Justice Alliance of South Africa

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**WRITTEN SUBMISSION**

**IN RESPECT OF**

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

**[B18-2014]**

**TO**

**The Parliamentary Portfolio Committee on**

**Justice and Correctional Services**

3 February 2015

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**INTRODUCTION and BACKGROUND**

JASA was a party as Amicus Curiae in both the High Court and Constitutional Court hearings supporting the Respondents in some respects and the Applicants in others. In both Courts JASA led evidence.

JASA wishes to propose FOUR further amendments to the Bill presently before the Committee all of which stem from the following matters of background:

1. Notwithstanding the ruling of the Court that no children under 16 should be criminalised for consensual sexual behaviour, it is vital that Parliament should do everything to ensure the protection of a younger child from an older ‘predator’. Many children in South Africa come from a background where they simply do not realise they have the right to say ‘no’. Very few if any children understand the legal doctrine of ‘informed consent’.

2. Traditional African Law has always made the protection of virginity a high priority in social mores.

3. The debate on TV and Radio at the time of the court hearings (in which the writer took part on several occasions) demonstrated that at least 80% of those who phoned or sent in text messages opposed the decriminalisation of child sex simply on the basis that they realised that for their own children and others there must be some deterrent to early sexual intercourse because most children were unaware of the risks involved. Children need and appreciate boundaries; Parliament has not hesitated to impose them in other areas such as alcohol and tobacco.

4. The Constitutional Court judgment criticised the State for not producing evidence to demonstrate that sanctions would be a deterrent to assist in controlling the “material risks” of children having sex. It is true that the State did not produce such evidence but JASA did, and, alas, the Court seems to have ignored it (Para 87 of Judgement). We accordingly attach herewith the affidavit of David de Korte, Principal of Camps Bay High School, supported by some 50 other school principals in the W Cape alone, with some 30 adding their signatures. The importance of this evidence to this Committee is to show that teachers (and of course parents and guardians) do need some form of sanction to control the present pandemic of child penetrative sex with all its grave risks. Pre-puberty children in particular must be protected by Parliament.

5. The ruling of the Court puts South Africa out of step with other major jurisdictions such as the UK and USA which retain sanctions for consensual child sex.

6. The Court having closed the door on imposing criminal sanctions on the children themselves, it becomes incumbent on Parliament to exercise its sovereignty and find alternative ways of protecting young children.

**WE THEREFORE PROPOSE THE FOLLOWING FOUR AMENDMENTS TO THE BILL**

1. The lower age of consent for penetrative sexual intercourse should be raised to 13 years for both boys and girls. This would mean simply amending clause 2 of the Bill from “12 years” to “13 years”. There must be an exception for those lawfully married within the terms of South African marriage law.

JASA is of an open mind as to whether Clause 3 should be amended in the same way.

2. ‘Kissing’ should be removed entirely from the definition of sexual violation where both parties are children. There is no doubt that its inclusion is a nonsense in this day and age, and it undermines respect for the legislation.

3. *A parent or guardian who knowingly permits a child under 14 years of age to engage in penetrative sexual intercourse shall be guilty of an offence.*

This type of sanction already exists in South African law in respect of parents who fail, without any good reason, to ensure their children attend school.

We submit it is significant that a child turns 13 while still in primary school, and 14 when in High School.

4. Section 54 of the Principal Act shall be amended by the inclusion of a new subsection to read:

*A person who has knowledge of a child under 14 years having penetrative sexual intercourse may\* report the matter to a designated child protection organisation, or to the provincial department of social development, who shall thereafter follow the procedures set out in section 110 of the Children’s Act 38 of 2005.*

\*Should it be ‘must”?

PLEASE NOTE: JASA requests an opportunity to make an oral submission on February 10 2015.

John J Smyth, QC

Chief Executive

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3 February 2015