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WOMEN'S LEGAL CENTRE

Further submissions to the Portfolio Committee on Justice and Correctional Services on amendments to Section 15 and 16 of the Criminal Law Sexual Offences and Related Matters Amendment Act

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1. Introduction

We commend the Committee's approach and robust efforts to ensure broad public participation in relation to the complex and sensitive issue of consenting adolescent sexual activity, through the process of considering amendments to the Criminal Law [Sexual Offences and Related Matters] Amendment Act no 32 of 2007 (SOA).

We recognise that the Portfolio Committee has not yet finalised any decisions and we are taking this opportunity to offer our views on the latest proposals as presented by the State Law Advisor, on 25 March 2015.

Consensus on decriminalisation

The hearings and discussions held by the Committee have resulted in broad-based consensus between most sectors of society and government departments on the most effective way to address the ruling of the Constitutional Court regarding sections 15 and 16 of the Criminal Law [Sexual Offences and Related Matters] Amendment Act no. 32 of 2007 (SOA). Through the committee's engagements with presenters there was extremely strong support for decriminalisation due to the harm caused by this, and the recognition that parents, caregivers, religious and traditional leaders should be responsible for guiding children and dealing with inappropriate or unhealthy behaviour by using educational and counselling approaches, where the role of the State is to provide support services.

We note that the suggestion by some that the amendments would 'lower the age of consent' has been understood by this committee to be a misconception. Although there is agreement that the Bill does not do this, we note that the Committee has contemplated how best to make the age of consent more explicit within the legislation.

2. New proposal is a significant departure from tabled bill and warrant further public participation

It is with great concern that we address the proposal for amendments to the SOA which were presented to the committee by the State Law Advisor on 25 March. This new proposal presents a significant departure from the amendments that were contained in the tabled bill (B18 – 2014) and on which the public and other government departments commented. It is our view that should Parliament adopt this recent proposal it would have far reaching negative consequences. The magnitude and significance of the potential impact of this latest proposal require further intensive public engagement, both with members of the public that have engaged in the process thus far and with sectors that are concerned with issues of child justice, many of whom have participated to date.

The organisations that have drafted this submission would like to stress that we have not been able to thoroughly interrogate or debate the potential implications of the Law Advisor's proposal within our networks in the children's sector. This is because the proposal is not a formal bill, it was presented to the committee at the 11th hour of the previous round of deliberations and because the timeframes in which the committee would be considering the proposal are uncertain. As a result there are some principled issues that we have not been able to comment on in this submission and many organisations who may have an interest in commenting who have not been able to do so.

3. New proposal abolishes statutory rape and statutory sexual assault, and makes consenting sex with someone under 16 equal to rape

The proposal, in summary, seeks to:

- Include consensual sexual activities between one person and a child under the age of 16 years in the definitions of the non-consensual offences of rape (section 3 of the SOA, where there is sexual penetration) and sexual assault (Section 5 of the SOA for non-penetrative acts).

- It then provides a close in age exemption; where the age difference between the child under 16 and the other person is less than 3 years, the consensual act will not constitute a crime.
- The proposal abolishes the offences of “statutory rape” and “statutory sexual assault”. These offences have been in existence for many years and serve a vital purpose of distinguishing between consensual and non-consensual sexual activities.

4. Fundamental problem with the proposal

The starting point of our concerns with the proposal is that it removes the distinction between under 12's and 12 – 16 year olds and treats consensual acts with both groups of children in the same way. The fact that the proposal does away with the crimes of statutory rape and statutory sexual assault also means that except where there is an age gap of less than three years, consenting sex with someone under the age of 16 will be treated equally severely as the crime of rape.

Rape, and rape of a child under the age of 16 in particular, is considered both in our law and in our society as being one of the most serious offences that a person can commit. It carries significant consequences for people accused or convicted of these offences. The current distinction in our law between consenting and non-consenting sexual activity recognises that the negative emotional, psychological and social impacts on victims of rape and sexual assault are far greater than in situations where consent is given.

We demonstrate in this submission that the consequences of the State Law Advisor's proposal are particularly extreme for **children** (under 18) and for **young adults** (18 to 21 year olds) who participate in relatively normative behaviours. The implications of the proposal must be understood not only in the context of the SOA but also, critically, in relation to the provisions of:

- The Child Justice Act no. 75 of 2008 (CJA);
- The minimum sentencing legislation;
- Legislation dealing with procedures for bail; and
- The Children's Act no. 38 of 2005.

5. Consent in the Criminal Law [Sexual Offences and Related Matters] Amendment Act

Given the nature of the proposal, we first elaborate on the current provisions in the SOA relating to the issue of 'consent'.

Parliament carefully deliberated on the definition of 'consent' before passing the SOA in 2007. These deliberations resulted in progressive South African law that recognises a broad range of circumstances in which harm is done to victims and it ensures that there are serious consequences for perpetrators who commit sexual acts under these circumstances. We have included the full text of the sub-sections 1(2) and 1(3) of the SOA which define 'consent' in an annexure to this submission, and will only highlight some of the provisions here.

- Firstly the SOA explains in sub-section 1(2) that 'consent means voluntary or uncoerced agreement.' It then sets out the circumstances in which a person is considered to have been coerced and their agreement was not voluntary.
- These circumstances include the use of force or intimidation as well as threats against the victim, other people or the property of the victim.
- Importantly, it includes 'the abuse of power or authority' that would inhibit the ability of the victim to indicate their unwillingness or resistance to a sexual act.

In our view these provisions are sufficiently broad to ensure that situations in which an adult engages in consenting sexual activity with a much younger child through abusing their power or manipulating that

child, the adult can be charged with the serious offences of rape or sexual assault. We also note that the definition, in section 1(3) indicates that the circumstances are 'not limited to' those that are listed, this gives courts the discretion to utilise these very serious offences in cases where consent was given and where they believe the more serious offences are warranted.

The Act also provides that under the age of 12, a child is considered too immature to consent to a sexual act and thus all sexual acts committed with children under 12 irrespective of their consent are considered serious offences of rape or sexual assault. We stand by this absolute presumption of non-consent where the victim is under 12 because it accords with the general reality that a child below 12 is emotionally, mentally and physically unable to consent to sex.

However, we think it is important to distinguish between children under 12 and those 12 or older but under 16 (which the SOA and the Bill [B18-2014] currently do) because 12 to 16 year olds are in a different phase of development. The fact that the law does not permit these adolescents to consent is a necessary legal fiction that is there to protect them from adults. However, because they factually do consent to sexual relationships with other adolescents and young adults a few years older than them, the law has to treat the fiction with some measure of caution. Statutory rape, with some protection through the close in age defence, is the law's time-tested solution to dealing with this problem. Consensual sex between a person over 16 with a person who is under 16 but over 12 is a crime, but the consequences are more proportionate to the fact that the act was factually a consensual one.

6. Implications of the State Law Advisor's Proposal

Our submission is mostly concerned with the implications of this proposal in respect of children and young adults under the age of 21 years, which we will deal with in three categories: 1) children under 16 years; 2) children 16 and 17 years old; and 3) young adults of 18 to 21 years old. We will also briefly address the question of mature adults who commit consenting sexual acts with children under the age of 16.

6.1. Children under 16 years

The proposed three year exemption fails to protect all under 16 year olds from criminalisation when they engage in consenting sexual acts; particularly 15 year olds: If a child who is 15 years and 3 months old, engages in sexual activity with a child of 12 years and 2 months, the 15 year old is more than three years older (by one month) than the 12 year old and would be charged with sexual assault or rape. To ensure that all children under the age of 16 are protected from being criminalised (as required by the Constitutional Court), the age gap would have to be a minimum of 4 years.

6.2. Children 16 and 17 years old

The proposal also results in the situation where some 16 and 17 year olds can be charged with sexual assault or rape for engaging in **consenting** sexual activities with children under the age of 16. For example, where a child who is 17 years and three months engages with a child of 14 years and two months, the 17 year old will be charged with rape.

The formulation that was tabled in B18 - 2014, and on which the public participation was based, saw these 16 and 17 year olds being charged with the less serious criminal offences of statutory sexual assault or statutory rape where the age gap was more than two years. In our view this formulation was appropriate in that it discouraged sexual relationships between these children, still dealt with them as criminal offences, but allowed for restorative measures through the provisions of the Child Justice Act. The Law Advisor's proposal stands to have extremely serious consequences for 16 and 17 year olds when considered in relation to the provisions of the Child Justice Act.

The Child Justice Act

Children under 18 charged with any crime must be dealt with in terms of the provisions of the Child Justice Act (CJA). Statutory rape is listed among the least serious offences in schedule 1 of the CJA whereas rape is listed among the most serious category of offences in schedule 3. This proposed change would mean that consensual acts of sexual penetration will be dealt with according to the procedures established for schedule 3 offences.

Procedures for schedule 1 vs schedule 3 offences in the CJA

Schedule 1 offences	Schedule 3 offences
Generally may not be arrested for the offence	May be arrested for the offence (s20)
Generally released from police custody into the care of parent, guardian or suitable adult. (s 22).	May not be released from police detention by police. (s21)
Need not make a formal bail application	Must make formal bail application to be released from detention. (s25 in conjunction with provisions of the Criminal Procedure Act, 51 of 1977)
May not be detained in a prison awaiting trial (s 27)	If s/he fails to make bail application or if bail denied may be held in a secure care centre or prison to await trial. (s26(3))
May be diverted by a prosecutor before the preliminary enquiry, thereby avoids appearing in a court. (s 41)	Cannot be diverted before the preliminary enquiry (s41)
May be diverted at the preliminary enquiry (if not already diverted) without involvement of the DPP.	May only be diverted if DPP of the opinion that exceptional circumstances exist. (s52)
May not be placed in a residential diversion option, only a community based one (s 53(4))	Even if diverted, may be placed in a residential diversion programme. (s53(4))
Unlikely to face a trial.	If pleads not guilty, cannot be diverted (s 52) and likely to be tried in a child justice court, possibly at regional court level.
May not be sentenced to imprisonment unless there is s/he has a criminal record and there are substantial and compelling reasons for imprisonment (s 77(3)(c)).	May be sentenced to imprisonment (s77(3))
May have his or her criminal record expunged after five years (s 87(1)(i)).	May never have her/his criminal record expunged (s87).

6.3. Young adults 18 to 21 years old

While we are particularly concerned with the negative impact of this proposal on children under 18, we are also concerned with its impact on young adults between the ages of 18 and 21. A young person of 18 and two months old who engages in consenting sexual activity with a child of 15 years and one month would be charged with rape or sexual assault and not with the lesser 'statutory' offences as is currently the case. For this age category there are a number of laws that describe the consequences for a charge of rape that will apply to the processing of their cases for engaging in consenting sex with someone relatively close in age to them through the criminal justice system.

Child Justice Act

The CJA (s 4(2)) currently allows that young adults from 18 to 21 who are charged with schedule 1 (of the CJA) offences may be dealt with in accordance with the CJA, which includes the possibility of diversion. When developing the CJA, Parliament included these provisions based on consideration of the logic that these young adults, although technically not children, are due to their age, still developing emotionally, psychologically and socially and that when they are accused of minor offences they and society would

benefit from the more restorative approach outlined in the CJA. The Law Advisor's proposal means that these offences will no longer fall in schedule 1 and that young adults (18-21 years) who engage in consenting sexual activity with children under 16 will no longer be dealt with under the CJA. They therefore will face the full effects of the adult criminal justice system for consenting sexual activity with someone who is close to them in age.

Minimum Sentences (Criminal Law Amendment Act No. 105 of 1997)

Currently only people convicted of non-consensual sexual offences are dealt with in accordance with the minimum sentencing regime, although the minimum sentencing legislation includes many specific offences in its scope, statutory rape is not included in the list of offences to which minimum sentences apply. This is an indication of the legislature's recognition that consenting sexual offences did not warrant the very serious sentences that are imposed by the Act. A primary (and indeed the intended) consequence of the Law Advisor's proposal is that the minimum sentencing regime will apply to persons who have consensual penetrative sexual acts with children under the age of 16, this also applies to young adults between the ages of 18 and 21. It's important to understand that the minimum sentencing legislation treats the rape of a child under 16 among the most serious offences and a person who is convicted of the rape of a child under the age of 16 must as a general rule be sentenced to life imprisonment.

The minimum sentencing legislation requires the following regarding sexual offences:

- **Life imprisonment:** Rape in very serious circumstances such as where the victim is a child under 16 years, where there is repeated rape of a victim, gang rape or the rape of a person with a physical or mental disability. These are described in section 51(1) of the minimum sentencing legislation, referring to part I of the schedule to the Act.
- **First conviction 10 years, second conviction 15 years and third conviction 20 years:** Rape (section 3 of SOA); Compelled Rape (section 4 of SOA), Sexual Exploitation of a child or a person with mental disabilities (sections 17 and 23 of the SOA), and use of child or person with mental disability to produce pornography (Sections 20(1) and 26(1) of the SOA). These are described in section 51(2)(b) of the minimum sentencing legislation, referring to part III of the schedule to the Act.

If it is passed into law, the State Law Advisor's proposal, will lead to the illogical situation where a person of 18 years who is convicted of rape after having consenting sex with a 15 year old will be sentenced more severely (minimum life sentence) than a 30 year old, for example, who has been convicted three times for rape – as it is currently understood without consent – of a person over 16 (minimum 20 year sentence). Thus the consequences for people convicted of rape where there is consent with a person under the age of 16 will be more severe than the consequences for committing acts of non-consensual rape.

Bail

In addition, the proposal has consequences for the bail processes that apply to people accused of rape under consenting circumstances. The bail legislation categorises the rape of a child under the age of 16 under the most serious crimes in schedule 6 of the Criminal Procedure Act, 51 of 1977. The legislation requires that for schedule 6 offences, the accused must convince the court that exceptional circumstances exist to justify her/his release. This does not apply to statutory rape, however the Law Advisor's proposal will mean that all consensual sex with persons under the age of 16 will also be considered rape and so the more stringent bail provisions will apply.

6.4. Mature adults

We are less concerned with the consequences of this proposal on mature adults. The timeframes in which we have to comment on this latest proposal from the drafters means that it has not been possible to properly deliberate, debate or reach consensus on the question of whether or not a mature adult engaging in consenting activity with a child under the age of 16 should be dealt with under the serious offences of rape and sexual assault or under the less serious 'statutory' offences. Some organisations making this submission are of the view that the current provisions relating to consent are sufficiently broad to allow for

prosecutions of mature adults under the crimes of rape or sexual assault when they engage in consenting sexual activity with children from 12 to 16 years. Should this Committee wish to strengthen the utilisation of these crimes in circumstances where one person is a mature adult who manipulates or abuses their power based on their relative age to the child, the Committee could consider inserting a phrase that alludes to 'relative age between adults and children under 16' in the definition of consent. We submit that such an amendment would require careful consideration and further inputs from a range of stakeholders. Should this be considered it may be best to leave the actual age gap to the discretion of the courts, so that the individual characteristics of the child and adult can be considered by the prosecution in each case.

7. Effects of a conviction for Rape under the Children's Act

The Children's Act also carries serious consequences for unmarried fathers who are convicted of rape. Let us imagine a situation where a 19 year old male has a consenting sexual relationship with a 15 year old girl. Let us consider that this results in the girl becoming pregnant. If the unmarried father is convicted of rape, he:

- May never have his paternity confirmed by a court (s 26), and therefore can never have parental responsibilities and rights in relation to his child.
- Does not have a say in whether the child should be given up for adoption (s 236(3)(c)).

This is different from the situation under the current law, where the 19 year old might be charged and convicted of statutory rape. A conviction for statutory rape does not have these effects on parental responsibilities and rights, because the law recognises that if the relationship was consensual the baby that is born may well benefit from a relationship with his or her father.

8. Clarifying the age of consent in the Act

The Children's Institute (CI), in its presentation to the Portfolio Committee on 11 April 2015, acknowledged the concern voiced by some members of the public that there is a perception that the age of consent is being lowered. Although, the amendments proposed in the tabled bill do not in fact lower the age of consent, they contribute to the general confusion regarding the age of consent, thus the CI suggested that public understanding may be enhanced by the inclusion in the amendments of a more explicit statement of the age of consent. They noted that civil society had not discussed the matter and requested permission to investigate and send a new submission to the committee based on an amendment to section 57. Following the hearings, the CI consulted with a group of children's rights organisations and the Centre for Child Law (CCL) was tasked with finding a formulation to include a provision in the Sexual Offences Amendment Bill that clearly conveys that the age of sexual consent is 16 years.

In order to produce the brief proposal, international comparative research was undertaken. However, none of the countries studied explicitly state an age of consent in their laws – in other jurisdictions, as is currently the case in South Africa, one must interpret the law to ascertain the age. The CCL, therefore, used the structure of the South African SOA itself to frame a way in which to make an amendment to section 57 that is compatible with other phrases captured in other South African laws, and which was consistent with the purpose and intent of the provisions of B18 - 2014. On 23 March 2015, we sent the submission written by the CCL and endorsed by five organisations offering two options for consideration by the Portfolio Committee. Subsequently these organisations have debated the issue further and agreed that, in order to ensure that the law is as un-confusing as possible, we wish to propose only the first of the two options at this stage:

57. Inability [of children under 12 years and persons who are mentally disabled] to consent to sexual acts

(1) Notwithstanding anything in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.

(2) Notwithstanding anything in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act.

(3) Subject to section 15, a person who is under the age of 16 years may not consent to any acts of sexual penetration.

Recognising that sexual development is normally on a continuum we proposed distinguishing between penetrative and other acts and setting the age of consent to sexual penetration at 16. In our view this proposal does not substantively change the objects of the Act and the provisions of statutory rape and statutory sexual assault as described in B18 – 2014 remain. Our objective is to protect children from predatory adults not to criminalise them for engaging in developmentally normal activity.

9. Conclusion

In conclusion we do not support the State Law Advisor's proposal as we think that the potential negative impact is significant, we believe that broad public consultation on such a far reaching proposal is essential.

We wish to thank the Committee for the opportunities that have been afforded to the public to participate in the robust process that has been followed regarding these amendments to date.

Annexure – Definition of Consent in Section 1 of the Criminal Law [Sexual Offences and Related Matters] Amendment Act no32 of 2007.

CONSENT

(2) For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, “consent” means voluntary or uncoerced agreement.

(3) Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5(1), 6 and 7 or any other act as contemplated in sections 8(1),

8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:

(a) Where B (the complainant) submits or is subjected to such a sexual act as a result of—

(i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or

(ii) a threat of harm by A against B, C or D or against the property of B, C or D;

(b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;

(c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that—

(i) B is committing such a sexual act with a particular person who is in fact a different person; or

(ii) such a sexual act is something other than that act; or

(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act—

(i) asleep;

(ii) unconscious;

(iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgment is adversely affected;

(iv) a child below the age of 12 years; or

(v) a person who is mentally disabled.

