

REPUBLIC OF SOUTH AFRICA

WITNESS PROTECTION AND SERVICES BILL

(As introduced in the National Assembly)

(MINISTER OF JUSTICE)

[B 9—98]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP GETUIEBESKERMING EN -DIENSTE

(Soos ingedien in die Nasionale Vergadering)

(MINISTER VAN JUSTISIE)

[W 9—98]

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BILL

To provide for the establishment of a Directorate for the protection of witnesses; to regulate the powers, functions and duties of the Directorate; to provide for the voluntary submission of witnesses or potential witnesses and members of their families or households to protection; to provide for witness services; and to provide for incidental matters.

BE IT ENACTED by the Parliament of the Republic of South Africa. as follows:—

Definitions

1. In this Act, unless the context otherwise indicates—
- (i) “Attorney-General” means a person appointed in terms of section 2 of the 5 Attorney-General Act, 1992 (Act No. 92 of 1992), to the office of Attorney-General; (x)
 - (ii) “commission” means any commission established by an Act of Parliament; (vi)
 - (iii) “Department” means the Department of Justice; (i) 10
 - (iv) “Director” means the Director for Witness Protection, appointed in terms of section 2; (ii)
 - (v) “Director-General” means the Director-General: Justice; (iii)
 - (vi) “ICD” means the Independent Complaints Directorate, established under section 50 of the South African Police Service Act, 1995 (Act No. 68 of 1995); 15 (viii)
 - (vii) “Minister” means the Minister of Justice; (vii)
 - (viii) “Office” means the Office for Witness Protection, established in terms of section 2; (v)
 - (ix) “panel” means a witness protection panel established under section 5: (ix) 20
 - (x) “prescribed” means prescribed by regulation; (xiii)
 - (xi) “regulations” means the regulations made under section 16; (xi)
 - (xii) “this Act” includes the regulations; (iv) and
 - (xiii) “Tribunal” means a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 25 1996). (xii)

Establishment of Office for Witness Protection

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

(2) The Office is headed by a Director for Witness Protection appointed by the 30 Minister, subject to the laws governing the public service.

(3) The Director exercises his or her powers and performs his or her duties subject to the control and directions of the Minister.

(4) Whenever the Director is for any reason unable to perform his or her duties or when the appointment of a person as Director is pending, the Minister may, subject to 35 the laws governing the public service, appoint a person as Acting Director to discharge the duties of the Director,

(5) The other personnel of the Office must be assigned by the Director-General.

(6) The Director-General may appoint a person as Deputy-Director for Witness Protection and one or more persons as Assistant Director for Witness Protection, to perform any duties of the Director, subject to the control of the Director.

(7) The Director-General may, subject to the laws governing the public service, make use of personnel seconded on a temporary or *ad hoc* basis to the Office: Provided that such secondment shall not affect any powers, duties or privileges which any seconded person may have in terms of any law. 5

Functions of Director

3. The Director—

- (a) is responsible for the protection of witnesses and for witness services in accordance with this Act; 10
- (b) must perform the administrative duties relating to the protection of witnesses and witness services; and
- (c) may make use of the services of competent persons, organisations or institutions in order to achieve the objects of this Act. 15

Reporting by Director

4. (1) The Director must annually, not later than 31 May of each year, submit to the Minister a report reflecting all the activities of the Office during the relevant period.

(2) The Minister must table the report in Parliament within 14 days after he or she has received it if Parliament is then in ordinary session or, if Parliament is not in ordinary session, within 14 days after the commencement of its next ensuing ordinary session. 20

Witness protection panels

5. (1) The Director may establish within the area of jurisdiction of each Attorney-General one or more witness protection panels to advise him or her with regard to the protection of witnesses. 25

(2) (a) A witness protection panel consists of persons appointed to the panel by the Director and functions under the chairmanship of a chairperson designated by the Director.

- (b) When composing a panel the Director must have due regard to-
 - (i) the nature of the proceedings in which the witness has testified or the potential witness is required to testify; 30
 - (ii) the nature and seriousness of the threat to the safety of the witness or potential witness or to any member of his or her family or household;
 - (iii) the personal circumstances and needs of the witness or potential witness or any member of his or her family or household; 35
 - (iv) any circumstances that may require the assistance or advice of persons with specialised knowledge in any particular field; and
 - (v) the assistance required from the South African Police Service, and any other role players.

(3) A panel must consider the merits of any request for the protection of any person referred to it and must report thereon to the Director. 40

(4) A panel may make the inquiries it deems necessary to enable it to carry out its functions and it may question any witness or potential witness or any member of his or her family or household with regard to the alleged need for protection.

(5) If the panel recommends that protection be granted to a person, it may make recommendations with regard to the type of protection which should be granted, the expected duration of the protection and any particular circumstances that ought to be taken into account in the granting of such protection. 45

(6) If a panel recommends that a request for protection be refused, it must inform the Director and the applicant contemplated in section 6, of the reasons for such recommendation. 50

(7) A member of a panel who is not employed in the public service is entitled to the remuneration for his or her services or the payment of the expenses incurred by him or her in connection with such services, determined by the Minister in consultation with the Minister of Finance.

Application for protection

6. (1) Any person who has given evidence or is required to give evidence—
- (a) in any criminal proceedings in respect of any offence referred to in the Schedule to this Act;
 - (b) in any proceedings before a commission or a tribunal;
 - (c) in any proceedings under the Inquests Act, 1959 (Act No. 58 of 1959); or
 - (d) before the ICD.

who has reason to believe that his or her safety or the safety of any member of his or her family or household is being threatened by any person or group or class of persons by reason of his or her testimony or contemplated testimony in such proceedings may—

- (aa) report such belief—
 - (i) to the investigating officer in the proceedings: 15
 - (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;
 - (iv) to the public prosecutor: 20
 - (v) to any person attached to the Office;
 - (vi) to any member of a panel;
 - (vii) to the chairperson of the commission or tribunal before which, or the judicial officer before whom he or she has testified or is required to testify; or 25
 - (viii) to the Executive Director of the ICD; and
- (bb) apply in the prescribed form that he or she or any member of his or her family or household be placed under protection in terms of this Act.

(2) Any person to whom a report is made as contemplated in subsection (1), must assist the person concerned in the making of an application for protection and must forthwith, if he or she is not a person who is connected with the Office, inform the Director of the application and submit the written application for protection to him or her.

(3) The Director may grant any witness or potential witness, or any member of his or her family or household, temporary protection as prescribed for a period not exceeding 35 30 days and must as soon as possible after he or she has received a formal application for protection, submit the application to a panel for evaluation.

(4) An application for protection may be made by or on behalf of a minor without the consent of his or her parent or guardian: Provided that no minor shall be placed under protection in terms of this Act without the consent of his or her parent or guardian unless 40 it is in the opinion of the Director necessary to do so for the sake of the safety of the said minor.

(5) The Director must in respect of an application for protection have due regard to the report and recommendations of the panel and must take into account the following factors, namely— 45

- (a) the nature and extent of the risk to the safety of the applicant or to any member of his or her family or household;
- (b) any danger that the interests of the community might be affected if the applicant or a member of his or her family or household is not placed under protection; 50
- (c) the nature of the proceedings in which the applicant has testified or is required to testify;
- (d) the importance of the evidence given or to be given by the applicant in the proceedings;
- (e) the probability that the applicant or any member of his or her family or 55 household will be able to adjust to protection in terms of this Act, having regard to the personal characteristics, circumstances and family relationships of the applicant:

- (f) the cost likely to be involved in the protection of the applicant or any member of his or her family or household;
- (g) the availability of any other means of protecting the applicant or any member of his or her family or household without invoking the provisions of this Act;
- (h) any other factor that the Director deems relevant.

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(6) In order to enable him or her to make a proper evaluation of an application for protection under this Act, the Director must be afforded access to any police docket or statement of a potential witness and to any testimony given in any proceedings before a criminal court, commission, tribunal or before the ICD or, in inquest proceedings, and he or she is entitled to obtain copies of any such statement or of such evidence or any part thereof.

Powers and duties of Director

7.(1) After having considered an application for protection and, where applicable, the report of a panel, the Director may—

- (a) grant the applicant or any member of his or her family or household protection under this Act in accordance with a memorandum of agreement agreed upon between the Director and the applicant; or
- (b) refuse the application and by written notice to the applicant revoke any temporary protection granted in terms of section 6(3) to the applicant or any member of his or her family or household.

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(2) If the Director is of the opinion that the safety of any person who is being protected in terms of this Act is still being threatened after the conclusion of the proceedings in question, he or she may extend such protection for as long as it may in his or her opinion be necessary.

(3) The Director may, if in his or her opinion it is necessary for the safety of any witness or any member of the family or household of any witness, and irrespective of whether or not the witness has already testified in the proceedings concerned, relocate the witness or his or her family or household and pay all reasonable expenses in respect of such relocation.

(4) The Director may by written notice discharge any person from protection in terms of this Act if he or she is of the opinion that—

- (a) the safety of the said person is no longer threatened;
- (b) satisfactory alternative arrangements have been made for the protection of the said person; or
- (c) the said person has failed to comply with any obligation imposed upon him or her in terms of this Act or the memorandum of agreement.

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(5) The Director must, subject to subsection (2), upon receipt of a written notice given by an Attorney-General or the chairperson of a commission or the person presiding at a tribunal or the Executive Director of the ICD, as the case may be, that a person protected under this Act is no longer going to be called as a witness in the proceedings concerned, discharge such person and all members of his or her family or household from such protection.

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Review by Minister

8.(1) Any person whose application for protection in terms of this Act has been refused by the Director, or who has in terms of section 7(4) or (5) been discharged from protection, may within 7 days of the written notice of such refusal or discharge apply in writing to the Minister to review the refusal or discharge.

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(2) The Minister may confirm the decision of the Director or set it aside and give such directions with regard to the protection of the applicant or any member of his or her family or household as he or she may deem appropriate.

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Civil proceedings against protected person

9.(1) 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 person who is under protection in terms of this Act might be jeopardised by the prosecution of any civil proceedings that

are pending against that person, whether in that High Court or in any lower court within its area of jurisdiction, the judge may suspend the prosecution of those proceedings or make any order he or she deems appropriate with regard to the prosecution of those proceedings in a manner aimed at preventing the disclosure of the identity or whereabouts of the said person. 5

(2) Notice of any order made in terms of subsection (1) must be given to the parties to the proceedings concerned and to their legal representatives in accordance with the rules of court.

Access to minor under protection

10. 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 a minor who is under protection in terms of this Act might be jeopardised 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 preventing the disclosure of the identity or whereabouts of the said minor. 10 15

Publication of information concerning protected person

11. Notwithstanding any other law, the judicial officer presiding at criminal or inquest proceedings or the person presiding at the proceedings of a commission or tribunal or the Executive Director of the ICD may on application by or on behalf of the Director make an order prohibiting the publication of any information which may reveal— 20

- (a) the identity of any person who is under protection in terms of this Act; or
- (b) the place or location where any person is under protection in terms of this Act.

Protected witnesses not obliged to disclose certain information

12. Notwithstanding the provisions of any other law, no witness who is or has been under protection in terms of this Act shall, when testifying in any proceedings before a court, commission, tribunal or at an investigation of the ICD, or in inquest proceedings, be obliged to disclose any information concerning— 25

- (a) the place or location where he or she is or has been under protection or where he or she has been relocated;
- (b) the circumstances relating to his or her protection; or 30
- (c) the identity of any other person who is under protection in terms of this Act and the place or location where such person is being protected.

Donations for witness protection

13. (1) The Director may accept any donation or contribution, in money or otherwise, for or in respect of the protection of witnesses: Provided that any such donation or contribution must on receipt thereof be declared to the Director-General. 35

(2) Donations referred to in subsection (1) must be utilised for the purposes and subject to any conditions determined by the donor.

(3) Any donations received by the Director must be reflected in the annual report referred to in section 4. 40

Agreements with foreign countries

14. (1) The Minister may, subject to section 231 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), enter into an agreement with any foreign

country for a person who is being protected under a witness protection programme of that country to be admitted to a protection programme in terms of this Act: Provided that no such person shall be admitted to the Republic without the consent of the Minister of Home Affairs or be placed under protection in terms of this Act without the consent of the Minister. 5

(2) The Minister may, subject to subsection (1), enter into an agreement with any foreign country, with a view to admitting a person who is being protected in terms of this Act to a witness protection programme in terms of any law in that country.

Offences and penalties

15. (1) Any person who without the permission of the Director— 10

(a) wilfully allows any unauthorised person to gain access to any person who is under protection in terms of this Act; or

(b) wilfully reveals—

(i) the identity of any person who is under protection in terms of this Act;

(ii) the place where any person is under protection or has been relocated in terms of this Act; or 15

(iii) any circumstances or information which could lead to the identification of any such person or any such place.

shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding three years. 20

(2) Any person who, with intent to gain for himself or herself or for any other person protection under a witness protection programme as provided for 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 not exceeding three years. 25

(3) A magistrate's court shall have jurisdiction to impose any penalty provided for in this Act.

Regulations

16. (1) The Minister may make regulations relating to—

(a) the placing of witnesses or potential witnesses or members of their families or households under protection in terms of a witness protection programme; 30

(b) the protection of the identity of persons who are placed under protection in terms of a witness protection programme;

(c) the regulation of access to places where persons are being kept or relocated in terms of a witness protection programme; 35

(d) the utilisation of members of the South African Police Service or private security personnel for protection services in terms of this Act;

(e) the proceedings and composition of and matters connected to panels;

(f) the provision of witness services and matters related thereto;

(g) any other matter that is required or permitted to be prescribed in terms of this Act; and 40

(h) in general, any matter which the Minister deems necessary or expedient to be prescribed in order to attain the objects of this Act.

(2) Different regulations may be made in respect of different categories of witnesses or potential witnesses or persons. 45

(3) 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 to imprisonment for a period not exceeding three years.

Repeal of section 185A of Act 51 of 1977, as inserted by section 4 of Act 135 of 1991 50

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

Short title and commencement

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

SCHEDULE

Treason.

Public violence.

Murder.

Rape.

Robbery with aggravating circumstances and robbery of a motor vehicle.

Kidnapping.

Extortion.

Defeating the ends of justice.

Perjury.

Any **offence** involving violence or unlawful sexual conduct towards a juvenile.

Any **offence** referred to in sections 13(*f*) and 14(*b*) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992).

Any **offence** referred to in section 1 or 1A of the Intimidation Act, 1982 (Act No. 72 of 1982).

Any statutory **offence** relating to the trafficking of, dealing in or smuggling of firearms, explosives *or* armament, or the possession of an automatic firearm, explosives or armament.

Any **offence** relating to exchange control, corruption, fraud, forgery, uttering, theft. or money-laundering involving a total amount in excess of R200 000,00.

Any conspiracy, incitement or attempt to commit any **offence** referred to in this Schedule.

Any other **offence** in respect of which the Director, after having considered the factors mentioned in section 6(5) and any information gained in terms of section 6(6), is of the opinion that the safety of the witness concerned or any member of his or her family or household warrants protection.

MEMORANDUM ON THE OBJECTS OF THE WITNESS
PROTECTION AND SERVICES BILL, 1998

1. The above-mentioned Bill envisages repealing section 185A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) ("the CPA"), which provides for the voluntary submission of witnesses in criminal cases to protection 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 section 185A of the CPA, have led to the identification of shortcomings in the present system. The Bill envisages addressing problems experienced with the present Witness Protection Programme and also providing for the protection of witnesses of commissions of enquiry and inquest proceedings, proceedings of special tribunals established under the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), as well as investigations of the Independent Complaints Directorate established under section 50 of the South African Police Service Act, 1995 (Act No. 68 of 1995) ("the ICD").

2. The main shortcoming of the present programme is the lack of a proper centralised structure to co-ordinate witness protection and to lay down a uniform policy. This has, *inter alia*, resulted in the duplication of functions, the ineffective utilisation of personnel and a lack of proper evaluation of applications by witnesses or potential witnesses.

3. The Bill envisages the establishment of an Office for Witness Protection, headed by a Director to be appointed by the Minister of Justice. Since the protection of witnesses is seen as a multi-disciplinary matter, provision is made in clause 2 for the Director to be assisted by officers from other Departments of State. Provision is also made in this clause for the appointment of a Deputy Director for Witness Protection and one or more Assistant Directors for Witness Protection.

4. Clause 3 sets out the functions of the Director, who is responsible for witness services and the protection of witnesses in accordance with the Bill and who must perform the administrative duties relating to the protection of witnesses and witness services.

5. Clause 4 provides for reporting annually by the Director to the Minister, which report must be tabled in Parliament.

6. In order to assist the Office for Witness Protection on a regional basis, the Director is authorised to establish witness protection panels within the area of jurisdiction of each Attorney-General. These panels will only meet as the need arises and will be responsible for the evaluation of a witness who is to be protected. The Director is given a free hand with regard to the composition of the panels and the appointment of chairpersons to the panels so as to meet the needs of any particular case. The panels will consider the merits of each application for protection and advise the Director accordingly. A panel is empowered to make any necessary and relevant inquiries and may question any witness or potential witness or any member of his or her family or household. If a panel recommends that protection be granted to a person, it may also make recommendations as to the type of protection that it thinks appropriate, the expected duration of the protection and any particular circumstances that ought to be taken into account. The panel must furnish the Director with reasons for the refusal to grant protection. Lastly, this clause provides for the remuneration of members of a panel who are not public servants. This remuneration is determined by the Minister of Justice in consultation with the Minister of Finance (clause 5).

7. Clause 6 of the Bill provides that any person who has reason to believe that his or her safety or the safety of any member of his or her family or household is threatened by reason of his or her testimony or contemplated testimony at criminal proceedings, inquest proceedings, proceedings before a commission of inquiry, tribunal or the ICD may apply in writing for protection in terms of the proposed legislation. The persons to whom the application may be addressed are specified in clause 6(1) of the Bill. They include the investigating officer in the case in question, a police or prison official, a public prosecutor, a member of a witness protection panel, any officer attached to the Office for Witness Protection and the Executive Director of the ICD. Any such person

must, if necessary, assist the applicant in making the application. Provision is made that the Director for Witness Protection may grant an applicant temporary protection (not exceeding 30 days). whereafter he or she must refer the application to a panel for evaluation. Upon receipt of the recommendation of the panel, the Director must decide whether or not to enter into an agreement with the witness for protection in terms of the proposed legislation. The factors that must be taken into account in this regard, are set out in clause 6(5) of the Bill. They are. *inter alia*, the nature and extent of the risk to the safety of the witness or his or her family or household, the interests of the community and the costs that are likely to be involved in the protection of the applicant or any member of his or her family or household. This clause also affords the Director access to police dockets or statements of a witness and to any evidence given in any proceedings before a criminal court, commission of inquiry, tribunal, inquest court or the ICD where this is necessary to make a proper evaluation.

8. Clause 7 of the Bill sets out the powers and duties of the Director. He or she may grant or refuse an application for the protection of a witness and may relocate a witness or his or her family or household. discharge any person from protection if the threat to the safety of that person no longer exists or if that person has failed to comply with the terms of the agreement for his or her protection, and must discharge a person who is no longer to be called as a witness. A decision of the Director to refuse an application or to discharge a person from protection may be taken on review to the Minister in terms of clause 8 of the Bill.

9. Clause 9 of the Bill provides that civil proceedings that are pending against a person who is under protection in terms of the proposed legislation, maybe suspended by a judge in chambers in an *ex parte* application, if it appears to the judge that the safety of that person might be jeopardised by the prosecution of those proceedings. It is further provided that the judge may make an order he or she deems appropriate with regard to the prosecution of the proceedings in a manner that will prevent the disclosure of the identity or whereabouts of the person concerned. A provision of this nature is deemed necessary to prevent the witness protection programme being abused and frustrating the objects thereof.

10. Clause 10 provides that a judge of a High Court may suspend any right of access enjoyed by any person to any minor child under protection if the safety of that minor might be jeopardised.

11. The Bill further contains a prohibition on the publication of information that may reveal the identity of a protected person or the place or location where the person is being protected (clause 11). Provision is also made that a witness, when testifying, may not be obliged to reveal any such information (clause 12).

12. Clause 13 entitles the Director to accept donations or contributions in money, or otherwise, on behalf of and for the witness protection programme. This must, however, be declared to the Director-General: Justice. Any donations received must also be reflected in the report to the Minister and Parliament.

13. In clause 14 provision is made that the Minister may enter into agreements with foreign countries for the protection of persons under a witness protection programme.

14. Clause 15 prescribes penalties for the contravention of the provisions of the proposed legislation.

15. In clause 16 provision is made that the Minister may make regulations relating to the placing of persons under protection in terms of a witness protection programme, the protection of the identity of protected persons, access to places of safety, the provision of witness services and in general any matter that the Minister deems necessary to regulate in order to attain the objects of the proposed legislation.

16. The Schedule to the Bill contains a list of the offences in respect of which protection may be granted to witnesses. Most of the serious offences are included in the list, for example murder, rape, robbery with aggravating circumstances and robbery of a motor vehicle, kidnapping, drugtrafficking, arms smuggling and fraud. It is, however, deemed necessary that the Director should have a discretion to be able to grant

protection to a witness in respect of any other offence if he or she is of the opinion that the safety of the witness warrants it and provision has accordingly been made for this eventuality.

Interested parties consulted

- (1) 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 Services
 - (k) National Defence Force
 - (l) South African Police Service
- (2) The Chief Justice
- (3) The Association of Law Societies
- (4) The Magistrates Commission
- (5) National Association for Democratic Lawyers
- (6) Black Lawyers Association
- (7) The General Council of the Bar of South Africa
- (8) Lawyers for Human Rights
- (9) Legal Resources Centre
- (10) The Attorneys-General.

The State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure set out in terms of section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.