



19 September 2011

Notes on the Protection from Harassment Bill [B1B – 2010]

1. Introduction and background

The purpose of this paper is to provide the Select Committee on Security and Constitutional Development with a brief summary of the main features of the Protection from Harassment Bill [B1B – 2010], and the main changes made to the Bill; as well as the salient issues raised in the analysis of and during the deliberations on the Bill in the Portfolio Committee on Justice and Constitutional Development (“the Portfolio Committee”).

Members are also referred to the summary of clauses as set out in the Memorandum on the Objects of the Bill on page 14 of the Bill. For the purposes of this paper, only the main features of the Bill are summarised, as well as issues which still require further deliberation by the Select Committee.

2. Portfolio Committee Amendments to the Bill

- **Main features of the Bill**

The Protection from Harassment Bill (“the Bill”), which emanates from an investigation by the South African Law Reform Commission, provides for the granting of a protection order for victims of harassment.

- **Alignment of Bill with domestic violence, firearms and electronic communication legislation (Clause 1)**

The Bill has concurrent application with the Domestic Violence Act¹ (DVA) and provides in clause 1(2) that persons who may apply for relief against harassment or stalking in terms of the DVA are not precluded from applying for relief in terms of this Bill. It also provides in clause 19 for Regulations to be made by the Minister to provide financial assistance to be provided by the State to complainants who do not have the means to apply for services in terms of the Bill and for witnesses required to attend proceedings. The Bill is also aligned with the relevant provisions of the Electronics Communications Act² and the Firearms Control Act³.

- **Definition of “harassment” (Clause 1)**

The definition of harassment is quite wide to provide for most if not all possible scenarios in which harassment could take place, and includes direct or indirect conduct which “the respondent knows or ought to know” causes harm or “inspires the reasonable belief that harm may be caused to the respondent or related person”. Examples of harassment include

¹ Act No 116 of 1998

² Act No 36 of 2005

³ Act No 60 of 2000



following, watching, pursuing or accosting the complainant or related person, as well as sending, delivering or causing electronic communication to be sent to the complainant. Harassment includes sexual harassment.

- **Definition of “related person” (Clause 1)**

A “related person” is defined as “any member of the family or household of a complainant, or any other person in close relationship to the complainant”.

- **Definition of “electronic communications identity number” and “communications service provider” (Clause 1)**

Many of the Portfolio Committee amendments were made to include the provisions relating to electronic communications. This includes the definition of “electronic communications identity number” and “communications service provider” as defined in the Electronics Communications Act, 2005.

- **Protection order for victims of harassment (Clauses 2 and 3)**

Clauses 2 and 3 provides for the granting of a protection order for victims of harassment. In terms of clause 2 the applicant must be informed of the right to lay criminal charges. Provision is also made for the application for a protection order to be brought on behalf of the complainant by another person who has a material interest in the well-being of the complainant or related person.

- **Court order to compel service providers to provide personal details of alleged stalker (Clause 4)**

Many of the Portfolio Committee amendments were made to include the provisions relating to electronic communications. In terms of the Regulation of Interception of Communications and Provision of Communication-Related Information Act⁴ (RICA), service providers of electronic communication are required to keep detailed personal information of their clients and the devices used by them; and cell phone clients in particular are required to register their SIM-cards and telephone handsets with their identity numbers and addresses. An important feature of the Bill is therefore the provision that the court can order electronic communications service providers, like cell phone service providers and internet service providers, to provide details of the identity and addresses (including cell phone numbers, e-mail and web addresses) of alleged stalkers who use electronic communication devices to harass others.

- **Punishment where service provider fails to comply with court order (Clause 18)**

One of the main Portfolio Committee amendments to clause 18 concerns the addition of a new offence and penalty relating to electronic communications. In terms of the amended clause it is an offence for any electronic communications service provider or its employee(s) who makes a false statement or fails to furnish the required information within the time

⁴ Act No 48 of 2008



specified by the court or inform the respondent that such information is to be provided to the court. The applicable fine, in the case of a service provider, is an amount not exceeding R10 000, or in the case of an employee, a fine or a maximum of 6 months imprisonment.

- **Court order to compel the police to investigate and determine identity of unknown stalker (Clause 5)**

The court can also order the police to carry out an investigation to determine the identity and address of an alleged stalker where this is unknown at the time of application for a protection order.

3. Issues for consideration by the Select Committee

- **Possible delays in obtaining relief where the respondent is unknown (Clause 5)**

In terms of clause 5 the court may adjourn proceedings for application for a court order where the respondent is unknown and may also issue a direction that the police must investigate the matter with the view of identifying and tracing the respondent. In addition where, in terms of clause 4, the court has ordered that an electronic communications service provider provide the identity and address of a respondent within 5 ordinary court days, such a service provider can approach the court for an extension of a further 5 ordinary court days or for a cancellation of the order where the information is not available. These provisions clearly show that the relief of a protection order may not be immediately available when a complainant needs it and should be revisited by the Select Committee.

- **Compulsory Notice to respondent by communications service provider (Clause 5(6) and Clause 18(4))**

The Bill provides that, in the case where the court has ordered an electronic communications service provider to make a respondent's identity and address available to the court, the service provider must within 48 hours give notice to a respondent that such details will be provided to the court. The Bill also makes it an offence for a service provider who fails to give notice to the respondent in this regard. Considering the relief that the Bill purports to give to victims of harassment it is a concern that giving a 48 hour notice period to the respondent will defeat the purpose of the relief as a respondent will have enough time to change his details and become untraceable, maybe even skipping the country.

The requirement of notice by the service provider should be reconsidered as the court must in any case notify a respondent when an order or interim order is granted to allow the respondent to respond to the allegations of harassment against him or her.

- **Compelling the police to investigate harassment complaints (Clauses 5 and 6)**

In terms of clause 6 the police have discretion to investigate a complaint of harassment made directly to the police if the identity or address of the respondent is not known; and to regulate the powers of the police to instances of harassment in terms of a direction that a court may issue. The question this provision raises is why the Bill does not compel the police to investigate the complaint in order to determine the whereabouts and identity of the alleged



perpetrator. Considering the relief that the Bill purports to give to victims of harassment it does not appear to be practical for the police not to at least investigate the whereabouts of the alleged perpetrator as the police is supposed to do in all complaints that are lodged at police stations.

- **Distinction between known perpetrators whose addresses are unknown and alleged unknown perpetrator - protection of victims (Clauses 5 and 6)**

Compelling the police to investigate complaints of harassment is also important when considering that the identity of some perpetrators may be known but their whereabouts may be unknown. In this instance a complainant would have to rely on the police to try and locate the perpetrator which will not be done unless the Bill compels the police to investigate such complaints. In the instance where the perpetrator's identity and/or whereabouts are unknown the question that comes to mind is what sort of protection will be given to a victim in this regard, as nothing prevents such a perpetrator to keep on harassing the victim. Where possible the victim could provide the police with information from which to compile an identikit for example, and these are invaluable leads that should be followed up in the course of an investigation. In terms of the provisions of clause 5 it would appear that the court will only grant an interim order when the respondent's details are known and this, together with waiting for the court to direct that the police must investigate the matter may cause unnecessary delays.

4. Additional matters

- **Increased workload on police and justice: trained personnel for effective implementation (Organisational, personnel and financial implications (page 17)**

As the Protection from Harassment Bill will have concurrent application with the DVA, it is important for the Committee to consider the current challenges in respect of the implementation of the DVA and the challenges victims encounter in accessing DVA services at courts and police stations.

- **Current challenges victims face in accessing services at courts and police stations in terms of DVA legislation⁵**

The DVA creates a protection order that prohibits the abuser (or respondent) and anyone acting on their behalf from engaging in acts of physical, sexual, emotional, psychological and economic abuse. Violation of any of the terms of the order constitutes contempt of court and may lead to the respondent's arrest. However, women who approach the courts seeking a protection order in terms of the DVA may be subjected to unnecessary and lengthy delays in obtaining orders due to problematic working hours that cause court personnel to be unavailable; staff being ill-trained and ill-equipped; and lack of privacy for complainants at court. Consequently less than half of South Africans who apply for DVA protection orders ultimately qualify. This means that the protection of the courts is being denied to some by institutional barriers, as well as prejudice and insensitivity on the part of some magistrates.

⁵ Dano, M, Nesbitt, G and Whittle, P (2011)



It is often practical issues that form the most serious obstacles to accessing the courts. For instance, although the Department of Justice and Constitutional Development (DOJ) has translated the application forms for a protection order into nine official languages it is not clear how widely these forms have been distributed to the courts, even to courts using indigenous languages. There may be a lack of understanding of the language used in the docket since it is always written in English. There are not enough courts in rural areas. The victims need to travel long distances to access the court and sometimes they leave the courts without any assistance as some courts only deal with matters of domestic violence on certain days and at certain times.

There is often not enough ongoing support for those who take out protection orders as these orders are often cancelled by the victims of domestic violence. In most cases the perpetrator will be removed from the house as per the protection order. He will then decide not to support the family so that for that period of separation there will be food shortages, and as a result the complainant will cancel the protection order. The victim's return to her home is not a guarantee that the abuse will stop.

With regard to police stations, civil society organisations have indicated that the Domestic Violence Act⁶ (DVA) is not properly implemented and cases of domestic violence are often not recorded. It has been found that in some rural police stations in areas falling under a tribal authority, the police did not open domestic violence cases where women lodged complaints, allowing such matters to be dealt with by the tribal authority instead, to the detriment of the complainant.

In Parliamentary oversight visits it has been found that most police stations did not keep all the required documentation in the Community Service Centre (such as copies of the Acts, Regulations and Station Orders) and none of them keep this documentation in the response vehicles. In those stations where there is documentation, the members serving in the Community Service Centre did not understand what was contained in this documentation and how to properly implement the requirements of the legislation.

The Independent Complaints Directorate (ICD) undertakes station audits to assess compliance with the Domestic Violence Act in particular. In the 830 audits completed in the period January 2009 to December 2010 it was found that 128 of these stations were complying on a level of "Non-Compliant" while 77 were "Fully-Compliant". The remainder were "Fairly Compliant" or "Substantially Compliant".

Key areas covered in this audit include whether the documentation and lists are available, whether all incidents are recorded in the Domestic Violence Register and whether protection orders are served. A key challenge identified by the ICD is that there is a lack of understanding of the Domestic Violence Act by members of the South African Police Service and that there is an existence of a culture of silence around domestic violence.⁷

⁶ Act No 116 of 1998

⁷ Independent Complaints Directorate (2011)



5. Conclusion

The Bill will have financial, as well as organisational and personnel implications which will require training initiatives and funds for the training of clerks of the court and police officers. It is also expected that implementation of the Bill will result in an increased workload for clerks of the court and magistrates. The DOJ, in conjunction with the Police and other role players, should provide the Select Committee with an Implementation and Costing Plan for the Bill. In particular it should set out, given the current challenges experienced in implementing the DVA, how these challenges will be addressed to ensure that the Protection from Harassment Bill will be effectively implemented to ensure the maximum protection and benefit for victims of harassment.

Sources

1. Protection from Harassment Bill [B1B – 2010]
2. Protection from Harassment Bill [B1 – 2010]
3. Protection from Harassment Bill [B1A – 2010]. Portfolio Committee Amendments to the Protection from Harassment Bill [B1 – 2010]
4. Regulation of Interception of Communications and Provision of Communication-Related Information Act No. 48 of 2008
5. Dano, M, Nesbitt, G and Whittle, P (2011). Crime: People's Assembly Steering Committee Discussion Paper. Research Unit. Information Services Section. Parliament of South Africa.
6. Independent Complaints Directorate (2011) DVA Reports January 2009-December 2010 Presentation to the Portfolio Committee. 23 August 2011