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**TO: SELECT COMMITTEE ON SECURITY AND JUSTICE
NATIONAL COUNCIL OF PROVINCES**
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DOMESTIC VIOLENCE AMENDMENT BILL

**JOINT SUBMISSIONS BY
RESEARCH ICT AFRICA AND ALT ADVISORY**

**ENDORSED BY THE ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS, MEDIA
MONITORING AFRICA, CHENAI CHAIR, MUTONDI MULAUDZI & SAMANTHA MALUNGA**

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INTRODUCTION

1. We, a partnership of civil society activists, researchers, legal professionals, and feminists welcome this opportunity to submit written comments in response to the call for submissions issued by the Select Committee on Security and Justice (“**Committee**”) on the Domestic Violence Amendment Bill [B20B – 2020] (“**Bill**”). This submission was jointly drafted by individuals from:
 - 1.1. **ALT Advisory (“ALT”)**, is a public interest advisory and research firm, based in South Africa, working for positive change. ALT envisages inclusive and empowering societies in which fundamental rights are protected and promoted on- and offline. Moreover, ALT works in association with Power Singh Inc., a duly registered South African law firm, that also offers public interest litigation services, including a full range of legal services relating to sexual violence and harassment. Recently, Power Singh Inc. launched a series of toolkits that seek to empower survivors, victims and persons affected by online gender-based violence. ALT and Power Singh Inc. seek, in all instances, to act in the public interest, and have the promotion and protection of human rights, both off- and online, as their overarching aim. For more about ALT, please visit altadvisory.africa.
 - 1.2. **Research ICT Africa (“RIA”)**, is a regional digital policy and regulation think tank based in Cape Town and active across Africa and the global South. RIA conducts research on the digital economy and society that facilitates evidence-based and informed policymaking for improved access, use and application of information and communication technologies for social development and economic growth. RIA also has a dedicated digital policy unit that specialises in internet governance, digital rights, cybersecurity, gender, innovation (including artificial intelligence and the Internet of Things), and data justice. Understanding the needs and digital challenges of vulnerable and marginalised communities – including women, youth, children, the elderly, and people in rural areas, for example – form an integral part of RIA’s work. For more about RIA, please visit researchictafrica.net.
2. This submission has further been endorsed by individuals from the following organisations:
 - 2.1. **The Association for Progressive Communications (“APC”)**, an international network of civil society organisations dedicated to empowering and supporting people working for peace, human rights, development and the protection of the environment, through the strategic use of ICTs, including the internet. Notably, the APC Women’s Rights Programme has worked for over a decade to render visible the impact of online gender-based violence on women’s rights. Working with women’s organisations, APC advocates for identifying, monitoring, analysing and combatting the uses of the internet and digital technologies that are harmful to women and marginalised communities. For more about APC, please visit, apc.org.
 - 2.2. **Media Monitoring Africa (“MMA”)**, is a not-for-profit organisation that has been monitoring the media since 1993. MMA’s objectives are to promote the development

of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. MMA has engaged in a range of legislative and litigious processes pertaining to media freedom, freedom of expression, access to information, and privacy rights. MMA has a keen interest in the promotion and protection of rights both on and offline. In addition, MMA works on various projects to advance equality and inclusion online and strives to promote online safety and privacy. For more information about MMA, please visit mediamonitoringafrica.org.

- 2.3. **Chenai Chair** is the Special Advisor for Africa Innovation at Mozilla. She focuses on exploring digital innovation and its impact on Africa's social and economic growth as well as digital rights from a feminist perspective. She developed the My Data Rights online portal which maps artificial intelligence, privacy and data protection from a feminist perspective. Ms Chair has widely researched and presented on matters relating to online gender-based violence, privacy, intersectionality and feminist approaches to the internet. In addition, she participated in the written and oral submissions on the Domestic Violence Bill in 2020.
- 2.4. **Mutondi Mulaudzi** is a Lecturer at the Faculty of Law at UNISA, and a PhD candidate at the School of Law at the University of the Witwatersrand. Her PhD is titled 'Beyond the binary: Developing an inclusive gender marking legal framework in South Africa'. Over the past year, Ms Mulaudzi has been invited to present in both academic and civic spaces on a variety of topics relating to online gender-based violence, equality and inclusion in online spaces and the concerns and complexities of content moderation for the LGBTQI+ community. In addition, she participated in the written and oral submissions on the Domestic Violence Bill in 2020 and provided review and editorial support for the present submissions.
- 2.5. **Samantha Malunga** is a Research Associate in the Aids and Society Research Unit at the University of Cape Town. Over the past year, Ms Malunga has publicly presented on topics relating to online gender-based violence. In addition, she participated in the written and oral submissions on the Domestic Violence Bill in 2020.
3. Several members of this group previously engaged in the public participation process relating to the Bill in 2020 through written and oral submissions to the Portfolio Committee on Justice and Correctional Services.¹
4. Together, this multistakeholder community welcomes the opportunity to provide this submission. As a point of departure, we commend the important inclusions in the Bill that serve to provide protection to victims, survivors, and persons affected by domestic violence that occurs online.² In our view, the proliferation of online harms, or harms facilitated,

¹ Joint Submissions By Research ICT Africa, Association for Progressive Communications, ALT Advisory, and Members Of The Feministing While African Network (2020) (accessible at <https://altadvisory.africa/wp-content/uploads/2020/10/Domestic-Violence-Amendment-Bill-B20-%E2%80%932020-Joint-Submissions-by-RIA-APC-ALT-FWA.pdf>).

² Throughout the submissions we refer to victims and survivors of domestic violence, mindful that it is important to take into consideration the different contexts, experiences, and responses that stem from violence, particularly domestic violence. We are mindful of the import of terminology and are cognizant of the different connotations and implications words can have on those who have experienced domestic both on- and offline. Accordingly, we do not

abetted, or aggravated by the internet, social media and the use of information communication technologies (“ICTs”), is indeed a practical challenge that has grown increasingly prevalent over the last two decades. Owing to the prevalence of emerging technologies and the potential for harm, violence and abuse in the digital environment, we submit that the Bill reflect these emerging and developing challenges to ensure that victims and survivors of domestic violence, both on- and offline, are afforded the maximum protection from domestic abuse that the law can provide.

5. As with the submission before the Portfolio Committee on Justice and Correctional Services, this submission is narrowly tailored and focuses on the online contexts and considerations applicable to domestic violence and the protection thereof. Accordingly, the submission is structured as follows:
 - 5.1. **First**, we briefly highlight two overarching considerations;
 - 5.2. **Second**, we emphasise the import of nuanced understandings of the evolving context in which domestic violence occurs online;
 - 5.3. **Third**, we provide our submissions on certain definitional aspects of the Bill; and
 - 5.4. **Fourth**, we address the expanded section 6A and the integrated electronic repository and the directives concerning its operation.
6. These are dealt with in turn below.

OVERARCHING CONSIDERATIONS

7. Before turning to the core submission, we would like to briefly reiterate some of our previous positions and emphasise some overarching considerations.

Intersectionality and inclusivity

8. We implore the Committee to recognise the multiple and intersecting forms of discrimination that can intensify experiences of domestic and gender-based violence. We note that gender, gender identity, gender constructs, sexual orientation, race, and ability often intersect with other identities and expectations which can create distinct experiences of oppression or privilege. The Constitutional Court recently reflected on the importance of recognising the multiple and intersectional nature of discrimination in *Mahlangu v Minister of Labour*.³ While the Court placed the responsibility on the judiciary to examine intersectionality, we submit that the legislature, inclusive of this Committee, should be equally mindful of the “intersecting axes of discrimination” as it contemplates this law reform process.⁴

seek to impose definitions, identities or responses on those who may be impacted by domestic violence. In *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46, the Constitutional Court adopted similar terminology and reasoning.

³ *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24 paras 96-97.

⁴ *Id* at para 195.

9. In addition, we note that the Bill predominantly relies on the binary terms, she, her, hers, and he, his, him. In line with the above point on intersectionality, as well as the efforts of the Committee to be more inclusive and reflect diversity as notably seen in the definition of harassment, we encourage the Committee to thread the theme of inclusivity throughout the Bill and rely on non-binary terms such as they and them in order to ensure that all persons are equally protected.⁵ We accept that “identity terminology is fast-paced and ever-changing/evolving”.⁶ We similarly recognise the need to prioritise and promote equality and inclusion as envisaged in the Constitution. We, therefore, submit that appropriate and inclusive terminology be “recognised and reflected in legislation and that wide protection is offered to the most vulnerable and marginalised.”⁷

Accessibility

10. Significant internet access discrepancies persist between rural or urban areas, between people of different sexes and gender, between poor or wealthier segments of society, between literate or illiterate people, and between children, adults, and the elderly. The discrepancies of access manifest in two interrelated ways. The first pertains to accessing physical infrastructure that enables access to online spaces, and the second relates to the ability to access and disseminate content online which centres around a person’s digital literacy.⁸ While we welcome the Committee’s efforts to expand on and incorporate the online elements of domestic violence, as well as digital tools to support the protection order process, we submit that the Committee should also take into consideration issues of accessibility. We note further that access and digital literacy considerations become particularly relevant in the context of the provision of support services, and implore the Committee to be mindful of this in terms of reporting online domestic violence, using the online repository, and adjudicating matters that relate to online harms.

THE EVOLVING CONTEXT OF DOMESTIC VIOLENCE

11. The importance of access to the internet cannot be gainsaid. However, the internet, initially envisaged as a safe and accessible place with significant potential for empowerment has, in many instances, become yet another space in which domestic violence, harassment, abuse, misogyny, sexism, racism, homophobia, and transphobia are amplified⁹ – including for victims and survivors of domestic violence. Likewise, new technologies such as tracking and monitoring tools, facial recognition technology and ‘smart home’ tools, as well as online spaces such as social media platforms have been heralded as powerful tools and spaces for good, but have also been used to facilitate, abet or aggravate domestic violence.

⁵ For more information on gender neutral or gender silent drafting, see: Donald L. Revell & Jessica Vapnek, Gender-Silent Legislative Drafting in a Non-Binary World, 48 *CAP. U. L. REV.* 103 (2020).

⁶ South African Research Chair in Equality, Law and Social Justice School of Law, University of the Witwatersrand, Johannesburg. ‘Submission to the Department of Justice and Constitutional Development on Amendments to The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000’ (2021) at 14.

⁷ Id.

⁸ Universal Access to the Internet and Free Public Access in South Africa (2019) (accessible at <https://internetaccess.africa/universal-access/>).

⁹ According to Pollicy, 36% of women in five cities in Sub-Saharan Africa have experienced sexual harassment online. See Iyer et al, ‘Alternate Realities, Alternate Internets’ 2020 (accessible at: https://www.apc.org/sites/default/files/Report_FINAL.pdf).

12. Like the Committee, we firmly believe in the importance of finding better ways to prevent and address domestic violence as a persistent human rights violation that not only threatens the security and safety of its victims and survivors but particularly hinders people from being full and equal participants in society. Given our respective experience in, and extensive work on, telecommunications and digital policy across the continent, we are particularly concerned about the fact that the same forms of discrimination in social, economic, cultural and political structures that result in gender-based and domestic violence are being reproduced, and sometimes even amplified, online or as a result of ICTs.¹⁰ It cannot be gainsaid that the various forms of violence that occur online form a part of the same continuum of violence that occurs offline.
13. Internationally, there are growing concerns and developing responses to new forms of harm that occur online. In a 2015 resolution on eliminating domestic violence, the United Nations (UN) Human Rights Council recognised that the act of domestic violence includes cyberbullying and cyberstalking.¹¹ In 2017, the Committee on the Elimination of Discrimination against Women in its General recommendation 35 recorded that:¹²

“Gender-based violence against women occurs in all spaces and spheres of human interaction, whether public or private, including in the contexts of the family, the community, public spaces, the workplace, leisure, politics, sport, health services and educational settings, and the redefinition of public and private through technology-mediated environments, such as contemporary forms of violence occurring online and in other digital environments.”

In 2018, the UN Special Rapporteur on violence against women, its causes and consequences submitted a report on online violence against women and girls from a human rights perspective. In the report, the Special Rapporteur accepted that “online and ICT-facilitated forms of violence against women have become increasingly common, particularly with the use, every day and everywhere, of social media platforms and other technical applications”.¹³ She further accepted that “there is a significant risk that the use of ICT without a human rights-based approach and the prohibition of online gender-based violence could broaden sexual and gender-based discrimination and violence against women and girls in society even further.”¹⁴

¹⁰ APC, Online gender-based violence: A submission from the Association for Progressive Communications to the United Nations Special Rapporteur on violence against women, its causes and consequences (2017) (accessible at : <https://www.apc.org/en/pubs/online-gender-based-violence-submission-association-progressivecommunications-united-nations>).

¹¹ Report of the Special Rapporteur on violence against women, its causes and consequences (2015) (accessible at : <https://undocs.org/en/A/HRC/26/38>.)

¹² Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (2017) (accessible at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3731&Lang=en).

¹³ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective (2018) (accessible at <https://digitallibrary.un.org/record/1641160?ln=en>) at para 12.

¹⁴ Id at para 19.

14. International, regional, and domestic research conducted by various civil society and public interest actors similarly reveal the evolving nature of domestic violence in digital spaces. For example, Amnesty International has unpacked the adverse impact of gender-based violence and abuse on social media platforms.¹⁵ The Web Foundation has reflected on the need for safer spaces online, and has highlighted the rise of online gender-based violence during the Covid-19 pandemic, recording that “the increased domestic violence against women witnessed during the crisis is spilling into the online space, turning the lifeline of the internet into a hostile space.”¹⁶ GenderIT and Take Back the Tech have also explored various elements of online violence against women and gender diverse persons.¹⁷
15. Pollicy has conducted research on online gender-based violence in Africa and South Africa recording that “online gender-based violence like any other form of gender-based violence infringes on women’s fundamental rights and freedoms, their dignity and equality, and impacts on their lives at all levels.”¹⁸ Domestically, Power Singh Inc. has sought to gain a better understanding of the realities of online gender-based violence in South Africa and has researched the different legal remedies, as well as the technical options and psychosocial support structures available to victims and survivors.¹⁹
16. We bring the above to the attention of the Committee as a means to illustrate the evolving nature of domestic violence, the increasing prevalence of domestic violence online, and the rapidly progressing nature of ICTs.

SUBMISSIONS ON SPECIFIC PROVISIONS OF THE BILL

Section 1: Definitions

17. We commend the amended definition of electronic communication and welcome the inclusion of ICT facilitated harms in the definitions of emotional, verbal, or psychological abuse, harassment, and sexual harassment. These are important amendments that have the potential to provide heightened support and protection to those who have been affected by online domestic violence.

¹⁵ Amnesty International, ‘Toxic Twitter - The Psychological Harms of Violence and Abuse Against Women Online’ (2018) (accessible at <https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-6/>). See also Amnesty International, ‘Amnesty reveals alarming impact of online abuse against women’ (2017) (accessible at <https://www.amnesty.org/en/latest/news/2017/11/amnesty-reveals-alarming-impact-of-online-abuse-against-women/>).

¹⁶ Brudvig et al, ‘Covid-19 and increasing domestic violence against women: The pandemic of online gender-based violence’ *Web Foundation* (2020) (accessible at <http://webfoundation.org/docs/2020/07/WWWF-Submission-COVID-19-and-the-increase-of-domestic-violence-against-women-1.pdf>). See also Web Foundation, ‘Why the web needs to work for women and girls’ (2020) (accessible at <https://webfoundation.org/2020/03/web-birthday-31/>) and Web Foundation, ‘How online gender-based violence affects the safety of young women and girls’ (2021) (accessible at <https://webfoundation.org/2021/03/how-online-gender-based-violence-affects-the-safety-of-young-women-and-girls/>).

¹⁷ See for example, Lim ‘Breaking Online Gender-Based Violence’ *GenderIT* (2018) (accessible at <https://www.genderit.org/articles/breaking-online-gender-based-violence>), Take Back the Tech, ‘research and Resources’ (accessible at <https://www.takebackthetech.net/research-resources>).

¹⁸ Iyer (above n 9) at 11 and Nwaodike & Naidoo, ‘A Comparative Analysis of Legal Frameworks in Ethiopia, Kenya, Senegal, South Africa, and Uganda’ *Pollicy* (2020) (accessible at https://www.apc.org/sites/default/files/Legal_Analysis_FINAL.pdf).

¹⁹ Power Singh Inc., ‘Deconstruct: Online Gender Based Violence’ (2021) (accessible at <https://powersingh.africa/deconstruct/>).

18. However, and notwithstanding these notable gains, we are concerned that the proposed amendments do not go far enough in all respects in providing for digitalised environments.
19. We submit that the definitions of certain conduct that falls under the umbrella term of domestic violence should more clearly encompass abuse and violence facilitated by ICTs. As illustrated above, it is widely accepted that, over the past few years, the nature, harm and consequences of online forms of gender-based violence and abuse, including domestic violence and gender-based violence facilitated through ICTs and related datafication processes, have become increasingly clear. As these harms rise in frequency and prevalence, it is important that the law is responsive and ensures maximum protection to victims and survivors.
20. There are various ways in which ICTs may pose risks or facilitate domestic abuse or harassment. First, abuse or violence can occur in online spaces. For example, social media can provide the platform on which harassment occurs. Second, abuse or violence occurring in 'offline' spaces can be facilitated through the use of ICTs. For example, a perpetrator may stalk a victim or survivor's electronic devices in order to glean information to enable harassment. Thirdly, domestic violence can also be facilitated by datafication processes. For example, the creation of deepfakes may be used to harass a victim or survivor.²⁰ Further, victims and survivors may experience violence or harassment in the context of being active online, or they may also suffer violence or abuse without even being active online, for example, the distribution of rape videos online where victims or survivors are unaware of the distribution of such videos online or the distribution of non-consensual intimate images. This highlights the importance of technology-inclusive definitions that protect not only the 50% of those in South Africa that are active online,²¹ but all people in South Africa.
21. Therefore, we recommend the following amendments or additions to the various forms of domestic violence that can occur online or be facilitated by technology.

Coercive behaviour

22. We submit that coercive behaviour can be conducted in online contexts, and result in limitations to technology or online spaces. Accordingly, we propose the following inclusion to the definition of coercive behaviour:

‘coercive behaviour’ means to compel, force, or **covertly force** a complainant to abstain from doing anything that **they** have a lawful right to do, or to do anything that **they** have a lawful right to abstain from doing, **including by means of electronic communications, or in respect of electronic communications.**

²⁰ This will be discussed in more detail below.

²¹ Gillwald et al, ‘The State of ICT in South Africa. Research ICT Africa’ (2019) (accessible at https://researchictafrica.net/wp/wp-content/uploads/2018/10/after-access-south-africa-state-of-ict2017-south-africa-report_04.pdf).

Controlling behaviour

23. Similarly to the point above, we note that this form of domestic violence can occur in the context of online spaces or through the use of ICTs:

‘controlling behaviour’ means behaviour towards a complainant that is aimed at making the complainant dependent on, or subservient to, the respondent and includes—

- (a) isolating **them** from sources of support;
- (b) exploiting **their** resources or capacities for personal gain;
- (c) depriving **them** of the means needed for independence, resistance or escape; ~~or~~
- (d) regulating **their** everyday behaviour;
- (e) **controlling, altering, or manipulating their electronic devices without their consent, including switching on and off of devices, either in the presence of the person or remotely, or the locking and unlocking of physical spaces;**
- (f) **limiting or restricting access to their electronic devices, or restricting access to online spaces or services; or**
- (g) **forcefully gaining access to or performing actions on the complainant’s electronic devices without their consent.**

Emotional, verbal, or psychosocial abuse

24. We welcome the inclusion of subsection (f) in the definition of emotional, verbal, or psychosocial abuse. We note the important role this can play in advancing equality and inclusion in South Africa. In addition, we welcome the recognition of the disclosure of private information. However, we are of the view that while these aspects are interrelated, they should not be conflated, as it is important to recognise the specific harms and discrimination that can be attached to the disclosure of a person’s gender, gender identity, sexual identity, sexual orientation or perceived sexual orientation. We, therefore, submit that sub-section (f) should be separated into two standalone sub-sections, one dealing with the disclosure of a complainant’s sexual orientation and the other dealing with the disclosure of private information concerning a complainant.
25. Additionally, we seek to emphasise the importance of consent, as has been recognised elsewhere in the Bill. In this regard, we would submit that the Bill should also make clear that consent is only derived in circumstances where it is voluntary, specific, informed and freely given. Furthermore, in order to promote consistent terminology throughout the Bill, we propose that consent be a key consideration in terms of these types of domestic violence. We, therefore, propose the following amendments to subsection (f) in the definition of emotional, verbal, or psychosocial abuse:

- (f) to disclose or threaten to disclose a complainant’s **gender, gender identity sexual identity, sexual orientation or perceived sexual orientation without the complainant’s consent;**

- (fa) to disclose or threaten to disclose private information, or content of a sexual nature, concerning a complainant, to others **without the complainant's consent**.

Economic abuse

26. Economic and financial abuse can manifest in an online context or may impact the ability of a person to access and use ICTs and electronic communications. In the context of domestic violence and abuse, depriving a person of resources can include electronic resources and can place a victim or survivor in a particularly vulnerable position. Without access to electronic communications, a victim or survivor may be unable to report the violence, communicate with their support structures, and access information. Additionally, research suggests that fewer women have access to mobile services and their position of vulnerability can be abused in a world where financial transactions only require a mobile phone.²² Examples of this type of economic abuse could include depriving a victim or survivor of a mobile device or limiting access to data, Wi-Fi, or airtime. We, therefore, recommend the following amendment to economic abuse:

- (a) the [unreasonable] deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including education expenses, household necessities for the complainant, **access to and the use of electronic communications, airtime, Wi-Fi and mobile data**, and mortgage bond repayments or payment of rent in respect of the shared residence or accommodation;

Harassment

27. We reiterate our acknowledgement of the expanded definition of harassment and welcome the examples included in the definition.
28. As noted in our previous submission, we highlight the particular predicament associated with online domestic violence, noting the evolving nature of the digital environment, the evolving nature of harms and violence that may occur, and the associated novel forms of abuse that are yet to arise. To this end, and while the current examples in the Bill are of great use, we recommend two further examples of harassment – the non-consensual distribution or manipulation of images, audio or video recordings; and online impersonation.
29. There is a growing trend in which content – be it images, text, videos or audio – is manipulated by technology and is disseminated without the consent of the person the manipulated content depicts. This is not novel in the South African context. In 2011, the Constitutional Court was faced with a case in which schoolboys super-imposed an image of

²² Gillwald and Mothobi, 'After Access' *Research ICT Africa* (2018) (accessible at https://researchictafrica.net/wp/wp-content/uploads/2019/05/2019_After-Access_Africa-Comparative-report.pdf) and UNSW, 'Understanding Economic and Financial Abuse in Intimate Partner Relationships' (2020) (accessible at <https://rlc.org.au/sites/default/files/attachments/UNSW%20report%201%20-%20Financial%20Abuse%20and%20IPV%20-%20PDF%20version%20-%20Final.pdf>).

their principal on an image of two naked men sitting in a sexually suggestive posture. The majority found the image was defamatory and an injury to the principal's feelings.²³ More recently, and through the development of artificial intelligence tools, the manipulation, manufacture or altering of content via technology has gained traction, and is commonly referred to as a "deep fake", or as it relates to images, "photoshop". In some instances, it may be the satirical manipulation of a video or image of the President.²⁴ However, in other instances, the manipulation and non-consensual dissemination of content is dangerous, harmful and amounts to harassment as envisaged in the Bill. South African journalist and editor Ferial Haffajee has written about her experience in this regard. She explained:

"I was photoshopped on to a barely clothed dancer; then I was a busty cheerleader wearing a barely-there costume; then I was a dog being walked by Rupert and a cow being milked by him. A dog, a cow, a prostitute — the nasty purveyors of online hate could not get more stereotypically sexist."

She noted further that "the designers and purveyors of cyber-misogyny have worked this out and use online attacks to silence journalists". It is highly likely that Haffajee is not alone in this regard, and others like her are in need of protection against such conduct.

30. Aligned to this, there is another form of harassment that we suggest be included – online impersonation. This is understood to be a strategy in which "harassers create hoax social media accounts, usually in order to post offensive or inflammatory statements" in someone else's name.²⁵ They also impersonate someone else the target knows in order to cause harm.²⁶

31. We submit that these examples be included as follows in the definition of harassment:

- (j) the disclosure, without consent, by means of electronic communication, of an image, audio or video recording that has been manipulated or simulated through the use of technological tools and which depicts or reasonably resembles the complainant, for example, images, audio, and/or video mimicking speech or facial expression of the complainant so as to make it appear that the complainant has said or done something they have not;**
- (k) creating an online account or profile using the complainant's name, image or other identifiable information, without the consent of the complainant, to disseminate content or to communicate with other people;**

²³ *Le Roux and Others v Dey* [2011] ZACC 4.

²⁴ See for example the recent video in which President Ramaphosa "sings" the popular Bob Marley song, 'Everything's gonna be alright' (accessible <https://www.timeslive.co.za/politics/2021-06-23-it-was-found-in-fikiles-suit-nine-hilarious-reactions-to-cyril-ramaphosas-stolen-ipad/>).

²⁵ Media Defence, 'Online Harassment' *Advanced Modules on Digital Rights and Freedom of Expression Online* (2021) (accessible at <https://www.mediadefence.org/ereader/publications/advanced-modules-on-digital-rights-and-freedom-of-expression-online/module-4-privacy-and-security-online/online-harassment/>).

²⁶ PEN America, 'Defining online abuse: a glossary of terms' *Online Harassment Field Manual* (accessible at <https://onlineharassmentfieldmanual.pen.org/defining-online-harassment-a-glossary-of-terms/>).

- (l) creating an online account or profile using another person's name, image or other identifiable information, in order to harass the complainant.**

32. In addition to the above points, we highlight a brief concern with subsection h(i). We note that the terms “abusive, degrading, offensive or humiliating” heighten the threshold of domestic violence. While it is important to protect victims and survivors against such conduct, we are concerned that these terms are vague and undefined. We, therefore, suggest that the Committee consider defining these terms in order to clearly provide for the type of conduct the subsection seeks to protect.

Intimidation

33. Similarly to the above submissions in relation to controlling and coercive behaviour we recommend the following inclusion to the definition of intimidation.

- (d) threats disseminated via electronic communications including threats of physical violence, or damage to property belonging to a complainant or any other person;**

Sexual harassment

34. We welcome the additions in the definition of sexual harassment, and similarly to the above submissions on harassment, we propose the following:

- (e) disclosure, without consent, by means of electronic communication, of an image, audio or video recording that has been manipulated or simulated through the use of technological tools and which depicts the complainant in a sexual context, for example, a photoshopped image of the complainant in a sexual context they were not in, or a simulated or manipulated video recording or depicting the complainant engaging in sexual activity;**
- (k) creation of an online account or profile using the complainant's name, image or other identifiable information, without the consent of the complainant, to disseminate content of a sexual nature;**
- (l) creation of an online account or profile using another person's name, image or other identifiable information, in order to sexually harass the complainant.**

Electronic communications

35. In light of the above proposals regarding manipulated or simulated content, we propose the definition of electronic communications is amended as follows:

‘electronic communications’ means electronic representations of information in any form and includes without limitation voice, sound, data, text, video, animation, visual images, moving images and pictures, **real, simulated, or manipulated**, or a

combination or part thereof, that is disclosed by means of an electronic communications service;

Section 6A: Integrated electronic repository for domestic violence protection orders

36. We note and welcome the development of the integrated electronic repository for domestic violence protection orders and the mandate of the Director-General to work in consultation with the Information Regulator to issue directives concerning its operation.

37. We note that the directives will likely play an important role in the practical functioning and safety of the repository. Accordingly, we submit that in developing such directives, the following factors must be considered:

37.1. **The sensitive nature of the information:** the information contained in domestic violence protection orders is necessarily of a sensitive nature. Such information is likely to contain special personal information, as defined in terms of the Protection of Personal Information Act 4 of 2013 (“**POPIA**”), as well as information concerning children. We note with concern that further harm and violence may occur to victims and survivors through unauthorised access to such information. To avoid this, we submit that the sensitive nature of the information should inform the development of the directives – particularly with regards to the processing of, and access to, such information.

37.2. **Security:** repositories of information pose a significant risk to the rights of data subjects.²⁷ “Centralised troves of personal data are susceptible to breach by malicious actors and abuse by public authorities, by way of access to personal data and government-led or sponsored surveillance and hacking.”²⁸ Such risk is exacerbated by the digitisation of repositories which enables the collection and storage of large quantities of information, increases their vulnerability to cybersecurity threats and makes them susceptible to a range of analytics. In light of the sensitive nature of the information to be contained in the repository, we submit that appropriate technical and organisational measures must be taken to safeguard its integrity and confidentiality. It is important to assure victims and survivors that their personal information will be effectively secured in order to avoid the replication and even amplification of harm. Concerns around the confidentiality and security of their information and the possibility of secondary harm may deter victims and survivors from applying for protection orders.

37.3. **Integration:** the description of the repository envisages its integrated nature, but the Bill is silent on which systems and/or government departments it will integrate with. In making such a determination, the Director-General and Information Regulator must note the additional risk posed by increased access to the information. We submit that access to the information should be limited to the necessary personnel.

²⁷ Data subject is defined in POPIA as a “person to whom personal information relates”.

²⁸ Access Now, ‘National Digital Identity Programmes: What’s Next?’ (2018) (accessible at <https://www.accessnow.org/cms/assets/uploads/2019/11/Digital-Identity-Paper-Nov-2019.pdf>).

38. We submit that the development of directives, as mandated in the Bill, must consider the above factors and entail appropriate consultation with relevant stakeholders.

CONCLUSION

39. We welcome and encourage the efforts of the Committee in respect of this Bill. We appreciate the opportunity to provide this submission and would welcome the opportunity to make further oral submissions.
40. Notwithstanding the important strides that have been made, there is still work to be done to ensure that victims and survivors of domestic violence are afforded the maximum protection the law can provide. Additionally, and as our lives continue to move increasingly online, there is an urgent need to ensure that such protections extend to the digital realm. Accordingly, for the reasons we have advanced, we urge the Committee to implement the submissions set out above.

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