

Children's Institute submission on the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B 18-2014]

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Chairperson of the Portfolio Committee on Justice and Correctional Services

Sent by email to the Cindy Balie, Committee Secretary cbalie@parliament.gov.za

Intro

The Children's Institute (CI) was established in 2001 as a multi-disciplinary policy research unit located in the Faculty of Health Sciences of the University of Cape Town. CI aims to contribute to policies, laws and interventions that promote equality and realise the rights and improve the conditions of all children in South Africa, through child focused policy research, advocacy, education and technical support.

One of the CI's research focal areas is the prevention of and responses to violence experienced by children in South Africa. Our findings show that the child protection system is unable to cope with the high levels of child abuse and needs more resources and better coordination. We teach a number of undergraduate, postgraduate and professional development courses for health and social service professionals. Of major concern are the requirements for reporting sexual offences and the ethical dilemmas posed by the requirement to report sexual activities between consenting adolescents. We submit that:

1. Consensual sexual activities between adolescents should not be a crime.
2. Children convicted of sexual offences should be assessed before their names are added to the National Register of Sex Offenders.
3. Once found to be a risk and placed on the National Register of Sex Offenders children convicted of sexual offences should be assessed before their names are removed.

If it pleases the Chair we would like to make a verbal presentation to the Portfolio Committee during the public hearings.

Lucy Jamieson and Assoc Prof Shanaaz Mathews, Children's Institute



Consensual sexual acts between children of certain ages

Arguments in support of sections 1, 2, 3 and 9 of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill [B 18-2014 (prop s75)]

Sexual experimentation by adolescents is a normal part of growing up. However, adolescents' health and well-being may be at risk if they engage in sexual activity without the necessary knowledge about contraception, STIs and HIV, and before they are mature enough to understand and handle the emotional and health consequences. It is in the best interests of children to minimise these risks; the question is how?

Criminalisation is not an effective deterrent

During the legal challenge to sections 15 and 16 of the Sexual Offences Act¹ the then Department of Justice and Constitutional Development (DoJ&CD) defended the criminalisation of consensual sexual activity between adolescents. Based on the assumption that the law acts as a deterrent, the DoJ&CD claimed that the prohibition protects “*the bodily and psychological integrity of adolescents by delaying their choice on matters which may have a harmful consequence*”² and that “*parents, guardians and other responsible adults will be empowered to drive the message of risks of early sexual intimacy through these prohibitions*”³. This assertion is not backed by empirical evidence.

Indeed, the evidence shows that criminalisation does not act as a deterrent as significant numbers of children below the age of 16 years have had sexual acts. *The South African Youth Risk Behaviour Survey 2008* states that the national prevalence for learners who reported ever having engaged in sexual acts are aged 13 years and younger (18.8% [14.1 - 24.5]), 14 years (18.6% [15.3 - 22.4]) and 15 years (28.3% [25.6 - 31.2])⁴. Evidence suggests that criminalisation does not affect behaviour change positively, and therefore is not deemed a good public health strategy.⁵

Criminalisation is a violation of children's rights

¹ *Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and Another*, CCT 12/13. Para 44

² Minister of Justice and Constitutional Development (2013) *Respondent's Heads of Argument in the matter Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and Another*, CCT 12/13. Para 44

³ Minister of Justice and Constitutional Development (2013) *Respondent's Heads of Argument in the matter Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and Another*, CCT 12/13. Para 91.3.

⁴ Reddy SP, James S, Sewpaul R, Koopman F, Funani NI, Sifunda S, Josie J, Masuka P, Kambaran NS, Omardien RG. *Umntente Uhlaba Usamila – The South African Youth Risk Behaviour Survey 2008*. Cape Town: South African Medical Research Council, 2010, p30.

⁵ Mathews S. (2006) Criminalising deliberate HIV transmission--is this good public health? *S Afr Med J*. 2006 Apr; 96(4):312-4.

We argue that the current provisions of the Sexual Offences Act do not serve the best interests of children. We agree with the Constitutional Court that the sections constitute a “deep” encroachment on the rights to human dignity and privacy, as well as the best-interests principle:

*It cannot be doubted that the criminalisation of consensual sexual conduct is a form of stigmatisation which is degrading and invasive... If one’s consensual sexual choices are not respected by society, but are criminalised, one’s innate sense of self-worth will inevitably be diminished.*⁶

Rights always have to be balanced and in terms of section 36 of the Constitution it is sometimes permissible to limit one right to give effect to another. However, a right cannot be limited if less restrictive means can achieve the same ends; it “does not permit a sledgehammer to be used to crack a nut.”⁷ The infringements on children's rights to dignity and privacy cannot be justified in the name of protecting adolescents from psychological harm, sexually transmitted diseases and pregnancy, because there are less restrictive and more effective means to reduce the risk of adolescents engaging in unhealthy sexual activities.

Right to parental guidance in the Constitution and international law

Children need to be supported by their parents, caregivers and adults in their lives to enable them to make healthy choices about relationships and when appropriate engaging in sexual activities. Criminalising adolescents for engaging in developmentally normal behaviour is an extreme measure that prevents them from approaching their parents, educators, social workers, nurses and other support people for guidance, information, contraception and treatment of STIs and HIV. The current provisions of the Sexual Offences Act inhibit adult support putting children at increased risk:

*Caregivers ... and institutions and organisations ... are unable to help because they cannot promote behaviour that is illegal and they are legally obligated to report sexual offences involving children and young adolescents ... Therefore, they cannot legally offer the adequate and appropriate support and guidance to promote healthy sexual development, which leaves adolescents to navigate the complex issues with only the support of their equally immature peers.*⁸

Thus, the existing provisions of the Sexual Offences Act violate children’s right to parental guidance. Article 5 of the United Nations Convention on the Rights of the Child reads:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or

⁶ *Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and Another* CCT 12/13 [2013] ZACC 35. Para 55.

⁷ *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 34.

⁸ Flisher and Gevers (2012) *Expert Opinion in the matter Teddy Bear Clinic for Abused Children and RAPCAN v Minister of Justice and Constitutional Development and Another*, CCT 12/13.

*other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*⁹

This right is enshrined in the South African Constitution through the child's right to family care, and parental care (section 28(1)(b)). The role of the state is to support families and parents to fulfil their duty to guide children.

Supporting children and families

Research has shown that a mandatory reporting and abstinence-only approach is not an effective deterrent. However “*comprehensive sex education programmes have shown an increased likelihood in delaying sexual initiation and reduced likelihood of teen pregnancy*”.¹⁰ All adolescents should therefore be offered appropriate education and guidance on sexual and reproductive health from their parents and caregivers, schools and health care facilities. Imposing an obligation on health professionals to report consensual sexual activities limits their ability to support adolescents and fulfil their obligations to provide contraceptives and HIV testing under the Children's Act and undermines the purpose of the Choice on Termination of Pregnancy Act¹¹. It is vital that the Sexual Offences Act is amended to allow professionals to freely support adolescents.

RECOMMENDATION

Adopt the proposed amendment to the sections 1, 15, 16 and 56 of the principal Act contained in sections 1, 2, 3 and 9 of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill [B 18-2014 (prop s75)].

⁹ Office of the High Commissioner of Human Rights (1989) *Convention on the Rights of the Child*. UN General Assembly Resolution 44/25. Geneva: United Nations.

¹⁰ Gevers A, Mathews C, Cupp P, Russell M & Jewkes R (2013) Illegal yet developmentally normative: A descriptive analysis of young, urban adolescents' dating and sexual behaviour in Cape Town, South Africa. *BMC International Health and Human Rights*, 13:31.

¹¹ McQuoid-Mason D (2011) Mandatory reporting of sexual abuse under the Sexual Offences Act and the 'best interests of the child'. *South African Journal of Bioethics and Law*, Vol 4, No 2.

Other amendments

Section 1(1) of the principal Act includes a definition of sexual violation:

“sexual violation” includes any act which causes—

- (a) direct or indirect contact between the—
 - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
 - (ii) mouth of one person and—
 - (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
 - (bb) the mouth of another person;
 - (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
 - (aaa) be used in an act of sexual penetration;
 - (bbb) cause sexual arousal or stimulation; or
 - (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
 - (iii) mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and **“sexually violates”** has a corresponding meaning;

The word ‘violation’ to describe these acts when they are performed by two consenting people is misleading and confusing. In the Oxford English Dictionary the word ‘violate’ means to “rape or sexually assault someone”. The sexual contact described under the definition only becomes a violation when it is done without consent. A more appropriate term would be sexual ‘stimulation’.

RECOMMENDATION

Amendment of section 1 of Act 32 of 2007

Section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), (hereinafter referred to as the “principal Act”), is hereby amended by the substitution for the definition of “sexual violation” of the following definition:

“sexual stimulation” includes any act which causes—

- (a) direct or indirect contact between the—
 - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
 - (ii) mouth of one person and—

- (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
- (bb) the mouth of another person;
- (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—
 - (aaa) be used in an act of sexual penetration;
 - (bbb) cause sexual arousal; or
 - (ccc) be sexually aroused thereby; or
- (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and “**sexually stimulates**” has a corresponding meaning;

This would require consequential amendments to the long title of the Act, section 1 (1) the definitions of “child pornography” part (c) and pornography part (c); “sexual act”; and sections 1(3), 5(1) and (2); 6, 16(1), 66(2)(a)(vi).

For example section 5 would be amended as follows:

Sexual assault

5. (1) A person (“A”) who unlawfully and intentionally sexually [**violates**] stimulates a complainant (“B”), without the consent of B, is guilty of the offence of sexual assault.

(2) A person (“A”) who unlawfully and intentionally inspires the belief in a complainant (“B”) that B will be sexually [**violated**] stimulated, is guilty of the offence of sexual assault.

The term violate is correctly used and should not be replaced in sections 1 “child pornography” part (l); “pornography” part (k); 18(2)(b)(vi); 24(2)(b)(vi); and 68(1)(b).

The National Register for Sex Offenders

Sections 4, 5, and 6 of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill [B 18-2014 (prop s75)]

The CI supports the proposed amendments to the sections 46, 47 and 48 of the principal Act contained in sections 4, 5 and 6 of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill.

Section 7 of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill [B 18-2014 (prop s75)]

Amendment of section 50 of the principal Act

When it comes to the deciding whether to include a child offender's name on the NRSO two sets of rights must be taken into consideration. Child offenders have a right to special protection within the criminal justice system this right is protected under international law, UNCRC articles 37 and 40; regional law African Charter on the Rights and Welfare of the Child article 17; and under the Constitution sections 28(1)(g) and 35. All children have the right to protection from abuse UNCRC articles 19, 23, and 34; the ACRWC articles 13, 16 and 27; and the Constitution sections 12(1), and 28(1)(d). Additionally, the best interests of both the offender and other children. Child sex offenders should not be included in the NRSO, unless there are substantial and compelling circumstances that would warrant such inclusion i.e. they pose a continued risk to other children and persons with mental disabilities.

An assessment of the child is the best way to establish the likelihood of re-offending (against another child or mentally ill person). An application by the prosecutor for an order to include the child's particulars would be followed by an assessment by a psychologist, psychiatrist or social worker. The court could then, after considering the assessment report, decide whether the child's particulars should be included in the Register.

RECOMMENDATION

Subsection 7(b) of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill [B 18-2014 (prop s75)] is deleted and replaced with the following:

(b) by the insertion after paragraph (b) of subsection (2) of the following paragraphs:

“(c) If a court has in terms of this Act or any other law convicted a person (“A”) of a sexual offence against a child or a person who is mentally disabled and A was a child at the time of the commission of such offence, the court may not make an order as contemplated in paragraph (a) unless

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- (i) the prosecutor has made an application to the court for such an order;
- (ii) A has been assessed, at state expense, by a suitably qualified person, as prescribed, with a view to establishing the likelihood of whether or not he or she will commit another sexual offence against a child or a person who is mentally disabled;
- (iii) A has been given the opportunity to make representations to the court as to why his or her particulars should not be included in the Register; and
- (iv) the court is satisfied that substantial and compelling circumstances exist, based upon such assessment and any other evidence, which justify the making of such an order.

(d) In the event that a court finds that substantial and compelling circumstances exist which justify the making of an order as contemplated in subsection (2)(a), the court must enter such circumstances on the record of the proceedings.”; and

...

Section 8 of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill [B 18-2014 (prop s75)]

In relation to the removal of the particulars of child offenders currently placed on the Register, the court’s decision to order removal of the particulars should be based on whether substantial and compelling circumstances exist for retention of the particulars, i.e. the person poses a continued risk to other children and persons with mental disabilities. Whilst we support the proposal to allow a child to make representations to the court showing cause that he or she has been rehabilitated and is unlikely to reoffend, as well as an affidavit stating that there are no pending sexual offence charges against the child. Such an application should be accompanied by an assessment (similar to the assessment referred to above). This is necessary as this person, unlike offenders that were placed on the NRSO as adults, will have been professionally assessed and found to be risk to other

children and persons with disabilities.

RECOMMENDATION

Section 8 of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill [B 18-2014 (prop s75)] is deleted and replaced with the following amendment:

Section 51 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“(1) Subject to subsections (2), (2A) and (3), the particulars of a person—”; and

(b) by the insertion after subsection (2) of the following subsection:

“(2A) (a) A person falling into the categories contemplated in subsection (1), who was a child at the time of the commission of the offence concerned, may, at any time before the expiration of the periods referred to in subsection (1), apply to the court referred to in section 50(2)(c) for an order that his or her particulars must be removed from the Register by—

- (i) addressing the court on the reasons for such application and showing good cause why he or she has been rehabilitated and is unlikely to commit another sexual offence against a child or a person who is mentally disabled, as the case may be; and
- (ii) submitting to the court an affidavit by him or her stating that no charge relating to a sexual offence against a child or a person who is mentally disabled, as the case may be, is pending against him or her.”

(b) upon which the court must cause an assessment of such person as contemplated in subparagraph (a) to be undertaken and thereupon determine whether substantial and compelling circumstances exist for not granting the order for the removal of such particulars.”

Section 10 of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill [B 18-2014 (prop s75)]

The CI supports the proposed amendments to the section 67 of the principal Act contained in section 10 of the Criminal Law (Sexual Offences and related matters) Amendment Act Amendment Bill.

Other concerns

Finally, we would also like to draw the attention of the Committee to our broader concerns with the Sexual Offences Act. The Children's Institute's research clearly demonstrates that the child protection system is overburdened and uncoordinated¹². The Sexual Offences Act needs harmonisation with other legislation in particular the Children's Act to strengthen the child protection system.

One example will suffice to highlight the lack of coordination within the child protection system. The Children's Act establishes the National Child Protection Register (NCPR). Part A of the NCPR is supposed to act as a surveillance system allowing social service professionals to monitor individual cases and providing macro level data to enable policy-makers and planners to target resources and services where they are most need. In 2010/11, the NCPR registered a total of 1,348 abuse (sexual, physical, and emotional) and neglect cases¹³. However, in the same year the police recorded over 51,000 sexual offences and physical assaults against children¹⁴. The discrepancies between the national statistics suggest that police are not fulfilling their obligations under the Children's Act to report cases to the Department of Social Development. As a result children are receiving adequate and appropriate protection services. This is in part due to the inconsistencies in the legislation in respect of the mandatory reporting of child abuse, inter-agency collaboration in response to reports of abuse and the establishment of two registers the National Register of Sex Offenders and the National Child Protection Register.

The harmonisation of the Sexual Offences Act, the Children's Act and other legislation that together form the basis of the child protection system needs careful consideration and should be done in collaboration with other portfolios.

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¹² Proudlock P, Mathews S & Jamieson L (2014). Children's rights to be protected from violence: A review of South Africa's laws and policies. In: Proudlock P (ed). *South Africa's Progress in Realising Children Rights: A law review*. Cape Town: Children's Institute, UCT;

Mathews S, Jamieson L, Lake L & Smith C (eds.). *South African Child Gauge 2014*. Cape Town: Children's Institute, UCT.
¹³ DWCPD (2013). *The United Nations Convention on the Rights of the Child. South Africa's Combined Second, Third and Fourth Periodic State Party Report to the United Nations Committee on the Rights of the Child. (Reporting period: January 1998 – April 2013)*. Department Women, Children and People with Disabilities (DWCPD): Pretoria. P101.

¹⁴ South African Police Service (2012). *Crime Report 2010/2011*. South African Police Service: Pretoria.