



CREATIVELY COMBATTING GENDER BASED VIOLENCE

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Department of Social Development

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Dear Mesdames

THE EMBRACE PROJECT NPC'S WRITTEN SUBMISSION ON THE VICTIM SUPPORT SERVICES BILL, 2019

1. The Embrace Project welcomes this opportunity to make submissions to the Department of Social Development ("the Department") on the Victim Support Services Bill, 2019 ("the 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.

Purpose of the Bill

3. The primary purpose of the Bill is to provide victims of violence, as defined by the Bill, added protections and support from state institutions. The Bill recognises the intersectional

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vulnerabilities of victims of violence, which include psychological, social, medical and legal vulnerabilities, and attempts to address them.

4. The secondary purpose of the Bill appears to be the regulation of existing and future non-governmental victim support service providers, programmes and facilities.

General comments

5. The Department is to be commended for the primary purpose which the Bill aims to achieve. Save to mention a few gaps which will later be identified in this submission, the purpose of the Bill is admirable.
6. However, the secondary purpose of the Bill is quite concerning, and may prove to counteract the primary purpose of the Bill. Furthermore, the secondary purpose appears to have taken centre stage as the majority of the provisions in the Bill are dedicated to the regulation of victim support service providers, programmes and facilities.

Substantive comments

7. The substantive comments to the Bill will be addressed under the following headings:

7.1. Victims

7.2. Regulation of victim support service providers, programmes and facilities

7.3. Social services

7.4. Police services

7.5. Legal services and the administration of justice

7.6. Education

7.7. General application

8. *Victims*

8.1. We recognise the Department's specific use of the phrase "any person" to broadly define "victim" in clause 1 of the Bill. However, we point out the importance of

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identifying, and specifically recognising, particular vulnerable groups of victims of violence such as children, womxn, migrants, sex workers, members of the LGBTQIA+ community, the disabled and the elderly.

8.2. Furthermore, the Department should consider replacing the word “victim” throughout the Bill with the word “survivor”. “Survivor” has a positive psychological and emotional connotation attached to it, whereas “victim” has a negative one. A survivor connotes hope, whereas a victim connotes helplessness. Should this suggested amendment be accepted, the Department will also be required to rename the Bill the Survivors Support Services Bill. This will require an amendment of clause 43 of the Bill.

8.3. For purposes of this submission however, survivors will be referred to as victims in line with the wording of the Bill.

9. *Regulation of victim support service providers, programmes and facilities*

9.1. As previously stated, the majority of the Bill contains provisions regulating victim support service providers, programmes and facilities. While we support the development of prescribed minimum norms and standards, in so far as they do not attract criminal sanctions, in terms of clause 27 of the Bill; as well as support the provision for the vetting of staff members of service providers in terms of clause 24 of the Bill, we do not support the accreditation requirement for non-governmental victim support service providers, programmes and facilities. This includes the registration, conditional registration, suspension of registration, deregistration or cancellation of registration of a victim support service facility with the Department. The provisions of concern in the Bill include clauses 10(4)(b), 10(5) to 10(8), 20 to 23, 25, 26, 28 to 32, 39, 40(1)(a)(g)(h)(k)(l)(m)(o)(p)(q) and 42.

9.2. One of the causes for concern in respect of those provisions is that the terms used in the Bill are either vague or undefined. For example, the Bill does not define what constitutes a victim support service programme (which requires accreditation under threat of criminal sanction). A “service provider” is only vaguely and broadly defined in clause 1 of the Bill, and a victim support service facility appears to be very broadly described (not defined) in clause 20(1) of the Bill. There is no distinction drawn between psycho-social services and support services in the Bill. Vagueness is an issue

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which may render the Bill unconstitutional, especially because it ascribes criminal sanctions for failure to comply with unclear provisions.

- 9.3. The greater cause for concern, however, is that non-governmental victim support service providers, programmes and facilities fill the gap left by the governmental sector. The non-governmental sector exists purely because the governmental sector has been unable to cater sufficiently for the needs of victims of violence in South Africa. This is due to both resource and administrative constraints by the governmental sector. By requiring that all forms of non-governmental victim support service providers, programmes and facilities (as they are currently broadly defined and described, and which would include informal shelters in underprivileged communities of the country) to undergo an accreditation and/or registration process, as well as a burdensome reporting process, the non-governmental sector will become subject to the same bureaucracy, slow administrative processes and resource constraints that generally cripple the governmental sector. This will more than likely result in the shutting down of non-governmental victim support services and facilities which cannot afford to undergo the registration process or comply with the accreditation requirements. These provisions, therefore, not only indirectly discriminate against victim support service providers, programmes and facilities which are not well resourced, but defeat the Bill's primary purpose to provide additional support and protection to victims of violence, by inevitably forcing the shutting down of services and facilities which victims currently rely on, and by stifling the opening up of future services and facilities.
- 9.4. The trauma likely to be experienced by victims who may be subjected to an investigation conducted in terms of clause 30(3) of the Bill, and the criminal liability attached to the refusal of entry for such an investigation, in terms of clause 30(4), are causes for grave concern to The Embrace Project. That is because clause 30(3) perpetuates secondary traumatising and defeats another objective of the Bill.
- 9.5. Clause 20(13) provides that should a registration certificate be refused or cancelled, the powers and duties of the holder thereof will devolve on the provincial head of the Department. This provision has the effect of nationalising non-governmental victim support service programmes and facilities. Some of these services and facilities may be for profit, or may be entities registered in terms of other laws of the Republic. The effect of this provision is that it encroaches on the rights of juristic persons or individuals

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from whom such powers and duties are being conferred on the provincial head of the Department. Clause 4 of the Bill, which provides that in the event of a conflict with other Acts of Parliament, such other Acts will prevail, does not resolve the issue with clause 20(13). The criminal sanction in clause 20(14) is naturally also problematic.

9.6. In respect of clause 24 of the Bill, being the provision for the vetting of staff members which we fully support, we suggest that the national registries referred to therein be made publically available. This would allow the public, and would-be victims, to protect themselves and their children against registered offenders. This would provide an additional layer of protection in terms of the Bill.

10. *Social services (clauses 10(1) to 10(4), and 34)*

10.1. We commend the coordination and the fostering of partnerships between victim support services in the governmental and non-governmental sectors. We maintain, however, that the regulation of such services and facilities (in the non-governmental sector) is counteractive.

10.2. We note that, for the most part, South Africa's violent roots stem from its legacy of colonialism and Apartheid. These legacies fostered ambivalence towards the law, produced an unequal socioeconomic society with a low sense of self-worth, and encouraged the abuse of substances to numb these realities. These low levels of self-esteem have been cemented by, what has become, institutionalised inequality (no longer on the basis of race but rather socioeconomic standing built on historically disadvantaged backgrounds). Furthermore, the majority of South Africans continue to live below the poverty line with little opportunity to better their circumstances based on high unemployment rates and poor marketability (unskilled labour force). The added frustration of not being able to change one's circumstances creates a dangerous sense of disempowerment.¹ The effect on the mental health of the South African populace and resultant erosion of its social fabric are underrated because they are not visible and are therefore overlooked in crime prevention policy.

10.3. The Centre for the Study of Violence and Reconciliation produced a report on the above factors contributing to South Africa's high rate of violent crime for the then

¹ The Centre for the Study of Violence and Reconciliation, *The Violent Nature of Crime in South Africa*, 25 June 2007.

Department of Safety and Security in 2007. Its recommendations have gone unimplemented. The recommendations included early intervention programmes for children, community programmes for violence-prone areas, and the provision of psychological and social service support. We therefore suggest that the Bill expands on clause 10(1)(e) by specifically prescribing the provision of governmental psycho-social services to members of identified violence prone communities. Thirty geographical areas of concern have already been identified by the Minister of Police as being gender based violence hotspots and in need of special intervention. More hotspots of different violence categories should continue to be identified, and the requisite governmental services dispatched thereto (which must include psycho-social services). The provision of such services should be aimed at violence prevention and not just victim support.

11. *Police services (clauses 12, 13, 37 and 38)*

11.1. We commend the Department for the provisions contained in these clauses and for the police accountability mechanism contained in clause 13 of the Bill.

11.2. In respect of clause 13, we recommend that the Department considers replicating the wording of sections 18(4)(a) and 18(4)(b) of the Domestic Violence Act no 116 of 1998, which contain similar but more stringent provisions. As well as considers adding the provisions contained in sections 18(5)(c) and 18(5)(d) of the Domestic Violence Act.

11.3. We note that according to a 2016/17 crime survey, only 35.5% of sexual offences are reported to the South African Police Services.² Of the 35.5% of sexual offences reported, between 40%-60% of them are withdrawn by either SAPS or the National Prosecuting Authority, predominantly on the basis that the charges are 'false'.³ A 2017 report revealed that only 8.6% of these reported cases see a successful conviction.⁴

11.4. We therefore make the following additional recommendations:

² 2016/2017 Victims of Crime Survey in Fourth Respondent's Submission at para 35.2.3 in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16.

³ 2000 report by the Information Analysis Centre in L Artz and D Smythe, 'Should we consent: Rape Law Reform in South Africa' Juta 2008 at pg 200.

⁴ South African Medical Research Council, 'Rape Justice in South Africa' 2017 report.

- 11.4.1. The Bill should most importantly provide for compulsory and regular sensitisation training for all members of the South African Police Services when assisting victims of violence. The Department 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. Sensitisation training is the most effective method for removing secondary victimisation – one of the objectives of the Bill. Such training should be provided by non-governmental victim support service providers. This will both foster relations between the government and non-governmental sectors (one of the imperatives of the Bill), and provide non-governmental victim support service providers with an additional income stream to continue to assist victims of violence.
- 11.4.2. The Bill should provide for the development of policing protocols and guidelines to be followed when assisting victims of violence. These protocols and guidelines should be published in the Republic's 11 official languages and made publically visible in each police station. That will assist with police accountability. Sections 18(3) and 18(5)(b) of the Domestic Violence Act contain a similar provision and the Department may wish to consider those provisions when taking this recommendation into account.
- 11.4.3. An information sheet containing the details of victim support services and their location (relative to the location of each police station respectively) should be made available to victims of violence at every police station in terms of the Bill. They should be provided to the victims by the attending police official as part of the policing protocols and guidelines developed. Sections 2(b) and 2(c) of the Domestic Violence Act contain similar provisions to the one suggested, and the Department may wish to consider those provisions when taking this recommendation into account.
- 11.4.4. The Bill should provide for the employment of a psychologist or social worker at each police station to assist members of the South African Police Services when dealing with victims of violence. Alternatively, Thuthuzela Care Centres should be strategically located near or on the same premises as police stations. Further, Family Violence, Child Protection and Sexual Offence units that are specialised

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to deal with the reporting of a sexual offence, as well as in offering assistance and providing information to the victim, should be placed at every police station.

11.4.5. The Bill should provide for a public education campaign around the abovementioned protocols and guidelines. The public education campaign should also be aimed at raising the profile of the Civilian Secretariat for Police to encourage the public to hold the members of the South African Police Services accountable. Section 18B(2)(d) proposed by the Domestic Violence Amendment Bill [B20-2020] contains a similar provision and the Department may wish to consider this proposed provision when taking this recommendation into account.

12. *Legal services and administration of justice (clauses 14, 15, 18, 19 and 36)*

12.1. We commend the Department for the provisions contained in the abovementioned clauses. However, we reiterate the necessity for sensitisation training to be made compulsory and conducted on a regular basis for legal and correctional services personnel, the National Prosecuting Authority, court officials and the judiciary, in order for the provisions to be effective. Section 66(2)(b) of the Criminal Law (Sexual and Related Matters) Amendment Act, for example, makes provision for such training for the National Prosecuting Authority. We recommend that the Department consider similar, but more mandatory, provisions.

12.2. We note that, in November 2019, a Kwa-Zulu Natal magistrate, Kholeka Bodlani, sentenced a father who was convicted of having raped his 11 year old daughter to a wholly suspended 5 year sentence because he was a good father. In September 2018 the Western Cape High Court's Judge Binns-Ward found, in mitigation in the sentencing of a rape accused, who had repeatedly raped a child, that the accused had a history of prior consensual intercourse with the victim who was 13 years old; there was no actual violence used other than *forced* sexual intercourse; and that the accused stopped his assault when the victim started bleeding.⁵ For these reasons the learned judge held, in dissent, that the accused's sentence should be reduced. Such findings and sentences are grotesque miscarriages of justice that should not

⁵ *Zamla v S* (A207/2016) [2018] ZAWCHC 130 (25 September 2018) at paras 1 to 44.

exist at the highest level of our criminal justice system in this day and age. They can only be corrected with dedicated training and effective accountability mechanisms.

12.3. Furthermore, the National Prosecuting Authority, like the South African Police Services, should be required to develop protocols and guidelines when dealing with victims of violence, with an effective accountability mechanism if they are not adhered to. The Department may wish to consider sections 18(1), 18(2) and 18(5)(a) of the Domestic Violence Act in respect of this recommendation.

12.4. To realise the provisions set out in clauses 14(a) and 14(d) of the Bill, the Department should consider reforming the rules of evidence in our law in respect of victims of violence. We recommend that the Department look at Rule 72 of the International Criminal Court Rules of Procedure and Evidence. Rule 72 regulates the admissibility of evidence by an accused on a victim's consent in a case of sexual violence. Unlike in domestic courts, such evidence (which is used as a defence by the accused) may not be adduced during the trial without warning. The Court is required to weigh up the degree of the probative value of the evidence against the prejudice that it may cause the victim before considering it admissible.

13. *Education (clause 16)*

13.1. For purposes of protecting learners in terms of clause 16 of the Bill, we recommend that provision be made for the rigorous vetting of educators. In addition to the vetting process set out in clause 24 of the Bill (which we submit should also be applicable to educators), educational institutions should guard against educators who have had allegations or charges of sexual misconduct or impropriety raised against them, but have circumvented the finalisation of a determination of those allegations or charges by, for example, resigning prior to the completion of a disciplinary process. When checking the references of educators prior to their employment, the Bill should require that educational institutions enquire about all non-finalised allegations and charges raised against educators. Alternatively, a new national register should be developed specifically for allegations and/or charges of sexual misconduct/impropriety raised against educators. The register should record whether or not the matter was finalised and, if finalised, what the outcome was. The incidents of sexual abuse at schools are alarming and it is largely due to predators, under the guise of educators, not seeing

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their disciplinary proceedings through, and then starting the abuse anew in a different educational institution.

- 13.2. We note that violence is learnt behaviour. Millions 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. Therefore, in support of the provision in clause 16(c) of the Bill, which requires that the Departments of Basic and Higher Education develop policies and practice guidelines to prevent victimisation at school, we suggest that the Departments consider developing 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 and appropriate inter-sex conduct. This could form part of the Life Skills and the Life Orientation curricula at school. Educators teaching these curricula would also require specialised training, which we also recommend be provided by non-governmental victim support service providers.

14. *General Application*

- 14.1. It is imperative that the Bill provides for compulsory and regular sensitisation training for all civil servants in the employ of the Departments of Social Development, Health, Police, Justice and Correctional Services, and Education, in order to properly assist victims of violence and realise the objectives of the Bill.
- 14.2. The vetting process set out in clause 24 of the Bill for the staff members of service providers should be applicable when employing civil servants in all of the relevant governmental departments identified in the Bill (and named above).
- 14.3. The Bill must also provide for adequate resources for centres such as the Khuseleka One-Stop Centres (in clause 34) and Thuthuzela Care Centres (in clause 36) to ensure that they are able to adequately service the needs of victims of violence. The same provision should be applicable to all of the governmental services and facilities identified in the Bill.

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14.4. Accountability and public reporting mechanisms should be provided for all of the governmental services and institutions identified in the Bill – along the same lines as the one provided for by the Civilian Secretariat for Police in respect of policing.

Conclusion

15. We highly commend the Department for the primary purpose of the Bill; as well as for the cooperation and collaboration that it aims to foster between the relevant governmental departments implicated in the Bill; and between the governmental and non-governmental sectors.

16. We, however, recommend the removal of the secondary purpose of the Bill, and its associated provisions, because of the undermining effect that it has on the Bill's primary purpose. Furthermore, we reiterate the importance of the provision of sensitisation training to ensure the realisation of the Bill's purpose, and for the effective implementation of its provisions. Without such training, another piece of progressive legislation (of which South Africa has many) will come to naught. The effective use of accountability mechanisms and sanctions for members of the civil service who fail to adhere to the provisions of this Bill are of equal importance. In our view, the success of the Bill and the attainment of its objectives hinge on the aforesaid, and not on the regulation of the non-governmental sector.

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

Yours faithfully



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