laws governing the public service, appoint a person to the office of Director: Office for Witness Protection, who shall be the head of the Office.

(2) The Director shall exercise the powers, perform the functions and carry out the duties conferred upon, assigned to or imposed upon him or her by or under this Act, subject to the control and directions of the Minister. 20

(3) Whenever the Director is for any reason unable to exercise, perform or carry out his or her powers, functions and duties or when the appointment of a person as Director is pending, the Minister may, subject to the laws governing the public service, appoint a person as Acting Director to exercise, perform or carry out the powers, functions and duties of the Director. 25

(4) The Director-General may, subject to the laws governing the public service, appoint a person as Deputy Director: Office for Witness Protection who shall, subject to the control and directions of the Director, exercise, perform or carry out any powers, functions and duties conferred upon, assigned to or imposed upon him or her by the Director. 30

(5) (a) The Director shall in the exercise of the powers, performance of the functions and carrying out of the duties conferred upon, assigned to or imposed upon him or her by or under this Act, be assisted, subject to his or her control and directions, by—

- (i) officers of the Department designated for that purpose by the Director-General; 35
 - (ii) witness protection officers;
 - (iii) security officers;
 - (iv) officers of any other Department of State seconded to the service of the Office, for a particular service, in terms of the laws governing the public service; 40
 - (v) persons in the service of any public or other body, institution or organisation, who can render a service in respect of any matter provided for by or under this Act and who are by arrangement with the body, institution or organisation concerned seconded with their consent to the service of the office; and
 - (vi) any other person whose services are obtained by the Director. 45
- (b) For the purposes of paragraph (a)(v)—
- (i) any body, institution or organisation which made an arrangement with the Director as contemplated in paragraph (a)(v), must from time to time, if requested by the Director in writing to do so, furnish him or her with a list of the names of persons, in the employ or under the control of that body, institution or organisation, who are fit and available to assist the Director as contemplated in the said subparagraph (v); 50
 - (ii) such a body, institution or organisation must, at the request of the Director, designate a person or persons mentioned in the list concerned so to assist the Director; and 55
 - (iii) the Director may refuse to accept the services of a person so designated and may thereupon request the body, institution or organisation concerned to designate another person.

(c) Notwithstanding any other law, any officer or person seconded to the service of the Office in terms of paragraph (a)(iv) or (v), or any person whose services have been obtained in terms of paragraph (a)(vi) may exercise the powers and must perform the functions or carry out the duties conferred upon, assigned to or imposed upon him or her from time to time by the Director and shall, in the exercise, performance or carrying out of such powers, functions or duties, act in terms of the laws applicable to the Office. 5

(d) Any person referred to in paragraph (a)(v) or (vi), who is not subject to the laws governing the public service, shall be entitled to such remuneration, including allowances for traveling and subsistence expenses incurred by him or her in the exercise, performance or carrying out of the powers, functions and duties conferred upon, assigned to or imposed upon him or her by the Director, as the Minister in consultation with the Minister of Finance may determine. 10

Powers, functions and duties of Director

4. (1) In order to achieve the objects of this Act, the Director—

(a) is responsible for the protection of witnesses and related persons, including temporary protection, and related services in accordance with this Act; 15

(b) must carry out the administrative duties relating to the protection of witnesses and related persons, including temporary protection, and related services;

(c) may enter into agreements to make use of the services of persons, bodies, institutions or organisations; 20

(d) may make an arrangement with any Department of State or enter into an agreement with any person, body, institution or organisation—

(i) in terms of which the Office will be authorised to make use of the facilities or equipment belonging to or under the control of such Department, person, body, institution or organisation; 25

(ii) in order to obtain documents and other information that may be required for the protection of a protected person; or

(iii) regarding any matter for the purpose of giving effect to the provisions of this Act;

(e) must regulate the procedure and determine the manner in which the provisions of this Act shall be carried out by any branch office referred to in section 2(2); 30

(f) may designate places to be utilised as places of safety;

(g) must exercise control over witness protection officers and security officers; and

(h) may exercise the powers and must perform the functions or carry out the duties conferred upon, assigned to or imposed upon him or her by or under this Act. 35

(2) (a) The Director may, either in general or in a particular case or in cases of a particular nature, in writing delegate any power, function or duty conferred upon, assigned to or imposed upon him or her by or under this Act to any other member of the Office. 40

(b) Any member of the Office to whom any power, function or duty has been delegated under paragraph (a) shall exercise that power, perform that function or carry out that duty subject to the control and directions of the Director.

(c) The Director may at any time in writing withdraw such delegation, and the delegation of any power, function or duty shall not prevent the Director from exercising, performing or carrying out that power, function or duty himself or herself. 45

(3) All Departments of State must render such assistance as may be reasonably required in the exercise, performance or carrying out of the powers, functions and duties conferred upon, assigned to or imposed upon the Director by or under this Act. 50

Witness protection officers

5. (1) The Director-General must, subject to the laws governing the public service, appoint for each branch office established in terms of section 2(2) a person as witness protection officer, who shall be the head of such branch office.

(2) Whenever a witness protection officer is for any reason unable to exercise, perform or carry out his or her powers, functions and duties or when the appointment of a person as witness protection officer is pending, the Director-General may, subject to the laws governing the public service, appoint a person as acting witness protection officer to exercise, perform or carry out the powers, functions and duties of the witness protection officer concerned.

(3) In order to achieve the objects of this Act and subject to the control and directions of the Director, a witness protection officer may exercise the powers and must perform the functions or carry out the duties conferred upon, assigned to or imposed upon him or her by the Director or under this Act.

(4) A witness protection officer shall in the exercise of the powers, performance of the functions and carrying out of the duties conferred upon, assigned to or imposed upon him or her by the Director or under this Act, be assisted by other members of the Office designated for that purpose by the Director.

(5) A witness protection officer must at all times control and supervise the activities of security officers in his or her area and must as often as the Director requires, but at least once every six months, submit a written report to the Director on such activities or on any other matter relating to this Act which the Director requests the witness protection officer to deal with in such report.

Security officers

6. (1) The Director-General may request—

- (a) the Secretary for Defence;
- (b) the National Commissioner: South African Police Service;
- (c) the Director-General: National intelligence Agency;
- (d) the Director-General: South African Secret Service; or
- (e) the Commissioner: Correctional Services,

as the case may be, to second any member of the security services referred to in section 199(1) of the Constitution, or any correctional official in the employ of the Department of Correctional Services, as a security officer to the service of the Office in terms of the laws regulating such secondment.

(2) In order to achieve the objects of this Act and subject to the control and directions of the Director, a security officer seconded in terms of subsection (1) may exercise the powers and must perform the functions or carry out the duties conferred upon, assigned to or imposed upon him or her by the Director or a witness protection officer, or in terms of this Act, and shall, in the exercise, performance or carrying out of such powers, functions or duties, act in terms of the laws applicable to the Office.

Application for protection

7. (1) Any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may—

- (a) report such belief—
 - (i) to the investigating officer in the proceedings concerned;
 - (ii) to any person in charge of a police station;
 - (iii) if he or she is in prison, to the person in charge of the prison where he or she is being detained or to any person registered as a social worker under the Social Work Act, 1978 (Act No. 110 of 1978), or deemed to be so registered and who is in the service of a Department of State;
 - (iv) to the public prosecutor or the interested functionary concerned; or
 - (v) to any member of the Office; and

(b) apply in the prescribed manner that he or she or any related person be placed under protection.

(2)(a) If a witness is for any reason unable to make a report as contemplated in subsection (1)(a) or to make an application for protection as contemplated in subsection (1)(b), any interested person or the investigating officer concerned, who has reason to believe [that the safety of the witness or any related person is or may be threatened as contemplated in subsection (1), may make such a report or application on behalf of the witness. 5

(b) Subject to section 12, an application for protection of a minor may be made by or on behalf of the minor without the consent of his or her parent or guardian. 10

(3) Any person to whom a report is made as contemplated in subsection (1), must assist the applicant in the making of an application for protection and, unless he or she is (he Director, must forthwith—

(a) inform the Director of the application; and

(b) submit the application to the Director or a witness protection officer. 15

(4) The Director may, whenever he or she deems it necessary, refer an application for protection submitted to him or her, to a witness protection officer for evaluation and the submission of a report as contemplated in section 9(1).

Temporary protection

8. (1) The Director or a witness protection officer— 20

(a) to whom a report referred to in section 7(I) has been made;

(b) who has been informed of an application for protection or to whom a written application for protection has been submitted as contemplated in section 7(3)(2); or

(c) if he or she is aware [that a report or an application referred to in section 7 is to be made, 25

may, pending the finalisation of an application for the protection of a witness or related person, place the witness or related person concerned under temporary protection as prescribed for a period not exceeding 14 days, if he or she deems it necessary for the safety of such witness or related person: Provided that— 30

(i) if a report or an application has been made as contemplated in section 7(2)(a), the witness or related person may only be placed under temporary protection if he or she has consented thereto; and

(ii) no minor shall be placed under temporary protection without the consent of his or her parent or guardian, 35

unless the Director is of the opinion that exceptional circumstances exist which do not warrant such consent.

(2) If a witness protection officer places a witness or related person under temporary protection as contemplated in subsection (1), he or she must report such placement within 48 hours to the Director. 40

Reports by witness protection officer

9. (1) A witness protection officer must consider the merits of an application for protection submitted or referred to him or her in terms of section 7 and must—

(a) as soon as possible after the receipt of such application, but not later than 14 days thereafter; or 45

(b) if the person has been placed under temporary protection as contemplated in section 8(1), before the expiry of such temporary protection, report thereon to the Director,

(2) A report referred to in subsection (1) must be in writing and must include—

(a) a written indication by the interested functionary concerned whether the person concerned is a witness or not; 50

(b) a recommendation whether the person concerned qualifies for protection;

(c) particulars relating to the factors referred to in section 10(1); and

(d) any other matter which in the opinion of the witness protection officer should be taken into account, 55

(3) If a witness protection officer recommends that a person be placed under protection, he or she may make recommendations with regard to the nature of the protection, the expected duration of the protection and any particular circumstances that ought to be taken into account in the placement under such protection.

(4) If a witness protection officer recommends that an application for protection be refused, he or she must inform the Director of the reasons for such recommendation.

Consideration of application for protection

10. (1) The Director must in respect of an application for protection have due regard to the report and recommendations of the witness protection officer concerned, or if such an [Implication has not been referred to a witness protection officer in terms of section 7(4). any written recommendations by the interested functionary concerned in respect of whether the person concerned should be placed under protection or not and must also take into account—

- (a) the nature and extent of the risk to the safety of the witness or any related person; 15
- (b) any danger that the interests of the community might be affected if the witness or any related person is not placed under protection;
- (c) the nature of the proceedings in which the witness has given evidence or is or may be required to give evidence, as the case may be;
- (d) the importance, relevance and nature of the evidence given or to be given by the witness in the proceedings concerned; 20
- (e) the probability that the witness or any related person will be able to adjust to protection, having regard to the personal characteristics, circumstances and family or other relationships of the witness or related person;
- (f) the cost likely to be involved in the protection of the witness or any related person; 25
- (g) the availability of any other means of protecting the witness or any related person without invoking the provisions of this Act; and
- (h) any other factor that the Director deems relevant.

(2) In order to enable him or her to make a proper evaluation of an application for protection, the Director must be afforded immediate and full access to any police docket and statement of a witness in relation to any evidence given in any proceedings, and he or she is entitled to obtain copies of any such statement or of such evidence or any part thereof.

(3) After having considered an application for protection, the Director may -

- (a) pending the approval or refusal of an application in terms of paragraph (b) or (c), make any interim arrangements with the witness or related person relating to his or her protection in terms of this Act; 35
- (b) approve the application and thereupon place the witness or any related person under protection in accordance with the protection agreement entered into by or on behalf of the witness or related person and the Director; or 40
- (c) refuse the application and, where applicable, by written notice to the witness revoke any temporary protection under which he or she or any related person has been placed in terms of section 8(1).

Protection agreement

11. (1) Subject to subsection (2), the Director must, before he or she places any witness or related person under protection—

- (a) enter into a written protection agreement with such witness; and
- (b) where applicable, enter into a separate written protection agreement with each related person,

setting out the obligations of the Director and the witness or related person in respect of his or her placement under protection. 50

(2) The Director shall—

- (a) enter into a protection agreement with the parent or guardian of—
 - (i) a minor; or
 - (ii) a person who is otherwise not competent to enter into a legally binding agreement; or 55

(b) enter into a draft protection agreement with a minor referred to in the proviso to section 12(1).

(3) If the Director has entered into a protection agreement as contemplated in subsection (2), he or she may, as soon as possible after the protected person concerned becomes competent to enter into a legally binding agreement, require the protected person to enter into a new protection agreement. 5

(4) A protection agreement must set out the terms and conditions under which a witness or related person is to be placed under protection, including—

(a) an obligation on the Director—

(i) to take such reasonable steps as are necessary to provide the protected person with the protection and related services, as referred to in the protection agreement concerned; and 10

(ii) not to keep a protected person under protection in any prison or police cell, unless otherwise agreed upon;

(b) an obligation on the witness or the related person— 15

(i) where applicable, to give the evidence as required in the proceedings to which the protection relates;

(ii) to meet all financial obligations incurred by him or her that are not payable by the Director in terms of the protection agreement;

(iii) to meet all legal obligations incurred by him or her, including any obligations regarding the custody and maintenance of children and taxation obligations; 20

(iv) to refrain from activities that constitute a criminal offence;

(v) to refrain from activities that might endanger his or her safety or that of any other protected person; 25

(vi) to accept and give effect to all reasonable requests and directions made or given by any member of the Office in relation to the protection provided to him or her and his or her obligations;

(vii) to inform the Director of any civil proceedings which have or may be instituted by or against him or her or in which he or she is otherwise involved; 30

(viii) to inform the Director of any proceedings in which he or she was or may be involved, either as a witness or accused or otherwise; and

(ix) not to endanger the security or any other aspect of the protection of witnesses and related persons or related services or any other matter relating to a witness protection programme provided for in this Act; 35

(c) any other prescribed terms and conditions or obligations agreed upon; and

(d) a procedure in accordance with which the protection agreement may, if necessary, be amended.

Protection of minor

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12. (1) No minor shall be placed under protection without the consent of his or her parent or guardian: Provided that any minor—

(a) who, as a witness, applies for protection in respect of proceedings against his or her parent or guardian or in which his or her parent or guardian is a suspect; 45

(b) who has no parent or guardian;

(c) whose parent or guardian cannot be identified or found, notwithstanding reasonable efforts to do so; or

(d) whose parent or guardian is unreasonably withholding or is unable to give his or her consent,

may be placed under protection without the consent of his or her parent or guardian if the Director is of the opinion that it is necessary to do so for the safety of the said minor. 50

(2) (a) If the Director, in the circumstances referred to in the proviso to subsection (1), places a minor under protection, he or she must—

(i) within seven days of such placement; or

- (ii) within such further period as [he Judge President of the High Court within whose area of jurisdiction the minor is domiciled or ordinarily resident. may determine in an application made to him or her in chambers by the Director, submit to the said Judge President—
- (aa) a report setting out his or her reasons for such placement; and 5
 - (bb) the draft protection agreement referred to in section 11(2)(b), for consideration by a judge in chambers.
- (b) The Director must also furnish to the minor concerned and, where applicable, to his or her parent or guardian, a copy of the report and the draft protection agreement referred to in paragraph (a). 10
- (3) After consideration of the report and draft protection agreement referred to in subsection (2)(a), the judge may by order—
- (a) set aside the placement under protection;
 - (b) confirm the placement under protection and thereupon ratify the draft protection agreement; or 15
 - (c) confirm the placement under protection and thereupon amend the draft protection agreement in the manner which he or she deems—
 - (i) to be in the best interests of the minor; and
 - (ii) necessary to ensure the safety of the minor.
- (4) If the placement under protection of a minor is set aside inter-m so subsection 20 (3)(a), the Director must forthwith discharge such minor from protection.
- (5) Any draft protection agreement ratified or amended in terms of subsection 3), shall constitute a binding protection agreement.
- (6) The Director shall be the *curator ad litem* of a minor who, without the consent of his or her parent or guardian, has been placed under temporary protection as 25 contemplated in section 8(I) or protection as contemplated in the proviso to subsection (1).

Discharge from protection

13. (1) The Director may, subject to subsections (5) and (8), on his or her own accord or upon receipt of a report referred to in subsection (3), and after consideration of any 30 representations referred to in subsection (5), by written notice discharge any protected person from protection if he or she is of the opinion that—
- (a) the safety of the person is no longer threatened;
 - (b) satisfactory alternative arrangements have been made for the protection of the person; 35
 - (c) the person has failed to comply with any obligation imposed upon him or her by or under this Act or the protection agreement;
 - (d) the witness, in making application for placement under protection, wilfully furnished false or misleading information or particulars or made a statement which is false or misleading in any material respect, or wilfully failed to 40 disclose any information or particulars material to his or her application;
 - (e) the person refuses or fails to enter into a protection agreement when he or she is required to do so in terms of section I 1 (3);
 - (f) the behaviour of the person has endangered or may endanger the safety of any protected person or the integrity of a witness protection programme under this 45 Act; or
 - (g) the person has wilfully caused serious damage to the place of safety where he or she is protected or to any property in or at such place of safety.
- (2) The Director may, subject to subsections (4) and (5) and after consideration of any 50 representations referred to in subsection (S), upon receipt of a written notice given by the interested functionary concerned that the evidence of a witness is no longer required in the proceedings concerned or that such proceedings have been concluded, by written notice, discharge such witness and all related persons from protection.
- (3) If a witness protection officer has reasonable grounds to believe or to suspect 55 that—
- (a) any of the circumstances for discharge referred to in subsection (1)(a) or (b) exist; or

(b) a protected person is performing or has performed any act referred to in subsection (1)(c) to (g),

he or she must forthwith report the matter to the Director.

(4) The Director may, upon an application by—

(a) a protected person;

(b) the parent or guardian of a minor; or

(c) a minor referred to in the proviso to section 12(1),

who is to be discharged from protection in terms of subsection (2), if he or she is of the opinion that the safety of such protected person is still being threatened after the conclusion of the proceedings concerned, extend the protection of such person for as long as it may in his or her opinion be necessary: Provided that the protection of a minor referred to in the proviso to section 12(1), may not be so extended without the prior approval of a judge in chambers.

(5) The Director must, before he or she discharges a protected person from protection, take reasonable steps to notify in [the prescribed manner—

(a) (i) the protected person and, if he or she is a minor, his or her parent or guardian; and

(ii) the interested functionary concerned, of the contemplated discharge in terms of subsection (1); or

(b) the protected person and, if he or she is a minor, his or her parent or guardian of the contemplated discharge in terms of subsection (2),

and must allow the protected person, and, where applicable, his or her parent or guardian, and the interested functionary concerned to make written representations to him or her within the prescribed period and in the prescribed manner in relation to any matter regarding such discharge.

(6) Any protected person remains under protection until he or she is discharged from protection in terms of subsection (1) or (2) or in accordance with an agreement referred to in section 21(1)(a) or until—

(a) he or she; or

(b) the parent or guardian of a minor; or

(c) a minor referred to in the proviso to section 12(1),

submits a waiver of protection, in the prescribed manner, to the Director.

(7) The Director must, subject to subsection (X), upon receipt of a waiver of protection referred to in subsection (6), without delay discharge the protected person from protection.

(8) The Director may not discharge—

(a) a protected person referred to in section 21(1)(a) from protection in terms of this section without the prior approval of the Minister; or

(b) a minor referred to in the proviso to section 12(1) from protection in terms of this section without the prior approval of a judge in chambers.

Review by Minister

14. Any person who feels aggrieved by any decision of or steps taken by the Director or any person acting on behalf of the Director under a provision of this Act, may within the prescribed period and in the prescribed manner, apply to the Minister to review the decision or steps concerned.

Civil proceedings in which protected person is a party or witness

15. (1) Any civil proceedings in which a protected person is a party or a witness may, subject to [the provisions of subsection (2)], be proceeded with in terms of the laws regulating such proceedings.

(2) If it appears to a judge of a High Court in an *ex parte* application, made to him or her in chambers by the Director, that the safety of any protected person might be endangered by the institution or prosecution of any civil proceedings in which a protected person is a party or a witness, whether in that High Court or in any lower court within its area of jurisdiction, the judge may make any order he or she deems appropriate with regard to the institution or prosecution or postponement of those proceedings in a manner aimed at—

- (a) preventing the disclosure of the identity or whereabouts of the said person; or
- (b) achieving the objects of this Act.

(3) Notice of any order made in terms of subsection (2) must be given to the parties to the proceedings concerned and to their legal representatives in accordance with the rules of court. 5

(-1) The address of the Office for Witness Protection shall for all purposes of service of process on a protected person, serve as the *domicilium citandi et executandi* of such person and notice of such address must be given in writing by the Director and delivered by hand or sent by registered mail by him or her to all other parties or their legal representatives. 10

Access to minor under protection

16. If a judge of a High Court in an *ex parte* application, made to him or her in chambers by the Director, is satisfied that the safety of a minor who is under protection might be endangered by the exercising by anyone of his or her right of access to that minor, the judge may suspend such right of access or make any order he or she deems appropriate with regard to the exercising of such right in a manner aimed at— 15

- (a) preventing the disclosure of the identity or whereabouts of the said minor; or
- (b) achieving the objects of this Act.

Confidentiality and disclosure of information

17. (1) The Director and every other member of the Office must, upon taking office, take an oath or make an affirmation in the form specified in subsection (3). 20

(2)(a) The Director must take the oath or make the affirmation referred to in subsection (1) before the Director-General.

(b) Any other member of the Office must take the oath or make the affirmation referred to in subsection (1) before the Director. 25

(3) For the purposes of this section the oath or affirmation must be in the following form:

“ ‘1, A B, hereby declare under oath/solemnly affirm that I understand and shall honour the obligation of confidentiality imposed upon me by or under the provisions of the Witness Protection Act, 1998, and shall not act in contravention thereof.’ “ 30

(4) No person shall disclose any information which he or she has acquired in the exercise of the powers, performance of the functions or carrying out of the duties conferred upon, assigned to or imposed upon him or her by or under this Act, or in the course of the performance of any functions relating to the provisions of [his Act, except— 35

- (a) for the purpose of giving effect to the provisions of this Act;
- (b) when required to do so by any competent court;
- (c) if he or she is authorised thereto by the Minister; or
- (d) in terms of subsection (5). 40

(5) The Director may, subject to subsection (6), and after consideration of any representations referred to in that subsection, on such conditions as he or she deems fit, disclose any information in respect of a protected person—

- (a) with the consent of—
 - (i) the protected person concerned; or 45
 - (ii) his or her parent or guardian, if he or she is a minor;
- (b) if the protected person has previously disclosed such information or acted in a manner which resulted in such disclosure;
- (c) if the disclosure—
 - (i) is required for the exercise or protection of any rights; 50
 - (ii) is required for the compilation of a voter's role; or
 - (iii) is in the public interest; or
- (d) in any criminal proceedings if the disclosure is necessary to establish the guilt or the innocence of a person:

Provided that the Director may not disclose any information in respect of a minor 55

referred to in the proviso to section 12(I) without the prior approval of a judge in chambers.

(6)(a) The Director must, before he or she discloses any information in respect of a protected person in the circumstances referred to in subsection (5)(b), (c) or (d), take reasonable steps to notify-

(i) the protected person; or

(ii) the parent or guardian of the protected person, if he or she is a minor, in the prescribed manner of the contemplated disclosure and must allow the protected person or, where applicable, his or her parent or guardian, to make written representations to him or her within the prescribed period and in the prescribed manner in relation to any matter regarding such disclosure.

(b) The provisions of paragraph (a) do not apply if the Director is of the opinion that such notification may jeopardise the purpose for which the information is to be disclosed.

(7) The Director must, in determining whether information in respect of a protected person should be disclosed as contemplated in subsection (5), take into account—

(a) the reasons for the disclosure;

(b) the probability that the disclosure may endanger the safety of the protected person concerned or that of any other protected person or the integrity of a witness protection programme under this Act;

(c) whether the need for the disclosure can effectively be met by any other means;

(d) whether there are effective means available to prevent any further disclosure of the information; and

(e) any other factor that, in the opinion of the Director, should be taken into account.

(8) No person shall disclose any information referred to in subsection (4)—

(a) which—

(i) came into his or her possession; or

(ii) to his or her knowledge was disclosed to him or her, in contravention of the provisions of that subsection; or

(b) if he or she ought to have reasonably suspected that such information was disclosed to him or her in contravention of the provisions of that subsection.

(9) Notwithstanding any other law, no person in respect of whom proceedings are, or may be, or have been instituted or conducted, or who is a suspect in such proceedings, shall have access to any information, record, document or statement relating to the proceedings concerned, including any information, record, document or statement which is contained in, or forms part of, a police docket or is held by any police official charged with the investigation relating to such proceedings, which may disclose any information referred to in section 18, unless the Director otherwise directs.

Publication of information concerning protected person

18. Notwithstanding any other law, the presiding officer—

(a) at any proceedings or at civil proceedings in which the protected person is a party or a witness; or

(b) at proceedings, other than the proceedings referred to in the definition of “proceedings” in section 1, instituted or conducted in terms of any law, in which the protected person is a party or a witness and in respect of which he or she is in terms of any law compellable to answer questions or to give evidence or to produce any book, record, document or object in his or her possession or under his or her control in such proceedings,

must make an order prohibiting the publication of any information, including any drawing, picture, illustration, painting, photograph, whether produced through or by means of computer software on a screen or a computer print-out as contemplated in the Films and Publications Act, 1996 (Act No. 65 of 1996), or not, pamphlet, poster or other printed matter, which may disclose—

(i) the place of safety or location where he or she is or has been under protection or where he or she has been relocated in terms of this Act;

(ii) the circumstances relating to his or her protection;

(iii) the identity of any other protected person and [he place of safety or location where such person is being protected; or

(iv) the relocation or change of identity of a protected person,

unless the Director satisfies the presiding officer concerned that exceptional circumstances, which are in the interest of justice, exist why such an order should not be made. 5

Protected person not obliged to disclose certain information

19. Notwithstanding any other law, no protected person—

(a) when giving evidence or producing any book, record, document or object in his or her possession or under his or her control in any proceedings or in any civil proceedings before a court; or

(b) if he or she is in terms of any law compellable to answer questions or to give evidence or to produce any book, record, document or object in his or her possession or under his or her control in any proceedings, other than the proceedings referred to in the definition of “proceedings” in section 1, instituted or conducted in terms of any law, when answering the questions or giving the evidence or producing that book, record, document or object in such proceedings,

shall be obliged to disclose any information referred to in section 18.

Donations, bequests and contributions for witness protection

20. (1) The Director may, with the approval of the Director-General, receive any donation, bequest or contribution, in money or otherwise, from any source for the purpose of giving effect to the provisions of this Act, and the Director-General must be notified of the receipt of any such donation, bequest or contribution,

(2) The Director must utilise any donations, bequests or contributions contemplated in subsection (1) as prescribed and in accordance with the conditions, if any, imposed by the donor, testator or contributor concerned, in so far as such conditions are not inconsistent with the provisions of this Act.

Agreements with international bodies, institutions, organisations or foreign countries

21. (1) The Minister may enter into an agreement, either in general or on specific terms and conditions, with any international body, institution, organisation or foreign country in order to—

(a) place a person who is being protected under a witness protection programme administered by that body, institution, organisation or country, under protection in terms of this Act; or

(b) admit a protected person to a witness protection programme in terms of any law applicable to that body, institution or organisation or in that country:

Provided that no person referred to in paragraph (a) shall be placed under protection without the consent of the Minister.

(2) For the purpose of giving effect to the provisions of subsection (1), any Minister shall, in relation to a person in respect of whom an agreement as contemplated in subsection (1) has been entered into and upon a recommendation by the Minister, exercise, perform or carry out any power, function and duty conferred upon, assigned to or imposed upon such Minister by or under any law.

Offences and penalties

22. (1) Any person who—

(a) wilfully or negligently allows any unauthorised person to gain access to any protected person;

(b) wilfully or negligently discloses, in contravention of any provision of this Act—

(i) the identity of any protected person;

(ii) information that a particular protected person is under protection;

(iii) the place of safety or location where any person is under protection or has been relocated in terms of this Act;

(iv) any information which could lead to the identification of any such person or any such place of safety;

- (v) any information which under-mines or compromises or could undermine or compromise the integrity of a witness protection programme in terms of this Act; or
- (vi) any information relating to the relocation or change of identity of a protected person; or
- (c) wilfully or negligently contravenes any provision of section 17(4), (8) or (9), or who discloses information in contravention of any condition determined by the Director in terms of section 17(5),
- shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding 30 years.
- (2) (a) Any person who—
- (i) wilfully contravenes any provision of section 10(2);
- (ii) wilfully interferes with, or hinders or obstructs the Director or any other member of the Office in the exercise, performance or carrying out of any of his or her powers, functions and duties contemplated in this Act; or
- (iii) with intent to gain for himself or herself or for any other person protection in terms of this Act, makes any false statement or furnishes information that he or she knows to be untrue or misleading,
- shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding five years.
- (b) Upon the conviction of any person for an offence referred to in paragraph (a)(iii), (republic prosecutor must, if the State has suffered any loss as a result of such offence, apply for an order for the payment of compensation in terms of section 300 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

Regulations

23. (1) The Minister may make regulations relating to—
- (a) the placing of witnesses or related persons under protection;
- (b) the protection of the identity of protected persons;
- (c) the regulation of access to places of safety where persons are being kept or relocated in terms of this Act;
- (d) the utilisation of security officers or private security personnel for protection services in terms of this Act;
- (e) the assistance to be rendered or functions to be performed by any Department of State, person, body, institution or organisation for the purpose of giving effect to the provisions of this Act;
- (f) the information to be furnished by, or any steps to be taken in respect of, a witness or related person whose application for placement under protection is being considered;
- (g) the terms and conditions that must be included in protection agreements or in other agreements or arrangements entered into or made under this Act;
- (h) the procedure for the relocation or change of identity of a protected person;
- (i) the manner in which and the conditions whereunder any decision of or steps taken by the Director or any person acting on behalf of the Director under a provision of this Act, may be subjected to review by the Minister;
- (j) the powers, functions and duties of witness protection officers and security officers;
- (k) mechanisms to be put in place in order to monitor the circumstances under which a person is kept under protection;
- (l) specific offences in respect of which, in addition to the offences listed in the Schedule to this Act, a witness or related person may be placed under protection;
- (m) any other matter that is required or permitted to be prescribed in terms of this Act; and
- (n) in general, any matter which the Minister deems necessary or expedient to prescribe in order to achieve the objects of this Act.
- (2) Different regulations may be made in respect of different categories of witnesses or related persons,

(3) Any regulation made under subsection (1) must, before publication [hereof in the *Gazette*, be submitted to Parliament.

(4) Any regulation made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or [o imprisonment for a period not exceeding three 5 years.

(5) Any regulation made under subsection (1) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance,

Repeal of section 185A of Act 51 of 1977, as inserted by section 4 of Act 135 of 1991

24. (1) Section 185A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), is 10 hereby repealed.

(2) Notwithstanding the repeal of section 185A of [he Criminal Procedure Act, 1977—

- (a) any person who is detained in or who has been placed under protective custody under the said section immediately before the commencement of this 15 Act, shall remain in such detention or placement and shall be deemed to have been placed under protection in terms of this Act;
- (b) any written agreement entered into between the person referred to in paragraph (a) and the Department prior to the commencement of this Act, shall, except in so far as it is inconsistent with this Act, remain valid until that 20 person and the Director have entered into a protection agreement in terms of this Act; and
- (c) (i) any regulation made under the said section and in force immediately prior to the commencement of this Act; and
(ii) any rule, notice, order, instruction, prohibition, authorisation, permis- 25 sion, consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in terms of any such regulation prior to the commencement of this Act, shall remain in force, except in so far as it is inconsistent with this Act, until 30 replaced by or in terms of a regulation made under section 23.

Insertion of section 191A into Act 51 of 1977

25. The following section is hereby inserted into the Criminal Procedure Act, 1977:

“Witness services

191A. (1) The Minister has the power to determine services to be provided to a witness who is required to give evidence in any court of law. 35

(2) The Minister may make regulations relating to—

- (a) the assistance of, and support to, witnesses at courts;
- (b) the establishment of reception centres for witnesses at courts;
- (c) the counseling of witnesses; and
- (d) any other matter which the Minister deems expedient to prescribe in 40 order to provide services to witnesses at courts.

(3) Any regulation made under this section which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(4) Any regulation made under this section may provide that any person 45 who contravenes a provision thereof or 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 three years.

(5) Any regulation made under this section must, before publication 50 thereof in the *Gazette*, be submitted to Parliament.”.

Short title and commencement

26. This Act shall be called the Witness Protection Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

(Offences in respect of which a witness or related person may be placed under protection)

1. Treason.
2. Sedition,
3. Murder.
4. Rape.
5. Public violence.
6. Robbery—
 - (a) when there are aggravating circumstances; or
 - (b) involving the taking of a motor vehicle.
7. Kidnapping.
8. Defeating the ends of justice.
9. Perjury.
10. Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.
11. Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), if it is alleged that—
 - (a) the value of the dependence-producing substance in question is more than R 10 000,00; or
 - (b) the value of the dependence-producing substance in question is more than R5 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
 - (c) the offence was committed by any law enforcement officer.
12. Any offence referred to in section 1 or 1A of the Intimidation Act, 1982 (Act No. 72 of 1982).
13. Any offence relating to—
 - (a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or
 - (b) the possession of an automatic or semi-automatic firearm, explosives or armament.
14. Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft—
 - (a) involving amounts of more than R50 000,00; or
 - (b) involving amounts of more than R 10000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
 - (c) it is alleged that the offence was committed by any law enforcement officer—
 - (i) involving amounts of more than R10 000,00; or
 - (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.
15. Any offence referred to in the Prevention of Organised Crime Act, 1998.
16. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.
17. Any other offence which the Minister has determined by regulation.
18. Any other offence in respect of which it is alleged that the offence was committed by—
 - (a) a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
 - (b) a law enforcement officer,
 and in respect of which the Director is of the opinion that the safety of a witness who is or may be required to give evidence, or who has given evidence in respect of such an offence in any proceedings or any related person, warrants protection.

19. Any other offence in respect of which the Director, after having considered the factors mentioned in section 1 (1) and any information gained in terms of section I (2), is of the opinion that the safety of a witness who is or may be required to give evidence, or who has given evidence in respect of such an offence in any proceedings or any related person, warrants protection,

**MEMORANDUM ON THE OBJECTS OF THE WITNESS
PROTECTION BILL, 1998**

PART 1

OBJECTS AND EXPLANATION

1.1 The above-mentioned Bill envisages repealing section 185A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides for the voluntary protection of witnesses in criminal cases and substituting it with a comprehensive Act, providing for the establishment of an Office for Witness Protection and supporting structures. Protection of witnesses in South Africa is a relatively new experience and the past four years, following the promulgation of the said section 185A have, through experience, led to the identification of shortcomings in the present system,

1.2 The Bill envisages addressing problems experienced with the present Witness Protection Programme by, amongst others, providing for the following:

- * The establishment of an Office for Witness Protection, headed by a Director: Office for Witness Protection, to be appointed by the Minister of Justice.
- * The powers, functions and duties of the Director.
- * Protection of witnesses is seen as a multi-disciplinary matter and therefore provision is made for the Director to be assisted by officers from other Departments of State as well as witness protection officers and security officers in the exercise, performance or carrying out of his or her powers, functions and duties in terms of the Bill.
- * Any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by reason of his or her being a witness in criminal proceedings, inquest proceedings, proceedings before a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), or proceedings before a commission of inquiry or before the independent Complaints Directorate established under section 50 of the South African Police Service Act, 1995 (Act No. 68 of 1995), may be placed under protection in terms of the proposed legislation.
- * The placement of witnesses or related persons under temporary protection for a period not exceeding 14 days, pending the finalisation of an application for protection.
- * The placement under protection, including relocation and change of identity, of witnesses or related persons and other related services.
- * The procedure to be followed for the placement of minors under protection and the suspension of any right of access to any minor who has been placed under protection if the safety of the minor might be jeopardised by the exercising of such right.
- * A mechanism for the review of decisions of or steps taken by the Director or by any person acting on his or her behalf.
- * A Schedule to the Bill which contains a list of the offences in respect of which a witness may be placed under protection, The Director, however, is granted a discretion to place a witness under protection in respect of any other offence if he or she is of the opinion that the safety of the witness warrants such protection,

PART 2

PARTIES CONSULTED

The following interested parties were consulted:

- * Departments of:
 - (a) Finance

- (b) Welfare and Population Development
- (c) Labour
- (d) Home Affairs
- (e) Health
- (f) Education
- (g) Correctional Services
- (h) Constitutional Development
- (i) Public Works
- (j) National Intelligence Agency
- (k) Defence
- (l) Safety and Security
- * The Chief Justice
- * The Association of Law Societies of the RSA
- * The Magistrates Commission
- * The National Association for Democratic Lawyers
- * Black Lawyers Association
- * The General Council of the Bar of South Africa
- * Lawyers for Human Rights
- * Legal Resources Centre
- * The Attorneys-General

PART 3

PARLIAMENTARY PROCEDURE

In the opinion of the Department of Justice and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution of the Republic of South Africa, 1996.