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## SUBMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES

On the Criminal law (Sexual offences and Related Matters) Amendment Act Amendment  
Bill: Focus on Section 15 and 16

By Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN)

“The second applicant, likewise a not-for-profit company, is RAPCAN, an acronym for “Resources Aimed at the Prevention of Child Abuse and Neglect”. It is dedicated to the prevention of child victimisation and the promotion of children’s rights, which it does by, amongst other things, developing best practices in relation to child victims and witnesses in the criminal justice system and by advocating legal and policy reforms to protect children from abuse, exploitation and neglect.”<sup>1</sup>

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<sup>1</sup> The Teddy Bear Clinic for Abused Children and Others v Minister of Justice and National Director of Public Prosecutions 2013(12) BCLR 1429 (CC) para 5

## Introduction

RAPCAN – Resources Aimed at Child Abuse and Neglect works to prevent child maltreatment in South Africa for more than 25 years. Sexual abuse of children is an important matter for RAPCAN. Practice models to prevent and mitigate the effects of sexual abuse of children has been developed and implemented by RAPCAN.

As a child rights organisation, RAPCAN is committed to realising children’s protection and participation rights. RAPCAN believes that children need to be protected from harm and that they should participate in all decisions that affect their lives. These principles of children’s rights are entrenched and recognised constitutionally<sup>2</sup>, internationally<sup>3</sup> and domestic laws should support these.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 did not respect children’s rights. The Act criminalised adolescents for consensual acts.

### How did the Act criminalise adolescents for consensual acts?

Sections 15 and 16 of the Act criminalised adolescents engaging in consensual sexual acts within their peer group (12 – 16 years). It also compelled adults to report children to the police who sought advice about sexual decision making. If convicted for consensual sexual acts, adolescents’ names would be entered into the National Register for Sex Offenders. The Act was in force from 16 December 2013.

### Why was RAPCAN opposed to the sections in the Act?

The Act:

- Criminalised normal adolescent behaviour - according to experts Flisher and Gevers<sup>4</sup>
- Caused adolescents to develop unhealthy emotions and behaviours<sup>5</sup>
- Exposed adolescents to the criminal justice system - causing them harm<sup>6</sup>
- Entailed that consenting adolescents are placed on the National Register of Sex Offenders<sup>7</sup>
- Separated adolescents from adult advisors on sexual decision making<sup>8</sup>
- Meant adolescents could not realise their participation rights<sup>9</sup>
- Aimed to limit fundamental rights to dignity, privacy and the best interest of the child<sup>10</sup>

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<sup>2</sup> The Constitution of the Republic of South Africa, 1996

<sup>3</sup> United Nations (1989) Convention on the Rights of the Child, United Nations Treaty Series, vol. 1577, p3

<sup>4</sup> Flisher A and Gevers A. Expert Opinion, Division of Child and Adolescent Psychiatry, Adolescent Health Research Unit, University of Cape Town.

<sup>5</sup> Ibid

<sup>6</sup> The Teddy Bear Clinic for Abused Children and Others v Minister of Justice and National Director of Public Prosecutions, *Supra* Note 1. Para 28

<sup>7</sup> RAPCAN (2013) CONSTITUTIONAL COURT JUDGMENT ON SECTIONS 15 AND 16 OF THE SEXUAL OFFENCES ACT: CONSENSUAL SEXUAL CONDUCT BETWEEN ADOLESCENTS 12 TO 16 YEARS. Learning Brief. 07 October 2013.

<http://rapcan.org.za/research/learning-briefs/> Accessed 2/2/2015

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> The Teddy Bear Clinic for Abused Children and Others v Minister of Justice and National Director of Public Prosecutions. *Supra* Note 1. Para 76

### Who opposed the criminalisation of adolescents for consensual acts?

The constitutionality of the sections 15 and 16 of the Act were challenged by the Teddy Bear Clinic for Abused Children and RAPCAN - Resources Aimed at the Prevention of Child Abuse and Neglect – represented by the Centre for Child Law. The Constitutional Court found that sections 15 and 16 of the Act infringed adolescents' Constitutional rights to dignity (s10), privacy (s12) and the best interest of the child s28(2). The Constitutional Court ruled that sections 15 and 16 are invalid:

*"[102] In terms of section 172(1)(a) of the Constitution we are obliged to declare the impugned provisions invalid to the extent of their inconsistency with the Constitution. For the reasons set out above,77 sections 15 and 16 of the Sexual Offences Act are inconsistent with the Constitution to the extent that they criminalise the consensual sexual conduct of adolescents and must accordingly be declared invalid."*<sup>11</sup>

### Does decriminalisation affect the age of consent?

The age of consent is set at 16 by this Act. This is the age an adolescent can agree to have sex with a person of any age. It is the most common age of consent in international law<sup>12</sup>.

Decriminalising adolescents aged 12 to 16 years old, consenting to sex within their peer group, will not lower the age of consent. They cannot consent to sex with any one more than 2 years older or younger than themselves when they are between 12 and 16 years old.

### What was the Constitutional Court's advice to citizens about adolescents consenting to sexual acts?

Even if we want to protect children from harm, we cannot do so at the expense of their right to participate in decisions that affect their lives<sup>13</sup>. This will uphold the principle of the best interest of the child.

During adolescence (12-16 years) they are old enough to have the capacity to make some of their own decisions independently of adults<sup>14</sup>. This upholds the principle of evolving capacity of children.

When adolescents are shamed and criminalised for normal behaviour, we undermine their right to dignity<sup>15</sup>.

When we force adolescents to tell us about their intimate relationships in order to criminalise them, we undermine their right to privacy.<sup>16</sup>

RAPCAN endorses the court's sentiments in relation to the rights to dignity, privacy and best interest of the child.

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<sup>11</sup> The Teddy Bear Clinic for Abused Children and Others v Minister of Justice and National Director of Public Prosecutions. 2013(12) BCLR 1429 (CC) para 102

<sup>12</sup> According to UNICEF the legal age of consent – the minimum legal age at which you can decide to have sex with someone – varies quite a bit around the world. But 16 is by far the most common age of consent.

[http://www.unicef.org/rightsite/433\\_457.htm](http://www.unicef.org/rightsite/433_457.htm) accessed 30/01/2015

<sup>13</sup> The Teddy Bear Clinic for Abused Children and Others v Minister of Justice and National Director of Public Prosecutions. *Supra* Note 1. Para 76

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

### What should our perspective on children's rights be?

The Constitutional Court quotes Judge Sachs in a Constitutional matter from 2007. It gives us a perspective of how the Constitutional Court views children's rights:

*"Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood."<sup>17</sup>*

RAPCAN is of the same view as Judge Sachs in relation to children's autonomy rights.

### What are RAPCAN's views of Sections 15 and 16 of the Amendment Bill?

RAPCAN agrees with the manner in which sections 15 and 16 have been represented in the Amendment Bill:

***"15. (1) A person ("A") who commits an act of sexual penetration with a child ("B") who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was—***

*(a) 12 years of age or older but under the age of 16 years; or*

*(b) either 16 or 17 years of age and the age difference between A and B was not more than two years.*

*(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the **[National] Director of Public Prosecutions if [both] A [and B were children] was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was more than two years[: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1)].***

*(b) The **[National] Director of Public Prosecutions concerned may [not] delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not."***

***16. (1) A person ("A") who commits an act of sexual violation with a child ("B") who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless A, at the time of the alleged commission of such an act, was—***

*(a) 12 years of age or older but under the age of 16 years; or*

*(b) either 16 or 17 years of age and the age difference between A and B was not more than two years.*

*(2) (a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if **[both] A [and B were children] was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between A and B was***

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<sup>17</sup> The Teddy Bear Clinic for Abused Children and Others v Minister of Justice and National Director of Public Prosecutions. *Supra* Note 1. Para 40

*more than two years[. **Provided that, in the event that the Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1)].***

*(b) The Director of Public Prosecutions concerned may **[not]** delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.”<sup>18</sup>*

#### What recommendations would RAPCAN make for adolescents aged 15, 16 and 17?

In addition, RAPCAN recommends that Parliament recognises that adolescents aged 15-17 year are a peer group by virtue of completing the Further Education and Training phase of schooling (grade 10-12) together. Peer group relationships between 15, 16 and 17 year olds would be normal, and thus should not be made illegal. Acknowledging that the age of consent is 16, we recommend that the close in age defence be applicable to 15, 16 and 17 year olds.

#### How would RAPCAN like to see adults and adolescents working together to guide sexual decision making?

- Adolescents need information from non-judgmental and caring adults to inform their life choices.
- Adults need to include sexuality information in talks with adolescents to guide normal child development.
- Adolescents should be empowered by adults to make good, independent decisions about sexuality and life choices.
- Attempting to use adult power to control adolescent behaviour could lead to more harm than good.
- Humiliating and withholding sexuality information from adolescents is harmful to their positive growth and development.<sup>19</sup>

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<sup>18</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill B18 Of 2014

<sup>19</sup> RAPCAN (2013) CONSTITUTIONAL COURT JUDGMENT ON SECTIONS 15 AND 16 OF THE SEXUAL OFFENCES ACT: CONSENSUAL SEXUAL CONDUCT BETWEEN ADOLESCENTS 12 TO 16 YEARS. Learning Brief. 07 October 2013.

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