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PROTECTING THE RIGHTS OF ALL CHILDREN

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Submission

Children's Amendment Bill (B13-2015) Children's Second Amendment Bill (B14-2015)

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Attention

Ms Lindiwe Ntsabo

Portfolio Committee on Social Development

Parliament of the Republic of South Africa

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Introduction

Molo Songololo welcomes the opportunity to make written and oral comment on the Children's Amendment Bill (B13-2015) and the Children's Second Amendment Bill (B14-2015). We look forward to engaging with the parliamentary members of the Portfolio Committee on Social Development at the scheduled public hearings on the proposed amendments.

Molo Songololo, established in 1979, is a child rights organisation that promotes the rights, care, protection and participation of children through awareness, education, advocacy and provision of services. The organisation has made significant contributions to the development and protection of the rights of the child and participated in various anti-apartheid initiatives during the 1980s to early 1990s, and in strategic post-apartheid child law, policy and programme reform and development initiatives.

Molo Songololo was selected as a Designated Child Protection Organisation by the Department of Social Development to provide child protection, prevention and early intervention support services to child victims of sexual abuse, sexual exploitation and trafficking in children, those at risk and their families.

Our oral submission will include children / youth who will express their views and opinions on certain aspects of the proposed amendments to the Children's Amendment Act and Children's Second Amendment Act.

Child participation is a key principle that underpins the child rights framework in South Africa and internationally. Children must be informed, consulted, and their views and opinions taken seriously and considered in decisions and policy reform processes that affect them.

It is imperative that children's opinions are considered as the proposed amendments to Children's Act 2005 directly affect their lives. The Portfolio Committee on Social Development and Parliament must ensure that children enjoy their rights to participation.

The Children's Amendment Bill (B13-2015)

Molo Songololo fully supports the amendments to align the Children's Act 2005 with the Sexual Offences Amendment Act as related to certain definitions, persons deemed unsuitable to work with children, removal of names from the National Register of Sex Offenders, removal of children without a court order, parental responsibilities and rights when an adopting order is granted, and related matters.

Molo Songololo carefully considered these proposed amendments and have the following comments and additions;

1 Section 1(b) of Act 38 of 2005

Molo Songololo agrees with the insertion of the definition of 'sexual offence' as defined by the Criminal Law (Sexual Offences and Related Matters) amendment Act, 2007 (Act 32 of 2007).

With the coming into effect on 7 August 2015 of the Prevention and Combating Trafficking in Persons Act 2013 (Act 7 of 2013);

Molo Songololo proposes that **the definition of sexual offences must include offenses relating to Section 10 of TiP Act concerning;**

"Involvement in offences

- (1) Any person who—***
- (a) attempts to commit or performs any act aimed at participating in the commission of;***
 - (b) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit; or***
 - (c) conspires with any other person to commit, an offence under this Chapter is guilty of an offence.***
- (2) A person who is found guilty of an offence referred to in subsection (1) is liable, on conviction, to the penalties for the offence in question, as provided for in section 13."***

2. Section 120 of Act 38 of 2005

- (a) (a)

We propose that the following be included....

- (a) On conviction of murder, any sexual offence contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), and section 10 of the Prevention and Combating of Trafficking in Persons Act 2013 (Act 7 of 2013) concerning involvement in offences, assault with intent to do grievous bodily harm, where a child is the victim of any such offence, or any attempt to commit any such offence, or offences related to the Film and Publications Act 1996 (Act 65 of 1996) regarding section 24A(5), concerning the distribution or exhibition of classified material to children and 24B concerning child pornography and sexual exploitation of children

- (a) (b)

Molo Songololo is of the opinion that children who have been convicted of sex offences should not be placed on the same National Sex Offender Register as adults. We believe that a separate Register and process needs to be developed and implemented for children.

In March this year, 17-years old learner from Proteus Secondary School in Atlantis, Thomas Aston, representing the Molo Songololo Children's Forum members at the public hearing held by the Portfolio Committee on Justice & Correctional Service on the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill stated the following;

"We are not very happy with the National Sex Offender Register. The Register treats children and adults who are sex offenders the same. They are put on the same register... This is not fair for children to be put on the same register as adults who have committed serious sexual crimes.

WE do not think children should be put on the same register. We think there should be a separate register just for children convicted of sex offences”.

Molo Songololo included an appendix to this submission to further motivate its position in this regard.

Molo Songololo proposes that this committee consider the establishment of a separate Register for Children who are sex offenders and engage the relevant parliamentary committees, government departments and civil society stakeholders to make representation in this regard.

However in relation to the proposed amendments of this Bill concerning;

(b)

We support that a child who was convicted of an offence is afforded the opportunity to make representation for the removal of their name from the register in subsection (b).

We propose an insertion in this section so that the court must ensure that resources and adequate representation is made available to all child sex offenders to make representation to the court.

(b) by the insertion after subsection (4) of the following subsection:

“(4A) Before making an order contemplated in subsection (1), in respect of a child who was under the age of 18 years when he or she committed the offence, the court must **ensure that adequate resources and representation is available to** -

(a) afford the child offender an opportunity to make representations as to why such an order should not be made;

(b) have the best interest of the child offender considered of paramount importance; and

(c) on good cause shown, make an order that the particulars of the child offender not be included in the Register.’

- (c)

We do not fully support this section. We believe that a distinction must be made between a child offender and an adult offender. This section denied children special consideration and protection.

We proposed the following insertion;

In respect of a person under 18-years who has been convicted of an offence as contemplated in subsection (4)(a) during the five years preceding the commencement of this Chapter, the court must annually review and decide is such child is deemed unsuitable to work with children.

Concerning subsection (c) we further propose that the time period in which an adult who committed an offence preceding the commencement of the Chapter is deemed unsuitable to work with children is extended.

We propose

- **5 years for 1st time offenders and**
- **10 years for repeated offenders**

4 Section 128 of Act 38 of 2005

(1)

Concerning persons under the age of 18 years; we propose the following insertion

(1)A person whose name appears in Part B of the Register, or a person who was under the age of 18 years when he or she committed the offence in respect of which the finding was made, **or their representatives or person acting in their best interest**, may in terms of

subsection (2) apply for the removal of his or her name and any information relating to that person from the Register.'

5. Section 150 of Act 38 of 2005

(b)

We propose the elimination of the word “ostensibly” from subsection (b). The word is too broad and provides room for people to interpret the clause in a way that may not be in the best interest of the child.

6. Section 152A of Act 38 of 2005

- (1)

We propose that the word may be deleted and replaced by the word **must**.

- (2) (b)

We propose that the word may be deleted and replaced by the word **must**.

We further proposed that the court must set a timeframe in relation to the return of child to parents or caregivers or for an investigation to determine if a child is deemed a child in need of care and protection.

Thus propose the following additions;

(b) subsection (1)(b) the presiding officer **must**, in addition, order that the child be returned to its parent, guardian or care giver, **within 48 hours of the order** as the case may be, or order that the question of whether the child is in need of care and protection be referred to a designated social worker for an investigation contemplated in section 155(2); **and report back to court within 48 hours**'.

10. Section 242 of Act 38 of 2005

We propose that section (e) reads: the court must determine which parental responsibilities and rights of the parent of a child remain in place, when an adoption order is granted in favour of the spouse or permanent domestic life-partner of that parent.

Appendix 1

Comments on the National Sex Offender Register

Molo Songololo is very concerned that the Common Law (Sexual Offences and Related Matter's Amendment Act of 2007, puts children and adults who were convicted of a sex offence on the same National Register for Sex Offenders (NRSO) regardless of the seriousness of the sexual violations committed by children (persons under 17 years of age).

We understand that the NSOR is meant to protect children and persons who are mentally disabled against sexual offenders by establishing and maintaining a record (database) of persons who –

- have been convicted of a sexual offence against a child or a person who is mentally disabled whether committed in or outside the Republic or
- alleged to have committed a sexual offence against a child or a person who is mentally disabled in respect of whom a court has made a finding and given a direction that the offender is mentally unfit to stand trial.

The NSOR records the names, contact details and offence committed by adult as well as child offenders; such as

- Rape
- Compelled rape
- Sexual assault
- Compelled sexual assault;
- Compelled self-sexual assault

- Acts of consensual sexual penetration with certain children (statutory rape)
- Acts of consensual sexual violation with certain children (statutory sexual assault)
- Compelling or causing children to witness sexual offences, sexual acts or self-masturbation
- Exposure or display or causing of exposure or display of genital organs, anus or female breasts to children
- Sexual exploitation of children and persons who are mentally disabled;
- Sexual grooming of children and persons who are mentally disabled;
- Exposure or display of or causing exposure or display of child pornography or pornography to children or persons who are mentally disabled;
- Using children or persons who are mentally disabled for pornographic purposes or benefiting there from.

As well as offences related to

- the Film and Publications Act, Act 65 of 1996 – Section 24A and 24 B
- Section 10 of the Prevention and Combating of Trafficking in Persons Act, Act 7 of 2013

Children are different

All children convicted of a sexual offence are presently treated equally regardless of the seriousness of the sexual violation committed.

They are also treated the same as adult sex offenders.

Children and adolescents are constitutionally different from adults. They are not fully developed yet. They have an evolving capacity and reduced liability with greater prospects for reform than adults.

Children and adolescents have a lack of understanding and undeveloped sense of responsibility, often unaware of the consequences of their thoughts and actions and are vulnerable to peer and other influences.

They cannot be treated the same as adults.

Placing children on the NSOR – more harm than good

We believe that placing children and adolescents on the same NSOR brings more harm to them than good;

- It associates them with serial rapists and paedophiles
- They are shamed, stigmatised and marginalised
- It isolated them and treats them as 'adult' criminals
- They are punished long after their sentence was served
- The obligation to report and declare after turning 18-years reduce future prospects
- It reduce their opportunity for rehabilitation

Most sexual offences committed by children and adolescents are far less aggressive than those committed by adults. In many cases it is more 'experimental' and influenced by peers and 'out-side' influence; such as

- Taking 'selfies' and simulating sex and recording it
- Sharing child pornography or pornography with peers
- Fondling and grabbing in a sexual way
- Encouraging and watching other having sex
- Performing oral, vaginal and anal sex

Some adolescent boys and girls, who are curious about sex and act experimentally, are sometimes irresponsible, impulsive and even aggressive and unaware of the potential legal consequences of their actions.

The proportions of adolescents that commit serious sexual offences are far less than those that usually

- bully, traumatise and harass others sexually
- Imitate sexual actions seen in the media, own family, in community or amongst peers

- Swept away by sexual arousal and attracted by the thrill being sexually 'cool'.
- Under the influence of alcohol or drugs
- Exposed to significant violence and abuse
- Acting out as a result of their own abuse

Research studies suggest that children's childhood histories may be contributing factors to their sexually offending behaviour in adolescence. And once detected, the re-offending rate amongst children and adolescents are far lower than that of adults.

Placing children / adolescents on the same NSOR as serial adult rapist or paedophile violates the rights of child offenders to be treated with fairness, respect and be given due consideration.

We feel that children who commit sexual offences cannot be treated the same way as adult sex offenders.

Restorative and diversion approach

We propose that another process and procedure be followed concerning children and adolescents who commit sexual offences.

The South African Child Justice system promotes a restorative justice and diversion approach. This approach aims to involve the affected parties (victims, offenders, families concerned and community members) in collectively identifying harms, needs and obligations through;

- accepting responsibilities and making restitution
- taking measures to prevent a recurrence of the incident and
- promoting reconciliation.

Restorative Justice sees crime as an act against the victim and shifts the focus to repairing the harm that has been committed against the victim and community. It believes that the offender also needs assistance and seeks to identify what needs to change to prevent future re-offending.

The Children's Second Amendment Bill (B14-2015)

Molo Songololo generally supports the amendments related to extend definitions and provide for the removal of a child to temporary safe care without a court order, transfer of children to another alternative care, and to remain in alternative care beyond 18-years and review of such related decisions and processes.

We have a few comments and additions regarding;

1 Section 1 of Act 38 of 2005

- (a)

We support the proposal to extend the definition of “adoption social worker” to include social workers in the employ of the national and provincial Department of Social Development.

- More resources must be made available to handle a potential increase in adoption rates and effective monitoring and follow-up of children placed in adoption.

- (b)

We support the inclusion of “**internships and learnerships**” to be included in the definition of “further education and training” to section 176(b), and that the terms must be defined in this section.

2. Section 151 of Act 38 of 2005

We propose that subsection 2A (b): child concerned, and where reasonably possible the parent, guardian, care giver **or person acting in the interest of the child**, as the case may be, are present in the children's court for the purposes of assisting the court in making a decision which is in the best interest of the child

3. Section 152 of Act 38 of 2005

We propose that subsection

- **(d)**

reads: “within 24 hours (~~delete - and without delay~~), report the matter to the relevant provincial department of social development of the removal of the child and of the place where the child has been placed; and”

5. Section 176 of Act 38 of 2005

- **(b)**

As suggested by Mamelani Projects, subsection 2 (b) should read: “the continued stay in that care is necessary to enable that person to complete his or her grade 12, higher education, further education, training or vocational training and internships or learnerships”

- **(c)**

We support the addition of subsection (c) but propose in inclusion that reads: “An application contemplates in subsection (2) must be submitted **six months** before the end of the year in which the relevant child reaches the age of 18 years, but a late application (may) **must** be condoned, upon good cause shown, if such application is submitted within three months after such date”

We proposed the six months before the end of year to prevent congestion of applications towards the end of the year. So children / youth will know their circumstances and status before the end of the year in which they turn 18 years old.

General Comment:

Molo Songololo want to know what are the potential consequences of allowing children over the age of 18 to continue with alternative care; financially, socially and educationally, etc.

Molo Songololo proposes that there is a need to make resources available, and more social workers to be employed to administer and process and monitor more adoptions cases. Adoption is a specialized service and we need more social workers to focus just on that.

END



This submission was drafted by Patric Solomons and Emily Mendoza drawing of discussions with Molo Songololo staff and in consultation with partners and members of the Molo Songololo Children's Forum.