9 October 2020

Parliamentary Portfolio Committee
on Justice and Correctional Services
Attention: V Ramaano
Email: Gbvbills@parliament.gov.za

Dear Sir

THE EMBRACE PROJECT NPC'S WRITTEN SUBMISSION ON THE DOMESTIC VIOLENCE AMENDMENT BILL [B20-2020]

1. The Embrace Project welcomes this opportunity to make submissions to the Parliamentary Portfolio Committee on Justice and Correctional Services ("the Portfolio Committee") on the Domestic Violence Amendment Bill [B20-2020] ("the Amendment Bill").

2. The Embrace Project is a registered non-profit company which aims to "creatively combat" gender based violence. We provide an online platform for the sale of artwork donated by various South African artists and creatives who collaborate with our organisation. The proceeds of the art sales are paid out to selected grass-roots organisations already combating gender based violence in their own communities. These organisations are the beneficiaries of The Embrace Project. We also create awareness around gender based violence (its prevalence and causes) through our social media presence, while simultaneously working at changing the narrative around violence and disempowerment. Participating in the current legislative process is one such method.

3. We record our interest in making verbal representations should we be called upon by the Portfolio Committee to do so.

Purpose

4. The purpose of the Amendment Bill is to increase the ambit of the Domestic Violence Act no 116 of 1998 ("the Act") by recognising additional forms of domestic violence (and additional protections needed therefor); by recognising the culture of silence around violence; as well as recognising the role of technology in both assisting in the protection of victims and the perpetration of violence.

5. We commend the Portfolio Committee on this progressive piece of legislation.

Legislative suggestions

6. We recognise and commend the Portfolio Committee's inclusion of 'controlling behaviour' in clause 2(d) of the Amendment Bill (section 1 of the Act).

7. The definition for 'disability' in clause 2(g) of the Amendment Bill should, we suggest, include 'psychological' as that is distinguishable from a mentally diagnosed illness encompassed by the word 'mental'.

8. We recommend that the phrase "within the preceding year" be removed from the definition for "domestic relationship" at paragraph (f), clause 2(h) of the Amendment Bill. We submit that the complainant and respondent sharing the same residence, premises or property is sufficient to find that the parties are in a domestic relationship without the inclusion of a time bar.

9. We recommend the removal of the phrase "the respondent knows or ought to know" and the word "unreasonably" from the definition of "harassment" in clause 2(o) of the Amendment Bill, as, although they impose an objective reasonableness test, there is a concern that the respondent's subjective state of mind will be tested instead by adjudicators. The removal of such words and phrases will ensure that there is no ambiguity in respect of the objective test to be applied. We, therefore, also recommend that the phrases "who knows or ought reasonably to know that such attention is unwelcome" and "in circumstances, which a reasonable person having regard to the circumstances would have anticipated that the complainant would be offended, intimidated or humiliated" be removed from the definition of "sexual harassment" in clause 2(v) of the Amendment Bill.

10. The word “or” at the end of paragraph (iii) in the definition for “harassment” at clause 2(o) of the Amendment Bill should be removed.

Substantive comments

11. The expansion of section 2 of the Act is commendable. However, the peremptory wording contained in sections 2A(2), 2A(3) and 2B(1) because of the use of the word “must”, and the criminal liability imposed by the insertion of sections 2A(5) and 2B(4), at clause 3 of the Amendment Bill, are of concern. These sections have implications for the confidential treatment of patient information required of functionaries, and may inadvertently be the further cause of victim isolation.

12. In terms of section 2A(5), not only might functionaries be in breach of their professional code of ethics, or in contravention of conflicting laws, for reporting domestic violence without their patient’s consent, but the trust relationship between the functionary and patient will be compromised, and so will the success of the professional assistance provided by functionaries. Furthermore, the Portfolio Committee must take into consideration the reality that reporting domestic violence worsens the situation for victims who are unable to leave the relationship for a multiplicity of reasons. Therefore, the agency of victims to report domestic violence should not be so easily taken away.

13. Placing a burden on lay adult third parties to report incidents of domestic violence in terms of section 2B, and holding them criminally liable should they fail to do so, in terms of section 2B(4), will only serve to further isolate victims from persons who will not wish to run the risk of criminal sanction for becoming aware of a victim’s situation, and failing to report it. Furthermore, the reporting liability placed on adults in section 2B does not distinguish between adults who themselves are in the same violent domestic relationship as another adult whose situation they are obliged to report. An adult third party may also not wish to worsen the victim’s situation by reporting incidents of domestic violence against their will, while simultaneously be unwilling to attract criminal sanction for failing to do so, and therefore distance themselves from the victim – causing more harm.

14. The aforementioned subsections of sections 2A and 2B will likely further encourage a culture of silence around domestic violence as victims, adult third parties and functionaries alike may be harmed by the consequences of these provisions. We, therefore, recommend

that “must”, in the subsections identified in paragraph 11 above, be replaced by “may”, and that sections 2A(5) and 2B(4), accompanied by sections 17(4) and 17(5), be deleted.

15. The rider to section 3(3)(b), in clause 4 of the Amendment Bill, does not make sense. Why is it that only in the case of a protection order not having been issued against the arrested person, or where there is no pending application for a protection order against such person, is a peace officer required to provide a complainant with a list of shelters and/or an information notice which must be explained to the complainant? The precondition is nonsensical, and a conjunction is missing at the end of section 3(3(b)(i), which requires either an “or” or an “and”.

16. We note that witnesses who fail to adhere to a subpoena may be found in contempt of court and that subpoenas generally attract sanctions for failure to comply therewith. We note the provision for the commission of an offence in section 5A, contained in clause 8 of the Amendment Bill, should a witness be called in terms of that section and fail to appear, remain in attendance, or produce the requisite evidence. We, however, request that the Portfolio Committee be mindful of the fact that witnesses in domestic violence cases may themselves be victims of the same or a different act of domestic violence, and that giving evidence may be traumatising and, in some cases, life threatening. Special provisions and protections should be provided for in the Amendment Bill to cater for witnesses who have a lot to lose should they give evidence. Criminal sanctions, in such cases, will not encourage witness attendance but rather add to the trauma and stress, and possibly discourage potential complainants from reporting incidents of domestic violence. We recommend that the Portfolio Committee consider a comparative study to understand how other jurisdiction treat such witnesses. The International Criminal Court Rules of Procedure and Evidence are worth considering. Rule 72, for example, regulates the admissibility of evidence by an accused on a victim’s consent in a case of sexual violence.

17. Section 5B(10)(a), in clause 8 of the Amendment Bill, holds the complainant liable for the costs incurred in the furnishing of information on electronic communications sent by the respondent, and/or for removing or disabling the respondent’s access to electronic communications. The complainant should not be the party liable for such costs when they were incurred to prohibit the respondent from perpetrating a violent act in terms of the Act. In fact, this provision lays the blame at the feet of the complainant, as costs in legal proceedings are incurred by the unsuccessful party. The fact that the electronic

communication had to be disabled or removed means that the respondent would have been found liable for domestic violence in terms of the Act, and therefore should be liable for such costs. Were it not for the respondent's conduct such costs would never have been incurred. The costs should therefore form part of the respondent's sanction. We thus strongly recommend that "complainant" be replaced by "respondent" in section 5B(10)(a).

18. Having regard to section 6(2B), in clause 9 of the Amendment Bill, it should be clarified in section 6(1) that the provision is applicable when the respondent does not appear on the return date but the *complainant does*.

19. Section 15(2), in clause 18 of the Amendment Bill, is problematic for the same reasons set out in paragraph 17 above in respect of section 5B(10)(a). A successful complainant should never bare the costs of any part of the proceedings.

20. We note the excellent provisions contained in section 18 of the Act as it exists currently, as well as the new sections 18A and 18B, which provide for the development of policies for law enforcement agencies, court officials and various governmental departments. We also commend the effort to provide for accountability mechanisms. However, we note that section 18 (which provides for the development of policy and implementation of accountability mechanisms for the South African Police Services and the National Prosecuting Authority) has been in effect since the commencement of the Act on 15 December 1999. Yet secondary victimisation/traumatisation is still experienced by victims when interacting with these institutions. Clearly, policy without effective accountability is rendered nugatory. Therefore, in addition to the implementation of a public education campaign around the existence of these accountability mechanisms (provided for in section 18B(2)(d)), sensitisation training for all of the institutions and departments identified in sections 18, 18A and 18B is imperative for the effective implementation of such a progressive piece of legislation. Sensitisation training should therefore be provided for in these sections. The Portfolio Committee may wish to consider section 66(1)(b) of the Criminal Law (Sexual and Related Matters) Amendment Act no 31 of 2007 in that respect..

21. In addition to the public education campaign on accountability mechanisms, the Departments of Basic and Higher Education should be required, in terms of section 18B, to develop specialised curricula for girls and boys, respectively, aimed at eradicating harmful practices, beliefs, attitudes and stereotypes which perpetuate gender based violence, and

violence in general. The curricula should address consent, bodily autonomy, 'safe sex' and appropriate inter-sex conduct. This should form part of the Life Skills and Life Orientation curricula at school. Educators teaching these curricula would also require specialised training. Violence is learnt behaviour, and the majority of South African children who grow up in violent households (where violence is either perpetrated in front of them or against them) are likely to perpetuate the cycle into adulthood if measures such as these are not put in place.

Conclusion

22. The Amendment Bill is truly a progressive piece of legislation for which we highly commend the Portfolio Committee. The criminal justice system is being brought into the new age – the fourth industrial revolution. The only point that we wish to express strongly is the need for the provision of compulsory and regular sensitisation training for the relevant institutions identified in the Amendment Bill.

23. Should you have any queries, please do not hesitate to contact us.

Yours faithfully

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