

WOMEN'S LEGAL CENTRE & REACH

JOINT SUBMISSIONS

TO

THE PORTFOLIO COMMITTEE ON

JUSTICE AND CONSTITUTIONAL

DEVELOPMENT

ON

THE PROTECTION FROM HARASSMENT

BILL [B1-2010]

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1 **INTRODUCTION TO THE ORGANISATIONS MAKING THIS SUBMISSION**

The Women's Legal Centre ("WLC") and Rural Education, Awareness and Community Health ("REACH") welcomes the opportunity to make submissions to the Portfolio Committee on Justice & Constitutional Development ("the Committee") on the Protection from Harassment Bill ("the Bill").

Please note that the WLC and REACH wish to be included on the roster for public hearings scheduled for 19 October 2010. Kindly advise on our time slots.

1.1 **THE WLC**

The WLC is a non profit and public interest law centre established by a group of women lawyers in 1999. Its central purpose is to advance women's human rights, particularly black and socio-economically disadvantaged women, through impact litigation, legal advocacy and the provision of a daily legal advice service. In respect of the gender based violence focus of the WLC's work it specifically aims to give effect to women's constitutional rights to human dignity, equality and freedom from all forms of violence from either public or private sources.

Through the services that the WLC provides to women it often deals with matters relating to the Domestic Violence Act of 1998 ("the DVA") and sex work in regard to the issue of harassment. Our interest in the Bill stems from it's similarity to the DVA, the positive impact that the promulgation of the Bill can have on the DVA and the creation of a legal remedy to extend the legal

protection that the state can offer to women, who fall outside of the ambit of the DVA.

1.2 **REACH**

REACH is a non-profit organisation that addresses sexual harassment and gender based violence on farms and in rural communities of the Western Cape. REACH was founded in response to the high prevalence of harassment and violence against women residing or working in rural and farming communities and the lack of programs and absence of support services to address and assist those whose lives are affected by these social problems. Rural and farm working communities face many educational, financial and social problems and have little knowledge of or access to legal and support services rendering women and children particularly vulnerable to human rights abuses.

REACH adopts a holistic approach in its work with farm and rural communities incorporating awareness raising and campaigns on women's rights; counseling and legal support to victims of harassment and abuse; research in continuing to highlight problematic issues affecting rural and farm women and advocacy to promote changes of policies in relation to sexual harassment and gender based violence. REACH has a very clear sense of the challenges faced by women in the rural and farming environment and have established strategies to manage these challenges in order to fulfill its mission of creating a society free from sexual harassment and gender based violence.

2 **CONTEXT OF THE SUBMISSION AND TERMINOLOGY**

- 2.1 “alleged perpetrator” refers to the Respondent in the court procedures relating to the application for, issue of and enforcement of protection orders.
- 2.2 Reference is made to the “survivor”, “victim” or “complainant” as a woman in this submission on the basis that the vast majority of survivors/victims of harassment are women who are subjected to harassment by male perpetrators. This does not in any way dismiss the fact that men can also be victims to harassment.
- 2.3 This submission does not purport to record all the factors that hamper the implementation of the DVA or to provide all possible recommendations to overcome the factors that hamper the implementation of the DVA and should accordingly not be construed as such.
- 2.4 This submission does not purport to record or make all recommendations relevant to affording victims of harassment the best possible legal protection that the law can provide, all the factors that may hamper the implementation of the Bill or to provide recommendations to overcome the possible factors that may hamper the implementation of the Bill and should accordingly not be construed as such.
- 2.5 This submission does not purport to have covered or have made reference to issues pertaining to all categories of women in terms of race, class, age, disability, religion, culture, sexual identity or orientation and/or socio-economic or political status. It also does

not dismiss the impact that the Bill may have on the categories of women not mentioned herein.

- 2.6 This submission also does not focus on children and harassment but acknowledges the impact that the Bill may have on children who are victims of harassment. This submission is primarily aimed at advancing the rights and interests of adult women i.e. women over the age of 18 years.

3 **PURPOSE OF THIS SUBMISSION**

WLC and REACH support the general purpose of the Bill. In what follows in this submission we will:

- 3.1 Inform the Committee of women's experiences in terms of harassment and with the legal systems and state departments that they need to deal with when seeking and obtaining legal assistance or redress for harassment.
- 3.2 Recommend amendments to the Bill and DVA to advance the rights and interests of women and particularly vulnerable categories of including rural and farm women and sex workers.
- 3.3 Recommend amendments to Bill and DVA in the interest of creating consistency between the Bill and the DVA.
- 3.4 Recommend amendments to the DVA for improvements on the implementation of the DVA by the courts and the South African Police Service ("SAPS") in order to improve the experiences of victims' of harassment from the time when the victim enters the

legal system up till and including when (and if) a perpetrator of harassment is punished for his harmful conduct.

- 3.5 Recommend amendments to the Bill to prevent problems with the implementation of the Bill by the courts and the SAPS to ensure that victims' of harassment rights and interests are protected and that secondary victimisation is limited from the time when the victim enters the legal system up till and including when (and if) a perpetrator of harassment is punished for her or his harmful conduct.

The WLC and REACH recognise the adverse impact that harassment has on victims emotionally, psychologically and mentally and submit, through reports from clients and our partner organisations, that harassment can result in more serious offences such as death or physical, emotional, psychological or mental injury of the victim or her family or friends. It is on this basis that we stress the importance of the legal protection that the Bill can afford victims, the effectiveness and implementation of the Bill and the accountability for the state's failures to comply with its legal obligations prescribed in the Bill.

4 GENERAL RECOMMENDATIONS

We make the following general recommendations in respect of the Bill:

- 4.1 It is recommended that the definition of 'harm' in Section 1 be amended. The definition should include damage to property as a form of harm and any other form of harm that may ensue as a consequence of the harassment in order to ensure that the Bill covers all forms of harm flowing from the harassment. We propose that the Section state as follows:

*“**harm**” means any mental, psychological, physical, economic harm, damage to property and/or any other form of harm that may ensue as a consequence of the harassment”.*

- 4.2 A definition of “reasonable belief” should be provided in Section 1 of the Bill so that complainants are not refused assistance by clerks of the court on the basis that the clerk of the court is of the view that the alleged harassment will not cause harm. Such a refusal of assistance can have serious consequences for the complainant or a related person to the extent that serious harm can ensue. Should the protection order have been issued, it could have prevented the respondent from committing the act of harassment that resulted in harm. The necessity for the definition is expanded on below in recommendation 4.3 in respect of the provisions in the Bill in which they apply. The definition of “reasonable belief” should be inserted beneath the definition of “prescribe” and “related person”. It should state as follows:

*“(xii) **“reasonable belief”** means that it appears or is likely from the circumstances and/or conduct of the respondent that the complainant or a related person will suffer harm in consideration of the following:*

- (a) the Respondent’s history of harassment against the complainant or a related person;*
- (b) the history and extent of harm suffered by the complainant due to the conduct of the Respondent including any form of harm other than the form of harm that the complainant may be suffering at the time that the application in terms of Section 2(5) is made;*
- (c) the seriousness of the harassment;*
- (d) the nature and extent of the harassment; and*

(e) the impact that the harassment may have on the complainant.”

- 4.3 The definition of “related person” in Section 1 should be amended to include any person that the Respondent may have reason to harass for purposes of adversely affecting the complainant. This insertion will cover circumstances where the Respondent, who was a previous intimate partner of the complainant, harasses the current intimate partner of the complainant. The insertion should state the following:

*“**related person**” means any member of the family or household of a complainant, any person in close relationship to such complainant or any person that the Respondent may have reason to harass for purposes of adversely affecting the complainant;”*

- 4.4 From information provided by our clients we have learnt that complainants applying for protection orders in terms of the DVA often fail to set out all relevant information on the acts of domestic violence that were perpetrated against the complainant in the affidavit and application form and fail to ask for conditions to be put in place that prohibit further acts of domestic violence complained of from being perpetrated against them. Accordingly, there is inconsistency between the needs of the complainant and what is set out in the affidavit and application form. This results in the complainant not being afforded the legal protection that she seeks and needs. This problem specifically comes into play when the complainant does not have a legal representative. These inconsistencies have resulted in the complainant having to amend the protection order which is a time consuming exercise for the court officials and the complainant. It follows that domestic

violence clerks should be required to provide complainant's with greater assistance in completing the affidavit and application form and should ensure that all relevant information is contained in the affidavit and the application form before the application is sent to the Magistrate for consideration. In light of the above, Section 2(2) of the Bill should be amended in order to prevent this problem from occurring when complainant's apply for protection orders in terms of the provisions of the Bill. It is recommended that Section 2(2) should state as follows:

- “(2) If the complainant or a person referred to in subsection (3) is not represented by a legal representative, the clerk of the court must inform the complainant or person, in the prescribed manner, of-*
- (1)
- (a) the relief available in terms of this Act; and*
 - (b) the right to also lodge a criminal complaint against the respondent of crimen injuria, assault, trespass, extortion or any other offence which has a bearing on the persona or property of the complainant or related person.*
- (2)
- (a) the importance of the complainant setting out full details of the harm suffered and the conditions that she requires the protection order to contain and the clerk of the court must assist the complainant in ensuring that the information contained in the affidavit and application form are consistent and that the complainant's complaints corresponds with the relief that the complainant seeks.*

Section 4(2) of the DVA should also be amended in line with the proposed amendment to Section 2(2).

- 4.5 In terms of Section 2(5), the word “may” should be replaced by “or is of the reasonable belief that the complainant or related person is likely to suffer harm” to ensure that complainants are not denied the opportunity to apply for a protection order and to prevent situations where a complainant is denied access to court to obtain a protection order which could result in dire consequences for the complainant. The amended section should read as follows:

“The application referred to in subsection (1) may be brought outside ordinary court hours or on a day which is not an ordinary court day, if the court has a reasonable belief that the complainant or related person is suffering or may suffer harm if the application is not dealt with immediately.”

- 4.6 The word “may” in Section 3(2)(b) should be amended to “or if the court is of the reasonable belief that the complainant or a related person is likely to suffer harm” for the same reasons provided in number 4.4 above. The amended Section should provide as follows:

“(b) harm is being suffered or if the court is of the reasonable belief that the complainant or a related person will suffer harm as a result of that conduct if a protection order is not issued immediately; and”

- 4.7 It is recommended that the DVA be amended in accordance with Section 3(3)(a),(4) and 6(5) of the Bill. Such amendments will prevent the undue delays often occurring in circumstances where interim protection orders are issued by the court in terms of the DVA and will have the effect of enforcing the implementation of the DVA by SAPS members who often omit to comply with instructions to serve protection orders.

4.8 It has come to our attention through information provided by our clients who we provide with legal advice as well as through our NGO partners that Section 3 of the DVA fails to serve the purpose for which it has been created. In instances where only the Respondent has employed the services of a legal representative the complainant's case is often prejudiced by the lack of legal representation even where the Respondent's legal representative is prohibited from cross-examining the complainant. This is due to a lack of understanding of the court proceedings and the laws of evidence on the part of the complainant as the complainant often fails to answer questions put to her by the court adequately as she either does not understand the impact of the answers she provides or reasons as to why the question has been put to her. Accordingly, the complainant's case is not fully and properly put before the court and the Respondent ultimately stands a better chance of convincing the court, on a balance of probabilities, that he has not committed the act of domestic violence in question. In addition, complainants are often re-traumatized by having to give testimony and find the legal representation of the Respondent intimidating in the absence of a legal representative representing the complainant. In these circumstances, it is recommended that the Bill and DVA be amended to provide for the appointment of a legal representative for the complainant, especially in circumstances where the Respondent has employed the services of a legal representative. In addition, where the complainant is economically disempowered and cannot afford to pay for legal representation, the court should appoint a legal aid attorney to represent the client. Section 6(3) of the Bill should be amended as follows:

- “3 (1) *If the complainant is not represented by a legal representative the court must advise the complainant of the right to legal representation and must provide the complainant with sufficient time to obtain the services of a legal representative.*
- (2) *If the complainant is not by the financial means to employ the services of a legal representative the court must advise the client of the right to legal aid legal representation and must provide the complainant with sufficient time to instruct such a legal representative.*
- (3) *Where the complainant or related person elects to continue the proceedings without a legal representation and if the court, of it's own accord or on the request of the complainant, after the court has informed the complainant, of the right to make such a request and the court is of the opinion that it is required in the case of a witness who could be exposed to undue mental stress or suffering, order that in the examination of those witnesses, including the complainant or related person, a Respondent who is not represented by a legal representative or where the Respondent is represented by a legal representative-*
- (a) is not entitled to directly cross-examine a person or his or her legal representative whom he or she is alleged to have harassed; and*
- (b) must put any question to the person by stating the question to the court, and the court is to repeat the question accurately to the person.*

It is recommended that the Section 3 of the DVA also be amended to include the recommended amended provision above.

- 4.9 In regard to Section 7(c) of the Bill, it is recommended that Section 7(2) of the DVA be amended to include the same in respect of domestic violence in the form of physical abuse, sexual abuse, intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent where the parties do not share the same residence or in respect of any other act of domestic violence for which a corresponding criminal offence exists in law. The recommendation is based on the fact that complainants are often not advised of the right to lay a corresponding criminal charge against the Respondent in addition to making use of the remedies provided by the DVA despite the fact that Section 4(2)(b) of the DVA stipulates that the clerk of the court must advise the complainant of this right. This amendment will also facilitate the state's fulfillment of its constitutional, legal and international law duties to protect complainants from violence.
- 4.10 It is recommended that Section 8 of the Bill and the DVA be amended to define "imminent harm". It has become clear that SAPS members fail to act in accordance with Section 8(4)(b) of the DVA to the extent that they either neglect or refuse to arrest Respondents when a complainant requests such an arrest on the basis that harm is imminent irrespective of whether the complainant is in possession of a valid warrant of arrest (or not). It is unclear as to whether the SAPS members fail to understand the meaning of "imminent harm" or whether they simply do not take domestic violence complaints seriously. We have been informed that the failure to arrest stems from SAPS members fear of facing wrongful arrest charges or a reluctance to become involved in "civil matters". Despite the fact that Section 8(4)(c) provides procedures to be followed in instances where the SAPS member

is of the view that insufficient grounds exists for the arrest of the Respondent which serves as a less serious manner of dealing with an allegation of imminent harm, SAPS' members also fail to execute their duties in terms of this provision. The SAPS' failure to implement the DVA in this regard has led to dire consequences for complainants such as the complainants' death or injury or the death or injury family or friends of the complainant. The following amendments are recommended:

Section 1:

A definition of imminent harm should be included in the definition Section and should state as follows:

*“**“imminent harm”** means mental, psychological, physical, economic harm, damage to property and/or any other manifestation of harm that is reasonably likely to ensue or is about to ensue as a consequence of harassment as defined in below should the Respondent not be arrested immediately;”*

Section 8(4)(b):

“If it appears to the member concerned that, subject to subsection (5), there are reasonable grounds to suspect that the complainant or related person is suffering or is of the reasonable belief that the complainant or related person will suffer imminent harm as a result of the alleged breach of a condition of the protection order by the Respondent, the member must immediately arrest the Respondent for allegedly committing the offence referred to in Section 15(1)(a) in the absence of a valid warrant of arrest.”

Section 8(5):

“In considering whether or not the complainant or a related person is suffering or whether there are sufficient grounds to hold the reasonable belief that imminent harm will ensue, as provided for in subsection (4)(b), the member of the South African Police Services must take into account –

- (a) the risk to the safety or well-being of the complainant or related person;*
- (b) the seriousness of the conduct comprising an alleged breach of the protection order;*
- (c) the length of time since the alleged breach occurred;*
- (d) the history of harm suffered by the complainant or related person due to harassment or any other form of harmful conduct on the part of the Respondent; and*
- (e) the nature and extent of the harm previously suffered by the complainant or related person, if any.”*

It is recommended that these amendments also be affected to Section 8 of the DVA.

5 HARASSMENT AND WOMEN RESIDING OR WORKING IN FARM OR RURAL COMMUNITIES

5.1 BACKGROUND

There are three main factors that hinder a rural or farm woman from gaining support and legal assistance against harassment which needs careful consideration to ensure that the Bill does not fall prey to some of the past and current failures of the implementation of the DVA.

5.1.1 **Lack of access to nearby services**

Farms are generally located at a distance from local towns or cities requiring women to travel long distances to access courts. The mode of transport most commonly used (and often the only form of transport available) is local taxis which are costly and not always a reliable form of transportation. If a complainant does not arrive at court on time there is no guarantee that she will receive assistance and is highly likely that she will lose a day's income. Women who cannot afford to pay for transport sometimes hitchhike which is not only unreliable but also poses a risk to her safety.

5.1.2 **Language barriers & lack of information**

Illiteracy, low levels of education and language barriers renders the application for protection orders and following through with subsequent legal procedures daunting for complainants. Survivors of domestic violence experience difficulties in dealing with domestic violence clerks and magistrates due to these factors. This results in complainants not knowing their rights and understanding the court procedures. They are also ill-informed of the steps that can be taken in instances where the relevant state officials fail to comply with their legal duties prescribed in the DVA.

5.1.3 **Challenges experienced with SAPS members and warrants of arrest**

Another great hindrance which continues to be a common occurrence is the lack of understanding of the seriousness of domestic violence by SAPS members and their failure to

fulfil their legal duties in terms of the DVA whether it is based on not attending to call outs related to domestic violence; unnecessary delays in serving protection orders or in one case that REACH has dealt with, where the SAPS refused to serve a protection order on a perpetrator of domestic violence because they did not understand the protection order as it was written in Afrikaans. It is also not uncommon to hear that SAPS members, particularly in small towns, are friends with the perpetrators of domestic violence and intentionally prevent legal procedures from running its course. REACH has also heard of cases where perpetrators, after contravening conditions of a protection order and being arrested, physically assault the victim again when released from SAPS custody. Victims are then afraid or reluctant to approach the courts again for a re-issue of warrants of arrest as they feel that protection orders aggravate situations rather than provide them with the protection that they need.

5.2 RECOMMENDATIONS

In the circumstances we recommend that circuit or specialised courts focusing on issues of domestic violence (including harassment) are set up in farm and rural areas to facilitate rural and farm women's access to protection orders. These courts should be staffed with a sufficient number of clerks and Magistrate's, Legal Aid representatives for complainants and social workers. The court staff should be able to speak the languages spoken in the relevant rural or farm community.

In relation to SAPS members failures to comply with their legal duties we recommend that SAPS members receive better and in depth training on their legal duties, that SAPS members receive training on the impact of harassment on victims and gender and human rights to improve service

delivery and the enforcement of victims' legal protection against harassment.

Furthermore, SAPS members should be held accountable for failing to comply with their legal duties in their capacities as state officials and persons responsible for enforcing the law and protecting the public. The Minister of Police must put in place heavier penalty and disciplinary procedures and must also put in place better procedures for monitoring and ensuring that proper and effective disciplinary action is taken were SAPS members act outside of their mandates as SAPS members.

6. HARASSMENT AND SEX WORKERS

6.1 BACKGROUND

At present, Sex work is criminalised in South Africa. Both purchasing and providing sex and sex related services are prohibited in terms of Section 11 of the *Criminal Law (Sexual Offences) Amendment Act of 2007*.

Sex workers' criminal status in society increases vulnerability to violence in a number of ways. Sex workers around the world continue to be murdered at rates higher than the general population; in fact in some places standardised mortality rates for sex workers are six times greater than those noted in the general population.¹

Due to fact that sex workers are by and large female, sex workers are particularly vulnerable to acts of violence against women. The incidence of physical violence, including ^{rape}, is higher amongst

¹ SWEAT submission to the South African Law Reform Commission page 27

sex workers than among the general population. Violence links with social stigma and discrimination resulting in disempowerment and in some situations learned helplessness giving the sex worker the message that their life does not matter.²

The human rights abuses that sex workers in South Africa are subjected to is alarming and demands immediate attention. Sex workers suffer both systematic and other acts of violence including rape and harassment. In Cape Town, 37% of street-based and 20% of brothel-based sex workers often experience violence and often do not report incidences to the SAPS based on the nature of and criminalisation of their work. Unreported crimes include assault, intimidation, refusal to pay for sexual services provided, robbery, threats of physical assault, stalking, harassment and rape. Many sex workers report abuse by the police³ and there is great skepticism about the role of the SAPS as an avenue for redress, especially in light of the fact that some SAPS members are perpetrators criminal offences committed against sex workers.

WLC has been monitoring the abuse of sex workers for over a year, and we have found the following:

6.1.1 Sex workers are often harassed by SAPS members where members follow, watch pursue or accost them at their place of residence, work, or when they are out doing grocery shopping.

² Ibid

³ Ibid

- 6.1.1 Sex workers are often harassed by clients where clients follow them, through verbal and electronic communication and common assaults.
- 6.1.2 Sex workers are often harassed by former employers.
- 6.1.3 Sex workers are often harassed by members of the community.

Sex workers are heavily stigmatised: being named, shamed and labeled as immoral, abhorrent and a threat to society. Sex workers are a popularly “accepted” target of hate crime - people feel justified in harassing and abusing them. Sex workers often function as a target onto which people express their hatred but at the same time they often feel justified in their violence and have no sense of accountability.⁴

South Africa’s current legal position does not comply with the international treaties that South Africa has signed and/or ratified, and law reform is imperative for this reason.

Furthermore, the existing legal framework is also allows SAPS members with wide discretion and encourages police corruption due to the spin offs, for example bribes and demands for sex. In reality a system of *de facto* decriminalisation exists in South Africa in that the sex work industry is left largely undisturbed by the police and law enforcement. The majority of interventions are based on responses to public and community complaints. In these instances the targets are the most visible elements, namely street based or outdoor sex workers, and in the majority of arrests, it is the municipal bylaws that are used⁵.

The Sexual Offences Act as it stands only allows for limited prosecution

⁴ Ibid

⁵ SWEAT Submission to the South African Law Reform Commission 2009 page 26

and requires intensive and intrusive police methods such as entrapment to secure a conviction. The indoor industry is rarely targeted except when the brothel becomes too high profile or there are community complaints. It is in these instances entrapment procedures are used.⁶

The reality is that sex workers are seldom prosecuted, and are more likely to be arrested, harassed and then released. In a recent Cape High Court judgment ⁷ the court interdicted the police from arresting sex workers in order to harass them. To our knowledge, no sex workers have been prosecuted under the new law. Often, municipal by-laws are used to arrest sex workers instead of the Sexual Offences Act because of the difficulties involved in proving the elements of the offence, particularly in relation to the sex worker.

Once arrested, they are required to pay a “fine” to the arresting officer or they are taken to the police cells where they are required to pay a R300 fine or kept overnight and then released the next morning. They do not appear in court nor do they receive any receipts for the payment of the fine.

The continued arrest of sex workers when they have not committed the acts for which they have been fined encourages a practice of abusing the law to deliberately persecute a specific group of people. This practice violates the right to equality before the law and amounts to unfair discrimination.

Sex workers have also complained of the violation of their Constitutional rights to be informed promptly of the reason for being detained, to choose

⁶ Ibid page 27

⁷ SWEAT v The Minister of Safety & Security & 7 Others
Judgement delivered in the Cape High Court on 20 April 2009

and consult with a legal practitioner, to challenge the lawfulness of the detention, to communicate with or be visited by a next of kin or a medical practitioner and to conditions of detention that are consistent with human dignity.

6.2 RECOMMENDATIONS

6.2.1 In acknowledgment of the fact that sex workers are often denied access to justice, we submit that the implementation and enforcement of the provisions of the Bill is fundamental in order to extend better and effective legal protection to sex workers.

6.2.2 We further submit that should sex work be decriminalised in South Africa, sex workers will better be able to reap the benefits for legal protection from the provisions of this Bill in that justice will be more accessible and harassers will be brought to book for their harmful conduct.

6.2.3 Furthermore, the promulgation of the Bill will have a wide impact on changing negative social perceptions of sex workers and will ultimately contribute towards reducing unfair discrimination against sex workers and women in that extending legal protection to sex workers through the Bill will be enforcing their constitutional rights to human dignity, equality and freedom and security of the person.

END
