Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

**Submission to the**

**Portfolio Committee**

**on Justice and Correctional Services**

**on the**

# Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill

# B18 - 2014

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## 1. Introduction

The Southern African Catholic Bishops' Conference welcomes the opportunity to comment on this legislation. It is extremely difficult to find the correct balance between the need, on the one hand, to respect children's rights to dignity and privacy and, on the other, the need to safeguard them from the consequences of exploitation, premature sexual activity, and experimentation. These consequences can be both physical, such as pregnancy or the spread of sexually transmitted diseases, and psychological or emotional, impacting on feelings of self-worth or resulting in inappropriate or negative behaviour in inter-personal relationships.

## 2. The need for amendments

The proposed amendments have come about as a result of the decision in the "Teddy Bear Clinic" case (CCT 12/13 [2013] ZACC (3 October 2013)), in which the Constitutional Court struck down, inter alia, sections 15 and 16 of Act 32 of 2007.

In paragraph 97 of the judgement Justice Khampepe writes: *"In any event, I am highly doubtful that the introduction of criminal prohibitions could ever be shown to be a constitutionally sound means of preventing the occurrence of such risks as teenage pregnancy."*

She goes on to find, in paragraph 101, that *"sections 15 and 16 are unconstitutional insofar as they impose criminal liability on adolescents for engaging in consensual sexual conduct."*

### *2.1. Proposed amendments to ss 15 and 16*

The amendments go some way to remedying the defects identified by the Con Court. There will be no criminal liability as long as both parties are over 12 and under 16; or, where one of the parties is 16 or 17 years old, as long as the age gap between him or her, and the other party, is not more than two years.

However, if party A is 16, and party B is 13, criminal liability remains possible. This runs contrary to the finding of the Con Court in paragraph 101 (see above).

A further problem is that the Bill fails to deal with situations where one of the parties is under the age of 12. If, for example, a 10 or 11-year-old child ('A') were to have sexual intercourse with a 14-year-old, the latter having consented, the provisions of s 15 would not apply, and A would be liable to criminal prosecution. Such a situation would clearly fly in the face of the Con Court's findings.

In this regard it should be noted that in terms of the Child Justice Act 75 of 2008, a child of 10 or 11 years of age is rebuttably presumed to lack criminal capacity. In other words, if it is established that such a child knew the difference between right and wrong, and could act in accordance with that knowledge, he or she would be liable to prosecution.

It may well be that such prosecutions would be extremely rare, but that is not the point. As it stands, the Bill rules out any prosecution for sexual penetration or violation where both parties are between the ages of 12 and 16, but it does not rule out such prosecutions if one party (or both of them) is 10 or 11. This is inconsistent and clearly at variance with the finding of the Con Court that the imposition of criminal sanctions on adolescents for engaging in consensual sexual conduct would be unconstitutional.

We suggest that this problem could be rectified by replacing "12 years of age…" with "10 years of age…" in sections 15(1)(a) and 16(1)(a).

### *2.2. Criminalising juvenile sexual activity*

As for the fact that the amendments grant a discretion to the Director of Public Prosecutions to decide whether or not to institute a prosecution, this does not rescue the sections from unconstitutionality. As the court noted in paragraph 76, *"[i]n principle, and as this Court has made plain, the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions. If the discretion to prosecute exists, the prospect of an adolescent being arraigned under the impugned provisions is ever-present. For the reasons set out above, any such prosecution will invariably infringe the best-interests principle, as well as the affected adolescent's rights to privacy and human dignity."*

The proposed ss 15(2) and 16(2) still allow for prosecution to occur where, for example, A was 16 and B was 13. This flies in the face of the Con Court's ruling, and any such prosecution would be unconstitutional.

## 3. Decriminalisation and Consent

It is important to stress that the mere fact that it is desirable (and necessary, in light of the Con Court's judgement), to decriminalise certain sexual activity between adolescents does not automatically imply a lowering of the age of consent. It is simply a recognition that the threat or imposition of criminal sanctions is not regarded as an appropriate way of dealing with adolescent sexual activity. This does not mean, however, that the relevant authorities could not intervene to educate, inform, or guide adolescents who engage in consensual sexual activity at an inappropriate age.

We believe that it is correct that the Bill avoids using the term 'age of consent', and that it instead focuses simply on ensuring that certain forms of adolescent sexual activity are insulated from criminal liability.

## 4. Conclusion

We will be happy to address the Committee orally if invited to do so.

For further information please contact

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