



**Community Law Centre, University of the Western Cape**

**And**

**Centre for Justice and Crime Prevention**

**Submission to the Portfolio Committee on Justice and Correctional Services on the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill**

**For attention:**

Hon. M Motshekga, chairperson  
The Portfolio Committee on Justice and Constitutional Development  
Parliament  
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**ENDORSEMENTS**

This submission is endorsed by 22 organisations and individuals as follows:

1. Cape Mental Health	13. Refugee Social Services
2. Centre for Law and Society, UCT	14. Sonke Gender Justice Network
3. Connect Network	15. Triangle Project
4. Disabled Children's Action Group	16. Western Cape Forum for Intellectual Disability
5. Khayelitsha Thuthuzela Forensic Centre	17. Women and Men Against Child Abuse
6. Lawyers for Human Rights	18. Women's Legal Centre
7. LINALI Consulting	19. Aniela Batschari
8. Molo Songololo <sup>1</sup>	20. Erica Greathead
9. Media Monitoring Africa	21. Dr. Kellie Gillespie
10. Ndifuna Ukwazi	22. Lisa Vetten; Research Associate, Wits Institute for Social and Economic Research, Wits
11. NICRO <sup>2</sup>	23. Prof. Jeanne Prinsloo, Rhodes University
12. POWA (People Opposing Women Abuse)	

<sup>1</sup> Molo Songololo indicated their support of this submission on both issues, they argued that further measures than those proposed must be in place regarding the issue of children and the Register: "We agree that consenting adolescents should not be criminalised. We also feel that child sex offenders should not go on the same register as adult sex offenders and that special measures and procedures need to be put in place for the management and rehabilitation of child sex offenders. We also assert that once child sex offenders turn 18-years old there must be a hearing to review their status."

<sup>2</sup> In addition to endorsing the content of this submission on both issues, NICRO further indicated that the issue of individual assessments of children before placing their particulars on the register is necessitated by the fact that although being of a particular chronological age (number of years old), children develop and mature at different rates and thus capacity and stage of development must be assessed for each child.

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## **1. Introduction**

We'd like to thank the committee for the opportunity to make submissions on the abovementioned bill. In addition, we appreciate your accommodation of our collective request to extend the deadline for these written submissions, we appreciate that February and March are particularly busy months for committees. In addition to this written submission we request an opportunity to make oral submissions to the committee should your schedule allow for this.

### **1.1. About the Community Law Centre (UWC) and the Centre for Justice and Crime Prevention**

The **Community Law Centre (CLC)** is part of the Law Faculty at the University of the Western Cape. It was founded by the late Dullah Omar in 1990 to support the development of the Constitution and promote human rights in a democratic South Africa. The CLC is founded on the belief that our constitutional order must promote good governance, socio-economic development and the protection of vulnerable and disadvantaged groups. Based on quality research, the CLC engages in policy development, advocacy and education. The CLC has a long history, amongst others, of working to promote children's rights and child protection in South Africa, on the continent and internationally and has worked centrally on law reform processes regarding the sexual offences, child justice and children's legislation. In addition the CLC's Parliamentary Programme has invested in building capacity within civil society to engage with and support our legislatures within the frame of participatory democracy. As such our work is premised on the practice of deliberation within civil society, expanding the range of organised civil society structures that engage with legislatures as well as ensuring that we promote positions which are evidence based.

The **Centre for Justice and Crime Prevention (CJCP)** was established in 2005 in response to a growing recognition for the need to develop a holistic body of knowledge around crime and violence prevention that places safety at the heart of the development agenda, an approach requiring more than just a criminal justice approach to bringing down the levels of crime. To this end the Centre engages in research and capacity building, and facilitates the implementation of crime prevention projects to document what works and what does not work in implementation. From its inception, the Centre has filled a gap in knowledge around children and youth as victims and perpetrators of violence, and this has formed a central component of the organisations work. The CJCP undertakes high quality research intended to develop contextually relevant evidence relating to the safety and well-being of children and young people, and tests this through a series of demonstrated child and youth safety and resilience projects.

## **1.2. Summary of our submissions**

In short, we fully support the current provisions of the Criminal Law [Sexual Offences and Related Matters] Amendment Act Amendment Bill B18 of 2014 (the bill) in as far as they relate to the decriminalisation of consenting sexual activity between certain adolescents. Our starting point is that we believe that the current provisions of the Criminal Law [Sexual Offences and Related Matters] Amendment Act No. 32 of 2007 (SOA) are not protective of adolescents and increase the risks of harm to them. We will in our submissions justify our position regarding this.

With regard to the automatic placement of convicted child sex offenders on the National Register for Sex Offenders (NRSO) we have some concerns with the provisions of the bill, in particular, the issue of assessment of children who have been convicted and the issue of addressing the children whose names are currently on the register. We will address these in our submission.

There are a number of issues currently in the SOA, which are problematic in and of themselves or in relation to their intersections with the Children's Act no 38 of 2005. However we are concerned that a full assessment of the SOA at this stage may undermine the finalisation of the bill within the timeframes set by the Constitutional Court. As such we will provide the Committee with more detailed submissions regarding these matters if the committee requests this.

## **2. Consensual sexual acts between adolescents of similar age (Clauses 1 – 3 of the Bill)**

### **2.1. Rationale for our submission regarding consensual sexual activity between adolescents**

#### Normal sexual exploration among adolescents

We will refer to 'healthy' and 'unhealthy' sexual behaviours in this submission. To clarify what we mean by these terms we refer to the definitions provided by adolescent psychologists Flisher and Gevers:

#### **Healthy sexual behaviour:**

"Behaviour that is mutually consensual, wanted/desired, not violent, safe (in terms of using methods to minimise risks of STI transmission and pregnancy), and for which the individual feels emotionally and physically ready for the particular behaviour and its potential consequences."<sup>3</sup>

#### **Unhealthy sexual behaviour:**

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<sup>3</sup> Flisher A and Gevers A. Expert Opinion. Division of Child and Adolescent Psychiatry, Adolescent Health Research Unit. University of Cape Town. P8

“Any sexual behaviour or sexual contact that would negate the criteria outlined above for healthy sexual activity. In particular, sexual behaviour that is not mutually consensual or that is violent in some way that one partner feels forced, coerced, tricked, persuaded or manipulated into a sexual situation should be considered abnormal.”

Adolescence is a time of physical, sexual, psychological and social development. It is during this stage of life that adolescents start exploring intimate relationships and sexual activity.<sup>4</sup> This exploration of intimate and dating relationships is important in preparation towards adulthood and adult relationships.<sup>5</sup>

We frequently hear comments in the public discourse that ‘children today are starting to have sex at 11 years old’ while it is extremely likely that this is true of some young people, it is not the norm. These statements sensationalise and overstate the issue and are not supported by South African research.

There have been a number of studies to gain insight into what sexual behaviours adolescents engage in, in South Africa. The biggest of these studies which included nearly 12 000 (11 904) 15 to 24 year olds indicates that 35% reported having had sexual intercourse before the age of 16, this means that 65% were older than 16 when they first had sexual intercourse. A study of three South African National HIV surveys (2002, 2005 and 2008) indicates that fewer than 10 per cent of respondents between the ages of 15 and 24 had started engaging in sexual intercourse before the age of 15.<sup>6</sup>

When looking at information obtained from children from 12 to 14 years old, only 1.9% of males and 1.5% of females in this age group reported having engaged in sexual intercourse.<sup>7</sup> A smaller study of 2 340 15 to 24 year olds tells us that the mean age of debut was 16,5 years old.<sup>8</sup>

This research indicates that although some adolescents do engage in sexual intercourse before the age of 16, the majority do not. The adolescents that do engage in sexual intercourse before 16 years of age are not doing so at very young ages, but rather at around 15 years.

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<sup>4</sup> Flisher and Gevers. Ibid. p6

<sup>5</sup> Flisher and Gevers. Ibid. pp5-6

<sup>6</sup> Shisana O, Rehle T, Simbayi LC, Zuma K, Jooste S, Pillay-van-Wyk V, Mbelle N, Van Zyl J, Parker W, Zungu NP, Pezi S & the SABSSM III Implementation Team (2009) *South African national HIV Prevalence, incidence, behaviour and communication survey 2008: A turning tide among teenagers?* Cape Town: HSRC Press. P39

<sup>7</sup> Human Sciences Research Council. (2005) *Factsheet: HIV epidemic in South Africa may have entered a phase of levelling off.*

*Factsheet 7: Sexual Behaviour*

<sup>8</sup> Flisher and Gevers. Ibid. p9

In addition, adolescents typically engage in a wide range of sexual activities, other than sexual intercourse. These include kissing, light petting (upper body contact), heavy petting (lower body contact).

That said, although it is not the majority of adolescents, early sexual debut is associated with a number of health, emotional and social risks.<sup>9</sup> These include sexually transmitted infections, teenage pregnancy, coerced and forced sex, emotional distress and trauma, and social shaming and humiliation. For these reasons it is necessary to put measures in place which seek to delay the age of sexual debut so that adolescents start engaging in sexual intercourse at later ages.

Actions or programmes to delay sexual debut into later adolescence are the responsibility of a range of actors including parents, religious communities, traditional leadership structures, health, education and social service professionals, media and civil society organisations that work with adolescents.

Criminalisation is not the best way to prevent unhealthy adolescent sexual behaviour.

We strongly submit, that criminalising the behaviour is a blunt tool to achieve delayed sexual debut and healthy sexual decision making among adolescents. Not only is it akin to putting a plaster on your finger when your leg has been broken, it does more harm than it does good.

The fact that these acts are currently criminal is not having any discernable influence on the sexual behaviours and choices of adolescents. This is supported by research in other jurisdictions that have found that criminalising adolescent sexual behaviour does not impact on the decisions taken by adolescents.<sup>10</sup>

In addition, by criminalising behaviour that is developmentally normal and healthy, adolescents who engage in these behaviours are treated like criminals which has significant negative consequences for the individual adolescents and society more broadly. They may be reported to the police, they may have to endure detailed questioning by police (who are all too often extremely insensitive, due to lack of skills to deal with adolescents), they may be arrested, charged and then required to undergo questioning by prosecutors and in some cases, go to trial. These processes generally make public that which is private and they are extremely humiliating, shaming and degrading. We are aware of cases of this nature, which have had extremely severe and long term psychological impacts on the adolescents concerned. The Constitutional

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<sup>9</sup> Flisher and Gevers. Ibid. p11

<sup>10</sup> Sutherland K 'From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities' (2003) *William & Mary Journal of Women and the Law* 9:333. 332-333

Court has discussed these consequences in depth and ruled that they are unconstitutional on the basis of the best interests of the child, the right to privacy and the right to dignity.<sup>11</sup>

“There can also be no doubt that the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents.”<sup>12</sup>

Finally by criminalising the behaviours, the Act adds a barrier to effective communication between adolescents and adults. If they disclose engaging in any sexual behaviour they are disclosing the commission of criminal acts. Furthermore the reporting requirements of the Act and of the Children’s Act no 38 of 2005 mean that once an adolescent discloses, the adult to whom they disclose must report this to the police. It effectively takes us further away from our goal of educating, guiding and supporting adolescents to make decisions which are healthy. The Constitutional Court explained how the provisions of the act affect this.

“The expert report clearly demonstrates that the impugned provisions cultivate a society in which adolescents are precluded from having open and frank discussions about sexual conduct with their parents and caregivers. ... Rather than deterring early sexual intimacy, the provisions merely drive it underground, far from the guidance that might otherwise be provided by parents, guardians and other members of society.”<sup>13</sup>

Adolescents’ experiences of this stage of their lives and their sexual development is influenced by social norms, culture and individual personality. Thus family norms, religious community norms, traditional values, peer group, and exposure to social standards (particularly through the mass media) regarding sex and relationships can shape the adolescent’s experience and affect the nature of their sexual relationships into adulthood.<sup>14</sup> In addition to these factors, adolescents learn through their personal experiences. In the absence of effective communication, guidance and support from adults, many adolescents are only left with their own experiences, peer groups and mass media as a source of understanding their intimate relationships. Frequently, the messages they receive from peers and the mass media can lead to unhealthy and encourage risky behaviours.<sup>15</sup>

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<sup>11</sup> Teddy Bear Clinic For Abused Children and RAPCAN vs the Minister of Justice and Constitutional Development. 2013(12) BCLR 1429 (CC) paras 55, 63 and 79

<sup>12</sup> Teddy Bear Clinic For Abused Children and RAPCAN vs the Minister of Justice and Constitutional Development. 2013(12) BCLR 1429 (CC) para 55

<sup>13</sup> Teddy Bear Clinic For Abused Children and RAPCAN vs the Minister of Justice and Constitutional Development. 2013(12) BCLR 1429 (CC) paras 68 and 89

<sup>14</sup> Flisher and Gevers. Ibid. p6

<sup>15</sup> Flisher and Gevers. Ibid. p6

Often adolescents receive conflicting messages from parents and religious institutions to those they receive from peers and the media. These messages are also often in conflict with the adolescent's own emotions and feelings about their relationships, their bodies and their sexual experiences. Unfortunately the quality of communication from parents and religious institutions is often ineffective due to a tendency for adults to judge adolescents, shame them for the feelings that they have, and not engage with the views and experiences of the adolescent. For these reasons programmes that can provide support to parents and other community structures to assist them to negotiate the difficult and often embarrassing process of communicating to adolescents about relationships and sex in appropriate and non-judgemental ways are a more effective tool for addressing unhealthy sexual behaviour between adolescents than criminalisation is. The Constitutional Court also found that the state could implement more effective methods to address the issue.

"I am persuaded that there are various methods the state could use that do not involve criminalisation of consensual sexual conduct between adolescents in order to encourage them to lead healthy and responsible sexual lives."<sup>16</sup>

We respectfully submit that the criminal law is not the best legislation to achieve changes in adolescent sexual decision making and strongly encourage the Committee to engage with the departments of Basic Education, Health and Social Development, as well as their corresponding portfolio committees in this regard.

The CLC shares a common goal with most people and organisations, where we would like to see government interventions which support programmes that have been shown through research to affect adolescent sexual decision making so that they delay sexual debut and make decisions for which they are ready. The research indicates that comprehensive programmes to address not only sexual, but also relationship decision making, including sex education, increased access to health and social services, youth development, support to families and an overall non-judgemental approach to sexual health are more effective than criminalising sexual activity.<sup>17</sup>

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<sup>16</sup> Teddy Bear Clinic For Abused Children and RAPCAN vs the Minister of Justice and Constitutional Development. 2013(12) BCLR 1429 (CC) para 98

<sup>17</sup> Kane R & Wellings K (1999) *Reducing the rate of teenage conceptions: An international review of the evidence: data from Europe*. London. Health Education Authority. P67; WHO (1999) *Preventing HIV/AIDS/STI and related discrimination: an important responsibility of health promoting schools*. World Health Organisation. P10; Kang M (2005). Age of Consent Laws: Puritan Notions of Right and Wrong *On Line Opinion Journal* accessed at <http://www.onlineopinion.com.au/view.asp?article=3266>



## **2.2. Recommendations relating to the decriminalisation of consenting sexual activity between certain adolescents**

We support the current formulation of clauses (1), (2) and (3) of the bill.

### **2.2.1. Definition of ‘child’**

The bill’s re-formulation of the definition of a child in section (1) of the act, coupled with the amendments which make specific reference to ‘*a child who is 12 years or older but under the age of 16*’ in sections 15 and 16 of the Act will, in our view, make the provisions less confusing and facilitate better implementation of the act. We thus support the proposed amendments in this regard.

### **2.2.2. Consensual acts of sexual penetration. (Clause 2 of the Bill, amending Section 15 of the Act)**

#### **The range of acts included in this section**

This clause is not limited only to sexual intercourse, it also deals with any acts which include penetration, however slight, of the genitals of one person with the genitals of another (sexual intercourse), any other part of the body (such as fingers or mouths), with an object. It also deals with the penetration of the mouth of one person with the genitals of another person. It’s thus important to bear in mind that there a range of sexual acts which are addressed by section 15 of the Act and section 2 of the Bill in which adolescents of these ages may engage during the normal course of sexual exploration.

We submit that the broadness of the definition of sexual penetration in the Act is important when considered in light of the offence of rape. In that context it appropriately recognises the seriousness of the range of penetrative acts which may be employed under non-consenting conditions. We thus caution against any amendment to this definition.

#### **Who is criminalised by this section?**

The Bill criminalises any person who is 18 years or older who engages in these penetrative acts with an adolescent from 12 to 15 years old with their consent.

Adolescents who are 16 or 17 years old are only criminalised if they engage in these penetrative acts with a person from 12 to 15 years old who is also more than 2 years younger than them. Thus a 16 year old who engages with a 12 or 13 year old or a 17 year old who engages with a 12, 13 or 14 year old may be held criminally liable.

An adolescent who is 12, 13, 14, or 15 who engages with another 12, 13, 14 or 15 year old is, according to the Bill, not committing a criminal act.

We note that the Constitutional Court is clear in its order that it is unconstitutional to impose criminal liability on adolescents under the age of 16 years for consensual sexual activity.<sup>18</sup> As such any formulation of the Act which criminalises any of this behaviour of children under 16, even if it includes a close in age exclusion or defence would not meet the standards set by the Court.

We submit that these amendments sufficiently protect adolescents from being manipulated by adults into engaging in sexual activity that may be harmful to them while at the same time safeguarding against causing prejudice or harm to adolescents who engage with their peers in sexual behaviours which are developmentally normal.

**We thus support the amendments proposed in clause 2 of the bill.**

### **2.2.3. Consensual acts of sexual violation. (Clause 3 of the Bill, amending Section 16 of the Act)**

#### **The range of acts included in this section**

The acts defined under 'sexual violation' in the Act are extremely wide and highly problematic in respect of the current provisions of section 16 of the Act. They include any direct or indirect (therefore including contact through clothing) contact between the genitals, female breasts or mouth of one person with any part of the body of another person (which includes hugging and kissing or simulating sex while wearing clothing). This therefore covers many acts that are benign and absolutely sexually appropriate when committed between two consenting adolescents.

Once again, only when these acts are committed in non-consensual circumstances or between an adult and an adolescent does this broad definition make sense. Under circumstances of adolescents practicing these behaviours with consent they result in inappropriate criminalisation of adolescents.

#### **Who is criminalised by this section?**

The provisions of clause 3 of the Bill which amend Section 16 of the Act are the same as those of clause 2 in respect of who is criminalised. Our comments above thus apply.

**We thus support the amendments proposed in clause 3 of the Bill.**

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<sup>18</sup> Teddy Bear Clinic For Abused Children and RAPCAN vs the Minister of Justice and Constitutional Development. 2013(12) BCLR 1429 (CC) para 117

### ***The term 'sexual violation' in the Act***

We wish to raise with the Committee the further issue of the definition of these acts as 'sexual violation'. Currently, according to the Act, when two people (adults or children) engage in these behaviours with consent they are phrased as being a 'violation' and when committed without consent as 'assault'. We propose the use of the term 'sexual contact' in the definitions section of the Act as this is more appropriate to describe these acts as there is clearly no 'violation' when, for example, two married people engage willingly in such acts.

**We recommend the substitution of the term 'sexual violation' with the term 'sexual contact' in the definitions section of the Act.**

### **Note:<sup>19</sup>**

*The Community Law Centre has also endorsed the submission of the Women's Legal Centre due to their explanation of how the current provisions discriminate against girls and due to their submission on proposed amendments relating to the discretion to prosecute in matters where there is more than two years age difference involving adolescents 16 and 17 years old. (Clause 3 amending section 16(2)(b)) which we have not addressed in our submissions.*

## **3. Automatic placement of convicted child sex offenders on the National Register for Sex Offenders (Clauses 4 – 10 of the Bill)**

### **Note on our terminology**

The Bill correctly utilises the phrase "a person who was a child at the time of the offence" in these clauses. For the purpose of our discussion we may use the term 'child sex offender' or 'child' in the paragraphs that follow. Please note that when we use those terms we are referring to a person who was a child at the time of the offence.

### **3.1 Rationale**

We believe that the provisions of the Act that automatically place convicted child sex offenders on the sex offender register cause two major rights infringements. Firstly it does not consider the best interests of the child and secondly it violates the child's right to a fair hearing.

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<sup>19</sup> Inserted after the submission was circulated for endorsement

Child sex offenders are not only different from adult sex offenders, they also differ from one another. Automatically registering all convicted sex offenders regardless of whether they are children or adults contradicts the principle that child offenders should be treated differently from adult offenders and require individualised assessment.

The main purpose for the register is to prevent sexual violation of children and people with mental disabilities by prohibiting convicted sex offenders from working with or being placed in position of authority over children and people with mental disabilities. We therefore believe that placing children on the register is not properly connected to this purpose because:

- There is no evidence to suggest that children who commit sexual offences against their peers become adult sex offenders that prey on children.
- Empirical studies have shown that the majority of children who are arrested for a sexual offence never commit a sexual offence again.<sup>20</sup>

The Constitutional Court has also emphasised the fact that in a rights-context the law must respond to the fact that children are *'developing being[s], capable of change and in need of appropriate nurturing'* and recognised that *'in the context of criminal justice, the Child Justice Act affirms the moral malleability or reformability of the child offender'*.<sup>21</sup>

The provision to automatically place child offenders on the register is overbroad due to the wide range of offences within the Act, which if a child is found guilty of will result in their name being placed on the register. The Act very effectively covers a wide range of offences against children, these provisions are, in our view, positive in that they broaden the scope of protection to children. However when considered in the context of children or adolescents engaging with each other they become problematic. Many of the offences that criminalise unacceptable behaviour between adults and children, also criminalise behaviour that is more acceptable between children. For example our discussion above relating to kissing, touching and other sexual contact between adolescents with consent is also a crime and those children who are convicted of these offences will also have their names entered in the register. In addition during adolescence there may be behaviours such as taking photographs of themselves and sending these to boyfriends or girlfriends, which are offences under other sections of the Act. While we agree that these behaviours should be discouraged, and where there is any coercion, lack of consent or force, that they should be legally prohibited, they are, in our opinion not serious enough when committed by a child, taking photographs of

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<sup>20</sup> David Finkelhor, Richard Ormrod, and Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, *Juvenile Justice Bulletin*, December 2009

<sup>21</sup> *J v the National Director of Public Prosecutions and Another*. 2014 (2) SACR 1 (CC). Para 36

their own body, to warrant their name being entered onto the register. Its also notable that Section 51(2)(b) of the Act states that where a person is convicted of two or more offences their name must remain on the register for the duration of their lives. This means that an adolescent who takes and sends a naked or semi-naked 'selfie' will be charged with and convicted of two offences and can never have their name removed. This has significant implications for their work and life options throughout their adulthood. We submit that the consequence of the register is unacceptably severe for these types of behaviours when committed by children or adolescents.

In *J v the National Director of Public Prosecutions and another* the Constitutional Court elaborated on the significant impact that being placed on the register would have for children as they progress into adulthood, arguing why this undermines the best-interests principle:

*"Being placed on the Register bears serious consequences for the offender. ... restrictions are placed on the ability to work, on the ability to license certain facilities or ventures, and on the privileges of certain roles in the care of children or mentally disabled persons. ... the consequences that flow from the provision may not always affect the child offender while still a child. ... However, this Court has held that consequences for the criminal conduct of a child that extend into adulthood (such as minimum sentences) do implicate children's rights."*<sup>22</sup>

And:

"Child offenders who have served their sentences will remain tarred with the sanction of exclusion from areas of life and livelihood that may be formative of their personal dignity, family life and abilities to pursue a living. An important factor in realising the reformative aims of child justice is for child offenders to be afforded an appropriate opportunity to be reintegrated into society. Furthermore it is undoubted that there is a stigma attached to being listed on the register even if the Sexual Offences Act closely guards the confidentiality of its contents. Given that a child's moral landscape is still capable of being shaped, the compulsory registration of the child sex offender in all circumstances is an infringement of the best-interests principle."<sup>23</sup>

We submit that an individualised approach, based on a professional assessment of the child offender, and with due consideration of the nature of the offence, is the only way to determine accurately whether the

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<sup>22</sup> *J v the National Director of Public Prosecutions and Another*. 2014 (2) SACR 1 (CC). Para 43

<sup>23</sup> *J v the National Director of Public Prosecutions and Another*. 2014 (2) SACR 1 (CC). Para 44

purpose of the provision (to provide long term protection to children and persons with mental disabilities) will be achieved through the inclusion of that child offender's name on the register. This to will protect the best interest of the child principle. Any lesser approach will be over-broad, and will draw child offenders into the net that do not need to be there.

### **3.2 Recommendations regarding the placement of children's particulars on the National Register for Sex Offenders**

#### **3.2.1. Decision to place particulars on a register (Regarding Clause 7 of the Bill which amends section 50 of the Act.)**

The current provisions of clause 7 of the bill, which amend section 50 of the Act are insufficient. While they do create the scope for all convicted offenders who were children at the time of the offence to '*address the court as to why such an order should not be made*' and empower the court not to place that person's name on the register. The failure of the bill to require the state to undertake assessments of children means that those children who come from resourced contexts will be able to pay for professional assessment, whereas those without, will not. In all likelihood those who are professionally assessed stand a stronger chance of their names not being included in the register. South Africa is renowned for its extremely high levels of inequality, where the majority of people live in poverty and the minority having access to financial resources. These provisions thus undermine the rights of children to equal treatment before the law. The provisions of the bill as they are currently formulated will also in all likelihood discriminate against the majority of children convicted of sexual offences.

The provisions as formulated, fail to offer sufficient protection to children. Although they do empower a court not to order that the child's particulars be placed on the register, the starting point is that they must be placed on the register unless.... We submit that the default position in respect of children should be that their names do not go onto the register unless a court orders that this be done. The clause should thus state that a person who was a child at the time of the sexual offence's name must not be placed on the register unless the court orders that it be included. Thus the starting point is that children's names don't go onto the register and only in cases where it is clear to the court that a child's name should be placed on the register will this be done.

We have provided the full text of our proposed amendments to the Principal Act in an annexure on the last page of this submission for ease of reference. Underlined text indicates our proposed additions to the text

of the principle Act and text in [square brackets] indicates our proposed deletions from the text of the Act or of the Amendment Bill.

**We thus recommend that section 50(1) of the Act be amended to reflect that the no persons who were children at the time of the offence be placed on the register unless (amending section 50(2)) the court makes an order in this regard. This can be achieved by inserting the following in subsection 50(1):**

**50. (1) The particulars of the following persons must be included in the Register, unless, subject to subsection 50(2), the person was a child at the time of the time of the commission of the offence;**

**This would also require amendment to the current clause 7(b) which amends the last sentence of subsection 50(2)(a) of the Act by inserting the following:**

**“... must make an order that the particulars of the person be included in the Register, unless that person was a child at the time of the commission of the offence in which case the court may, subject to paragraph (c), make an order that the particulars of that child be included in the register.”**

**We further recommend that in matters where the presiding officer is considering placing the name of the child offender on the register, that the provision for child offenders to have an opportunity to place reasons before the court as to why his or her name should not be on the register as currently stated in Clause 7 and amending Section 50(2)(b)(ii) be retained.**

**Most importantly we submit that the bill must include provisions to the effect that in cases in which the court is considering placing a child’s name of the register, the state is responsible to ensure that a suitably qualified person assesses the child before the order can be made to place their name on the register.**

We recognise fully the wide range of demands that are placed on state resources, however we believe that the potential violation of children’s rights to equality, non-discrimination and that their best interests are of paramount importance warrants the investment into these costs. We also note that should the wording of the clause be changed to allow the default position to be that children’s names are not placed on the register unless the court decides to consider this question in relation to a particular child, it will result in far fewer children needing to be assessed, address the high potential that the provision as currently formulated is unconstitutional and consequently lower the burden of costs to the state.

Should these submissions be considered acceptable to the Committee Clause 7(b) which inserts subsection 50(2)(c) into the Act could read:

**(c) before making an order in terms of paragraph (a), the court must –**

**(i) inform a person, who was a child at the time of the commission of the offence, of the court’s power to make an order in terms of paragraph (a);**

**(ii) afford the person referred to in subparagraph (i) an opportunity to address the court as to why such an order should not be made; and**

**(iii) the Minister must ensure that the person referred to in subparagraph (i) is assessed by a suitably qualified professional as prescribed**

**Whereafter the court may direct that the particulars of such a person shall [not] be included in the register**

Who should be on the register?

The bill provides no guidance to the court as to what should be considered in making the decision to place the name of a child sex offender on the register. This provides tremendous discretion which will undoubtedly result in uneven application of the law in different courts across the country.

**We recommend the inclusion of provisions which require the Minister to develop regulations in this regard. These must recognise that only in substantial and compelling circumstances should a person who is a child at the time of the offence be included in the register. These should require consideration of factors relating to the specific child as well as consideration of the nature of the sexual offence.**

### **3.2.2. Removal of particulars from the register (Clause 8 which amends section 51 of the Act)**

For the cases where a decision is taken to include the name of a person who was a child at the time of the offence on the register we support the current clause 8(b) of the Bill which amends Section 51 of the Act. This allows that a child may apply to have their particulars removed from the register prior to the expiration dates set out in the Act.

We submit that there should never be any circumstances in which a person who was the child at the time of the commission of the offence whose name is included in the register cannot apply to have their particulars removed. The possibility of such a person being placed on the register for life without the option to apply for their name to be removed would be untenable given the developmental nature of childhood.



**We support the provisions of clause 8(b) which set out what the circumstances under which the court may order the removal of someone's name prior to the expiration period. However we further recommend that people in these circumstances also have access to assessment at the expense of the state to determine if their name can be removed.**

### **3.2.3. Children whose particulars are already on the register**

A number of children's particulars have already been placed on the register over the past years since it was initiated. The provisions of clause 8 which amends section 51 of the Act are insufficient with regard to the fair treatment of these children. This is because the clause currently places the onus on the person who was a child at the time of the offence to approach the court in order to apply to have their details removed from the register. This is extremely problematic as it pre-supposes that these people have knowledge that their name is on the register, that they become aware of the provisions of this amendment should it be passed and that they have the resources and means to access the court for this purpose. In our view this is extremely unrealistic.

There will be some people who were children at the time of the offence, whose names have been included in the register under the current provisions of the Act, but subsequent to the Constitutional Court ruling who may qualify not to have their particulars included. Importantly, given the fact that the state has taken stringent measures in the first place to place those names on the register. The onus must lie with the state to review the register and re-assess if those children's names should be on the register.

**For these reasons we submit that the clause should be added in this section place the onus on the Minister of Justice and Correctional Services to review the names of children currently on the register and ensure that these are assessed. We recommend further that a timeframe of one year be placed on the finalisation of this process.**

## **4. Conclusion**

Overall we support the proposed amendments relating to the de-criminalisation of consenting sexual activity between adolescents of similar age. However the provisions with regard to the placement of persons who were children at the time of the offence's particulars on the National Register for Sex Offenders are extremely concerning as they are currently formulated by the bill.

We are of the opinion that the State should place greater focus on a preventative approach to crime and that this process of amending the Act should not be done in isolation of such a discussion. If proper focus were placed on preventing crime from a developmental approach, then the burden and costs in relation to the justice response including assessments would be less. Criminalising adolescents' consensual sexual behaviour and placing their names on the sex offenders' register – as a default – do not promote crime prevention, rather it entrenches stigmatisation, which is also not beneficial to the individual or society, and in the long run causes more harm than good.”

Should the committee require any further information regarding the submissions above or relating to other provisions on the Act we will undertake to provide such information at the request of the committee insofar as we have expertise on the issue at hand.

## Annexure: Proposed Amendments to section 50 of the Act

### Persons whose names must be included in Register and related matters

50. (1) The particulars of the following persons must be included in the Register, unless, subject to subsection 50(2), the person was a child at the time of the commission of the offence:

(a) A person who in terms of this Act or any other law—

- (i) has been convicted of a sexual offence against a child or a person who is mentally disabled;
- (ii) is 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 in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977;
- (iii) is serving a sentence of imprisonment or who has served a sentence of imprisonment as the result of a conviction for a sexual offence against a child or a person who is mentally disabled; or
- (iv) has a previous conviction for a sexual offence against a child or a person who is mentally disabled or who has not served a sentence of imprisonment for such offence; and

(b) any person—

- (i) who, in any foreign jurisdiction, has been convicted of any offence equivalent to the commission of a sexual offence against a child or a person who is mentally disabled;
- (ii) who, in any foreign jurisdiction, has been dealt with in a manner equivalent to that contemplated in paragraph (a) (ii); or
- (iii) whose particulars appear on an official register in any foreign jurisdiction, pursuant to a conviction of a sexual offence against a child or a person who is mentally disabled or as a result of an order equivalent to that contemplated in paragraph (a) (ii),  
whether committed before or after the commencement of this Chapter.

(2) (a) A court that has in terms of this Act or any other law—

- (i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or
- (ii) made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person,  
must make an order that the particulars of the person be included in the Register, unless that person was a child at the time of the commission of the offence in which case the court may, subject to paragraph (c) make an order that the particulars of that child be included in the register.

(b) When making an order contemplated in paragraph (a), the court must explain the contents and implications of such an order, including section 45, to the person in question.

(c) before making an order in terms of paragraph (a), the court must –

- (i) inform a person, who was a child at the time of the commission of the offence, of the court's power to make an order in terms of paragraph (a);
- (ii) afford the person referred to in subparagraph (i) an opportunity to address the court as to why such an order should not be made; and
- (iii) the Minister must ensure that the person referred to in subparagraph (i) is assessed by a suitably qualified professional as prescribed

Whereafter the court may direct that the particulars of such a person shall be included in the register