Oral submissions to Parliament on behalf of Joshua Generation Church

4 March 2015

Re: Proposed amendments to the Criminal Law (Sexual Offences and Related Matters Act)

I am here on behalf of and representing:

1) Joshua Generation Church, a church with a regular attendance figure of approximately 2400 people across 15 congregations; and

2) the Four12 global partnership of churches overseeing over 200 churches in South Africa and worldwide.

In that capacity, I would like to make oral submissions on the proposed amendments to the Criminal Law (Sexual Offences and Related Matters) Act of 2007 as follows:

Firstly, we would like to make clear that we understand that the Constitutional Court of South Africa has made a judgment on this issue, and that this amendment is therefore *fait accompli* - and we commend parliament for implementing that which the Constitutional Court has already decided on.

We understand the reasoning behind the amendment and agree that the criminal prosecution of children under the age of 16 is not the answer to *the problem of children engaging in consensual sexual activity under the age of 16*, however we submit that for in the best interests of the children in South Africa, there should **be** an answer to the problem and the amendment unfortunately does not in its current form make way for any answer to that problem.

As such, we submit that whilst this amendment covers certain aspects of the Constitutional Court judgement, it does not take into account certain aspects raised in the Constitutional Court judgment with relation to the protection of the interests of the children of South Africa, and we submit it should not be left as it is - but should be added to.

With the age of consent essentially moving to the age of 12, South Africa is now going to have one of the lowest ages of consent in the world and is joining a very small handful of countries worldwide with an age of consent that is so low.

With this in mind, it is submitted that parliament has the responsibility to go the extra mile in protecting the children of South Africa against all the potential negative outcomes that can go hand in hand with a country having an age of consent that is so low.

We are aware that there are positive outcomes to this amendment, such as the protection of children from the criminal justice system. However we submit that there are also negative outcomes that could occur as a result of having the age of consent so low and request that parliament please take these into account.

LEGITIMATE AND IMPORTANT PURPOSE

It is important to note that the Constitutional Court ("Con Court") at para 81 accepted that the purpose of discouraging adolescents from prematurely engaging in consensual sexual conduct which may harm their development, and increase the likelihood of risks associated with that sexual conduct, **is a legitimate and important purpose for parliament to take into account.** So the Court acknowledged that the **discouraging of adolescents from engaging in consensual sexual conduct** is a legitimate underlying purpose for parliament to take into account when legislating.

The Court further acknowledges at para 97 that consensual sexual acts can carry the risks of "psychological harm, pregnancy or the contraction of sexually transmitted diseases."

LESS RESTRICTIVE MEANS

So the Con Court acknowledges the risks involved as well as the purpose behind the legislation as being not only legitimate **but also important**. And whilst they have declared the criminality to be unconstitutional, which we are in agreement with, in para 95, the Court said that the state ought to be given a margin of appreciation with the use of less restrictive means available to achieve the purpose.

So whilst the criminal provisions are to be done away with, the Con Court specifically states that parliament may and should use less restrictive means to achieve the legitimate and important purpose of **discouraging adolescents from engaging in consensual sexual conduct.**

This amendment is correctly worded in that it takes away the criminal element, however it is incomplete in that it does so without adding or employing any "less restrictive means" to achieve the purpose of discouraging adolescents from engaging in sexual conduct

In para 98, the Con Court specifically says that there are various methods that the state can use in order to achieve the purpose - **being the discouragement of adolescents to engage in sexual conduct.**

As such, we would like to submit that due to the fact that:

1) South Africa is now joining a small handful of countries worldwide that have the lowest age of consent in the world; and

2) The Con court has stated that the discouraging of adolescents from engaging in sexual conduct is a legitimate and important purpose and

3) That Con Court has said that the State can employ less restrictive means to achieve that purpose,

We would like to implore parliament to recognise:

1) the legitimate purpose that the Constitutional Court laid out ,and

2) apply such less restrictive means whatever they may be.

To put such a big decision into the hands of children as young as 12 without ensuring that there are mechanisms in place to inform them of the consequences of their decisions would not be responsible and would definitely not be in the best interests of the children of South Africa.

We would like to further raise that there are potential scenarios that the amendment does not take into account and that it should:

"AIDING AND BETTING" CLAUSE

The first example would the scenario where an adult encourages 2 children between the ages of 12 and 15 inclusive to engage in sexual activity in front of said adult or in front of someone else. In terms of this amendment, such an act would not be illegal as the adult can now raise the defence of the consent of the children. This will be a loophole in the legislation following this amendment and we submit that it is too important a loophole to ignore. In the best interests of the children of South Africa, it is submitted that we need a clause dealing with this potential eventuality.

Germany is one of the countries that has recognised this risk that I have just referred and we submit that South Africa should have a clause similar to that of Germanys saying for example that

"Whoever abets the commission of sexual acts of a person under sixteen years of age in front of himself/herself or in front of a third person…

by acting as an intermediary; or

by encouragement to commit the sexual act; or

by furnishing or creating an opportunity,

shall be punished with imprisonment."

I put it to parliament to ensure that such a scenario is either covered somewhere else in our law as being a criminal offence (either under the grooming provisions or elsewhere), or to add a clause to this amendment ensuring that it is covered.

"EXPLOITATIVE SITUATION" CLAUSE

Germany has also added a very general clause stating that *"It is illegal to take advantage of an exploitative situation."*

It is submitted that this is a good clause because it allows the court to exercise discretion where the act committed was clearly exploitative of a child, even if such act was with the child's consent. This clause could cover the example raised by Honourable Member Steve Swart, where a young girl is told by a gang that in order to join them, she has to engage in sexual conduct with them as a form of initiation and the girl consents. The current amendment does not cover a situation like this - but the addition of a clause similar to *"It is illegal to take advantage of an exploitative situation"* will give the court a discretion which it is submitted the courts will need following this amendment.

As such, we would submit that a similar clause be considered for South Africa.

"POSITION OF TRUST" CLAUSE

Furthermore , we would ask that parliament consider that many countries have a higher age of consent if the older partner is in a position of authority over the young person such as being his or her teacher, manager, coach, parent or stepparent.

The so called *"Position of trust"* rule is applied in Sweden and Canada (to name just two countries) and raises the age of consent to 18 or similar when the adolescent is in the in the perpetrator's care or under the authority of the perpetrator. We would ask that this be considered by parliament.

The legitimate problem we are facing here is that nobody in this room, nobody in parliament and no reasonable and moral person in South Africa believes that 12 year old children should be engaging in sexual activity. Therefore, this amendment, while solving the problem of criminality, is somewhat of an anomaly in that it allows and legalises something that no-one believes children should be doing. As such, we need to recognise that Parliament has a responsibility to fill the gap that this amendment is going to leave in our law.

"RED FLAG" POLICY ISSUES

I would furthermore like to raise the following "red flag policy issues" which are indirectly relevant to the subject matter and deserve consideration and thought when drafting these amendments and thereafter.

1) We have heard over and over in this room today that it is and should be the responsibility of the parents to discipline their children and to take responsibility for the actions of their children, and rightly so - parents do have a responsibility to teach, discipline and protect their children and this responsibility is heightened in light of this amendment. As such, it is important that parliament ensure that there are policies in place freeing the hands of parents to discipline their children in a reasonable manner. I am in agreement with my brother from the Kingdom Governance Movement that one cannot be saying in one room of parliament that parents are responsible for the disciplining of their own children, and then in another room be saying that reasonable spanking should potentially be outlawed. There has to be a congruency in our laws and a wholistic approach with every arm of government knowing what the other arm is doing. In this room today, we have been told and it has been confirmed over and over that the parents are responsible for the discipline of their children and therefore in line with that, it is submitted that parliament implement a policy whereby it is understood and accepted that reasonable chastisement including the use of reasonable spanking be left in the hands of the parents. This is a big issue on which much can be said, but I am touching on it because the decriminalisation of sexual activity is now leaving a gap which parents are going to have to fill and it is submitted that parliament should go to great lengths ***not to tie the hands of parents*** trying to fill this gap.

2) Secondly, it has been submitted and stated many times in this room that faith-based organisations are to play an important role in the teaching of our children not to engage in sexual activity, and rightly so. With that in mind, it is very important that parliament recognise the importance of faith-based organisations ***being permitted*** to teach in accordance with their scripture and their beliefs. Again, one cannot in one room of

parliament say “The faith-based organisations must teach these children to abstain” and in another room call it “hate speech” when faith-based organisations preach from their scripture against something that is legal in the eyes of the law. We have seen here today that for practical reasons, the law does not always line up with what the majority of South Africans believe to be right and faith-based organisations should have the freedom to state as such. This is a freedom of religion and freedom of conscience and freedom of expression issue - but it is submitted that it is an issue worth raising in this context due to the current climate under which this amendment finds itself. ***Parliament should have policies in place specifically stating the importance of protecting the freedom of religion, freedom of conscience and freedom of expression of faith-based organisations.***

3) Thirdly, the Con Court judgment was based on *inter alia* the dignity and privacy of children. I would like to raise as a red flag for parliament the concern that the issue of dignity and privacy for children not become a slippery slope into complete freedom of children to do what they like without any guidance or discipline. The slippery slope starts with the decriminalisation of sexual activity of children based on dignity and privacy of the children (which is now being done). From there, it is not unforeseeable that the next point down the slope would be to take away the rights of parents to interfere with the choices of their children under the banner of “dignity and privacy.” Parents have already lost the right to ***consent or even be aware*** of their small children having an abortion. In the all-consuming name of “privacy and dignity,” children as young as 10 can now go to an abortion clinic and have an abortion without even consulting with their parents or gaining the consent of their parents (which law we as an organisation disagree with, but unfortunately is currently in place). As such, it is not a stretch of the imagination that the next point down this slippery slope would be the taking away of the rights of parents to interfere in the “sexual lives” of their children. I would ask parliament to be aware of this, red flag it now, and put into policy that Parliament notes that:

a) it is not in the best interests of children to be engaging in sexual activity (in agreement with the Con Court); and

b) it is an important responsibility of the parents to discourage their children from engaging in sexual activity and for the discipline required therewith.

For the sake of the best interests of the children in this country, it is submitted that a policy preventing the issue of child sexual activity falling down the slope of a “free for all” under the banner of “privacy and dignity” be put in place as soon as possible, specifically noting that the guidance and authority of parents should not be tampered with.

SUM UP

In summary, we submit that:

1) The amendment covers the requirements of the Constitutional court with regard to the lifting of the criminal sanctions while still protecting the adolescents from perpetrators that are more than 2 years old, which is good;

2) The amendment does not however provide for any less restrictive means to discourage adolescents from engaging in sexual conduct to their detriment;

3) It also does not cover for certain potential loopholes which loopholes are to be considered and investigated;

4) there are certain "red flag" policy issues which come to the fore in light of this amendment which we submit that parliament should bear in mind and attempt to counteract.

Therefore we would request that parliament go back to the drawing board with a view to considering all the potential negative outcomes of the amendment and attempt to close loopholes that could exist to the detriment of the children in South Africa, as well as ***adding in measures*** that must be taken by the state to educate children and discourage them from engaging in sexual activity. It is submitted that there is a responsibility on parliament to consider the fact that the removal of the criminal aspect leaves a void that must be filled by the legislation, faith-based organisations and the parents if our children are going to be adequately protected. Parliament should also ensure that the correct policies are in place to free the hands of parents and faith-based organisations who are all too happy to assist parliament in the implementation of the "less restrictive" measures as set out by the Con Court, and must not be hindered in doing so.