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

Submitted by:

The Teddy Bear Clinic for Abused Children

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Background

The Teddy Bear Clinic for Abused Children, is a not for-profit company duly registered and incorporated in accordance with section 21 of the Companies Act, Act 61 of 1973. This organisation has its origins more than 28 years in the outpatient facilities of the Johannesburg General Hospital (Charlotte Maxeke) and the Department of Paediatrics of the Medical School of the University of the Witwatersrand in response to an urgent need for medical examinations for children.

The Teddy Bear Clinic offers a comprehensive range of services for abused children and other children in need of care, including forensic medical examinations, forensic assessments, psychological assessments (competency to testify, suffering undue mental stress – section 213, and mental age assessment), counseling, play therapy, preparation for court to children and their families, sexual violence awareness programmes at school and within the community, educator training on sexual abuse, diversion programmes for young sex offenders and training and research.



Comments

This section refers to the Amendment of section 15 and section 16 of Act 32 of 2007.

1. Sections 15 and 16 of the Sexual Offences Act made it a crime for children between the ages of 12 and 15 to engage in any and all conduct of a consensual, sexual nature – including holding hands, cuddling, kissing, and other behaviours part of a normal adolescent sexual development. We firmly believe and support the amendment bill that it should not be criminalised.
2. Criminalisation is both labelling and disempowering and induces secondary trauma thus, it is in contravention of the best interests of the child.
3. Apart from creating strange anomalies, when read with other laws relating to children, these sections infringed a range of children's constitutional rights, including equality, privacy, dignity and were not rationally connected to the purpose the state claimed it sought to achieve with these sections.
4. These provisions were particularly harmful for girl children, as girls can bear a physical marker of sexual intercourse in the form of pregnancy, where boys do not. Girls would thus be 'easy targets' for prosecution under these misguided laws. Far from deterring risky sexual behaviour, this also discouraged girls from reporting rape for fear of being charged with so-called 'consensual sexual penetration/violation'.



5. False allegations of rape in the case of pregnancy where young girls were seeking help at clinics alleging that they were raped by strangers because of their pregnancy status and were too afraid to admit that they were in fact in a consensual sexual relations because of the legal implications it would have on both parties.
6. Criminalization of consensual sexual acts (especially coupled with the duty to report) limits the ability of both parents and support organisations to educate, empower, guide and support adolescents in their sexual development. This they cannot do, because they cannot be seen to promote behaviour that is illegal. Parents were obliged to report any form of intimate contact to the police or relevant authorities.
7. Instead of being helpful it was more harmful and hence counter-productive.
8. At no stage was sex between teenagers condoned or encouraged.
9. The age of consent has remained the same which is 16 years.
10. Even when children were diverted away from the criminal justice system, they did not avoid the substantial trauma or harm created by the exposure to earlier processes in this system such as arrest, questioning by police officials and detention in police cells. The questioning had negative effects on the dignity of children, and arrest and detention obviously exacerbated the negative effects.
11. There are glaring contradictions which stipulate that adolescents do not have the capacity to make choices about their sexuality yet on the other hand they could be held criminally liable for such a choice.



12. We would like to emphasise that these cases do not affect or deal with any acts of sexual violence perpetrated by children. It deals exclusively with *consensual* sexual acts between children. Any non-consensual violent sexual offences committed by children will still be dealt with in the criminal justice system in line with the Child Justice Act.

The Teddy Bear Clinic supports the proposed amendments to section 15 and section 16 which was an outcome of the Constitutional Court ruling.

Recommendation(s)

1. Professionals and parents should provide children with the necessary support and guidance about sexuality to make informed decisions without fear of incriminating the child or themselves.
2. Whereas what is required is an open and frank discussion between children and adults about positive sexual behaviour.
3. Government departments should invest in parenting programmes to facilitate open dialogue between parents and children.
4. Schools should be equipped and empowered to provide adequate education and information through their life skills programme.
5. There should be a shift from punitive to prevention.

The Teddy Bear Clinic supports the proposed amendments to sections 46, 47 and 48 that deal with the responsibility of convicted sex offenders to disclose that they are on the Register.



Comments

1. Both adults and children convicted of a sexual offence should automatically go on the register and this is problematic as children are treated in the same way as adults.
2. It also places a burden on the child to make representation to the court to motivate why his/her name should not be placed on the register.
3. This could also have further implications of costs because children who cannot afford legal representation may not be in a position to make this submission.
4. The issue of assessment is critical and there is no clarity around this issue. Who will bear the costs? Who will conduct these assessments?

Recommendation(s)

1. Children should not automatically be placed on the register unless there the child presents a high risk of re-offending or has committed more than one offence. It has to be compelling circumstances which must be at the discretion of the court what those circumstances are.
2. It should also be clarified who the suitably qualified persons are to conduct the assessments such as social workers and psychologists.
3. The cost of the representations should be at the cost of the state to ensure that all children have equal access.

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