

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

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**2<sup>nd</sup> February 2015**

**On behalf of Childline South Africa, I, Dumisile Nala, hereby make a submission on the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill and request the opportunity to make an oral submission to the Parliamentary Portfolio Committee on Justice and Correctional Services on the 10<sup>th</sup> Feb 2015.**

**Childline South Africa**

Childline South Africa is a National Non-Profit Organisation that provides services to children and families in all 9 provinces and in both rural and urban areas. Services include (inter alia):

- The national toll-free 24 hour helpline for children and adults with concerns about children;
- Online counseling of children, young people and young adults;
- Therapy programmes for children who have been abused, inclusive of sexual abuse and sexual exploitation. These programmes include the families of the children;
- Rehabilitation programmes for children and young people with sexually inappropriate and criminal sexual behaviour;
- Awareness programmes for children and adults on child protection issues including life skills information on sexuality, appropriate sexual behaviour and the psycho-sexual behaviour and development of children;
- Training of parents, caregivers and professionals on childhood sexuality and the management of inappropriate sexual behaviour.
- Training of professionals on legislation relating to the protection of children's rights, including both the Child Justice Act no 75 of 2008 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act no 32 of 2007.

Given the above experience and activities, Childline South Africa is eminently qualified to comment on the Amendment Bill before Parliament having worked with children both as victims as well as with children in conflict with the law in relation to sexual offences.

As an Organisation Childline does not promote sexual behaviour between young teenagers, but rather attempts to provide children with the information and life skills that enable them to make informed decisions and hopefully delay their sexual debut until they are older and more mature.

We therefore comment as follows:

- 1. Consenting Sexual Behaviour of Children: (Ss 15 and 16 of the Criminal Law (Sexual Offences and related Matters) Amendment Act and Ss 2 and 3 of the Amendment Bill**

Childline strongly supports Ss 2 and 3 of the Amendment Bill for the following reasons:

- I. The provisions contained in Ss 15 and 16 of the Act have prevented children from accessing services including advice and counseling on responsible sexual behaviour, as well as clinic and health services relating to contraception, ante-natal care where a child has fallen pregnant and safe termination of pregnancy. Childline SA has been involved in a child death review project in an experimental site in KwaZulu-Natal, and the most frequent death review category has been related to the deaths of fetuses, some viable, where the young mother has resorted to an illegal process of abortion and/or concealing the birth of the foetus.
- II. Criminalizing consenting sexual behaviour has not reduced HIV infection in young teenagers. (HSRC report 2014, reporting on HIV incidence in 2012) Many express concern about the state of our society and the need to regenerate moral values and curb adolescent sexual and other behaviour. It must be noted that this legislation has prevented open communication between parents and children, counselors and child, as any parent or counselor in whom a child confides when asking advice about sexual behaviour, is obligated to report that child and his/her partner. It has broken down trust between parents and caregivers and children, and counselors to whom children go for help.
- III. Criminalising consenting sexual behaviour among young teens distorts what is considered normal sexual exploration among teenagers. Non consenting sexual behaviour between children should be actively and appropriately followed up by the Criminal Justice System.
- IV. Childline's experience has indicated that where police spend time investigating consenting sexual behaviour among young teens, this diverts attention and resources away from appropriately and effectively managing more serious sexual crimes perpetrated against children by adults.
- V. Some young adolescents do not have the knowledge or maturity to make responsible decisions about their sexual behaviour. Criminalisation prevents openness on sexuality and creates fear of seeking appropriate information.
- VI. Criminalisation also inhibits and even prevents open discussion on a child's sexuality and sexual behaviour. Parents, caregivers and counselors fear being put in the position of having to report their own, or children in counseling to the police because of the mandatory reporting requirement in the Act.
- VII. The criminalization of young adolescents has negative consequences for the child. This produces stigma and exposure to processes that may have a deleterious impact on the child, for example police management of children is rarely sensitive to the best interests and needs of the child.

- VIII. Consultation with trainees attending Childline training on the Criminal Law (Sexual Offences and Related Matters) Amendment Act indicates almost unanimous agreement that criminalization of adolescent consenting sexual behaviour is counter-productive to the development of responsible young adult sexual behaviour. Recommendations and suggestions as to alternatives included:
- Parents, caregivers and non-government organisations need to create a safe space to enable discussion on sexuality and sexual behaviour with young teens in order to facilitate their making responsible and informed choices about their sexuality and sexual behaviour.
  - Prevention and early intervention programmes should be developed and implemented to facilitate the development of responsible sexual behaviour.
  - Some respondents suggested that schools religious organisations develop and implement positive sexuality programmes for children and youth.
  - Platforms for anonymously asking questions and obtaining appropriate information on responsible sexuality should be created for children and young people without fear of exposure and/or a criminal investigation process.

## 2. Children convicted of sexual crimes and the Sexual Offences Register

Childline is not of the view that *no* child should ever be placed on the sexual offences register, but that there should be both a thorough assessment of the child, an opportunity to participate in a sex offence specific rehabilitation programme where appropriate, and then a re-assessment of the child's level of risk to others. In view of this position, Childline SA strongly supports the changes to S 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act/Section 7 of the Amendment Bill that are proposed by the Child Law Centre, University of Pretoria as follows:

Section 50(2):

(2) (a) A court that has in terms of this Act or any other law—

(i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or

(ii) made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act, 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person,

must, subject to the provisions of subsection (2A), make an order that the particulars of the person be included in the Register.

(b) When making an order contemplated in paragraph (a), the court must explain the contents and implications of such an order, including section 45, to the person in question.

(2A) (a) If a court has in terms of this Act or any other law convicted a person (“A”) of a sexual offence against a child or a person who is mentally disabled and A was a child at the time of the commission of such offence, the court may not make an order as contemplated in subsection (2)(a) unless –

(i) the prosecutor has made an application to the court for such an order;

(ii) A has been assessed, at state expense, by a suitably qualified person, as prescribed, with a view to establishing the likelihood of whether or not he or she will commit another sexual offence against a child or a person who is mentally disabled;

(iii) A has been given the opportunity to make representations to the court as to why his or her particulars should not be included in the Register; and

(iv) the court is satisfied that substantial and compelling circumstances exist, based upon such assessment and any other evidence, which justify the making of such an order.

(b) In the event that a court finds that substantial and compelling circumstances exist which justify the making of an order as contemplated in subsection (2)(a), the court must enter such circumstances on the record of the proceedings.

The motivation for these changes is as follows:

1. Childline South Africa strongly supports the ethos and intention of the Child Justice Act no 75 of 2008 which establishes the principle of dealing with children in conflict with the law via processes that are congruent with restorative justice and rehabilitation. In some instances (for example, Carpenter 2013) this is considered “cruel and unusual punishment” as it has life-long consequences for children who are put on the register. These life-long consequences may close many lifetime opportunities for children and the labeling of the child places the child at risk of fulfilling an aberrant life script. According to van Aardt (2014) “registration requirements impose restrictions on young offenders that inhibit their ability to embrace a reformed life and is detrimental to young sexual offenders.”
2. Research indicates that young offenders are different from adult offenders, and are unlikely to re-offend. Children tend to offend against similar aged children and are therefore unlikely to develop a pattern of offending throughout a lifetime. Children usually have different motivations for offending, different factors that provoke offending behaviour and in Childline’s extensive experience over many years, the vast majority of sexually offending children dealt with through our programmes have suffered extensive abuse (both sexual and physical), exposure to domestic violence, and severe emotional neglect. Placement on a register will not provide effective remediation for these violations.

Children's behaviour, because of both neurological and emotional immaturity tends to be more impulsive, less coercive, lacking in anticipation of consequences, and may be linked to curiosity, exposure to and enacting of pornography, or enacting something that is seen either in real life or in the media, confusion, anger and trauma.

It is important to note that there are critical motivational, neurological, psychological and behavioural differences between young sexual offenders and adults.

3. Because during adolescence, a child's sexual behaviour is unlikely to have settled into a fixed pattern, children are more amenable to successful completion of a rehabilitation programme which addresses their inappropriate and/or aberrant sexual behaviour.
4. Assessment processes prior to placement on a sexual offender register will enable the potential for rehabilitation to be assessed and appropriate responded to.
5. Evidence into the effectiveness of registers with regard to safeguarding children from sexual abuse is poor at best.

Our overall comment is not that child sex offending behaviour should not be viewed in a serious light, but rather it should be dealt with in a manner appropriate for children and in line with both international (the United Nations Convention on the Rights of the Child), regional (African Charter on the Rights and Welfare of the Child) and National principles of child justice.

It is essential to note the critical shortage of rehabilitation programmes for child sexual offenders and therefore the need to invest in children to ensure the long term sexual safety and freedom from abuse in South African Society.