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To: Dr Mathole Motshekga
The Chairperson
Portfolio Committee for Justice & Correctional Services
20 March 2015

via email: vramaano@parliament.gov.za

Dear Dr Motshekga

SUBMISSION TO THE PORTFOLIO COMMITTEE FOR JUSTICE AND CORRECTIONAL SERVICES WITH COMMENTS / INPUTS ON THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT

The NPA thanks the Committee for the opportunity to provide inputs on the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B18-2014] which is currently before the Committee for consideration.

The NPA welcomes the amendments arising from the orders in the two Constitutional Court cases and in response to the specific request for comments, the NPA's inputs to the committee are on the following three issues:

1. The impact the criminalisation of sexual conduct between 12 to 16 year olds has had; i.e. the effectiveness of such prosecutions as a deterrent

The NPA has instituted very few prosecutions in the past in terms of both the Sexual Offences Act 23 of 1957 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, where both persons were children between the ages of 12 and 16 years. The relevant sections under discussion would be sections 15(2) and 16(2) of Act 32 of 2007.

It was recorded in the Department's Heads of Argument in The Teddy Bear Clinic for Abused Children and RAPCAN v The Minister of Justice and Constitutional Development Constitutional Court case (Case CCT 12/13[2013] ZACC 35, judgement delivered 3 October 2013); ".....that historical data indicates that the NDPP in the past three years, since the enactment of the SOA, has only authorised two prosecutions in terms of section 15, both cases in which the children were diverted.

In relation to section 16, the DPPs have received three dockets of which two prosecutions were declined and one remains pending due to further investigation". This information related to cases where both persons were between the ages of 12 and 16 years.

Since the said Constitutional Court judgment there has been a moratorium on prosecutions in terms of sections 15 and 16, as they relate to both parties being children between the ages of 12 and 16 years (for sections 15(2) and 16(2)). Prosecutions have however continued against persons who are older than 16 and who offend against children between the ages of 12 and 16 years.

For purposes of providing actual data regarding prosecutions on sections 15 and 16, included herewith a table that reflects information from the Thuthuzela Care Centres on these sections with reference to convictions and acquittals (where one party is over 16 and the other below the ages of 12 and 16 years) in comparison with all the matters reported at TCCs. This information is provided for the current financial year as from April 2014 up to January 2015 (10 months); (Kindly note that the information as provided [excluding matters reported] are reflected per offence or per offender and not per case).

April 2014 – January 2015	Matters reported at TCCs	Section 15 & 16 convictions	Section 15 & 16 acquittals	Diversion on section 15 & 16	Informal Mediation on section 15 & 16
Q1	6706	25 / 4	0	1 / 0	3 / 0
Q2	7464	28 / 3	4 / 0	4 / 0	0 / 2
Q3	8442	29 / 2	0	4 / 0	3 / 0
January	2580	5 / 0	2 / 0	2 / 0	0

Totals	25 192	87 / 9 = 96 The total number of conviction s for Sexual Offences: 1711. Therefore 96 from 1711 represent s 5.6%.	6 The total number of acquittals for Sexual Offences: 730. Therefore 6 from 730 represent s 0.8%.	11	6 / 2 = 8
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In the analysis, the total number of sections 15 and 16 finalised cases with a verdict in court amounts to $96 + 6 = 102$. Based on all sexual offences finalised with a verdict $1711 + 730 = 2441$, the % of sections 15 and 16 finalised is $(102/2441)$, 4.2%. Also note this information is only in relation to TCC-reported cases.

This indicates that even in cases where the accused is over the age of 16, and the complainant is between the ages of 12 and 16, where sections 15 and 16 applies, the NPA only deals with a limited number of these cases.

The information that the NPA has on the deterrent effect of criminalising consensual sexual conduct is not based on research, but on experience in the courts. With reference to sections 15(2) and 16(2) and the data provided (*supra*), it seems that criminalisation does not have any effect on reducing these reported cases. The charges are mostly laid by parents, with neither child willing to participate in the criminal justice process. This obviously poses a challenge for prosecution in that neither party is willing to provide evidence against the other. Most cases are either withdrawn by the South African Police Services or the NPA makes a decision not to prosecute (*Nolle Prosequi*). These decisions are based on the Constitutional imperative of the best interests of the child. Cases of this nature are usually referred to the Children's Court or to the Department of Social Development for appropriate interventions, in terms of the Children's Act.

2. Challenges experienced in relation to the management of the National Register of Sexual Offenders generally, and the registering of child sex offenders in particular

Guided by the Constitution, we in the National Prosecuting Authority ensure justice for the victims of crime by prosecuting without fear favour or prejudice and by working with our partners and the public to solve and prevent crime

The custodian of the NRSO is the Department of Justice and Correctional Services and not the NPA. Chapter 6 of the Act does not place any legal obligations on the NPA to perform any functions as they relate to the NRSO, other than in section 50(4). The obligation to bring it to the court's attention (by the NPA or any person, preferably the prosecutor dealing with the case), should the court have failed to make the necessary order, is addressed in the NPA Directives.

Any amendments to the Act in this regard would place no further obligation on the NPA and would therefore have no specific effect on the NPA in addition to the current status. The NPA would however appreciate the opportunity to address the committee on the legal procedure proposed in section 7 of the Bill. We believe there may be merit in the argument that placing the onus on the child accused (once convicted) to show why details of the said child should not be placed on the register is unfairly burdensome on the child.

In relation herewith it is our submission that the current procedure proposed in section 7 of the Bill is contrary to the ethos of our Constitution as stipulated in section 28(2). Reasons for this argument have been raised in various submissions already made to this Committee. The discretion rests with the court to make the order, but it may be more appropriate, which is our submission, to place the responsibility (in the form of an application) on the state to present evidence as to why the order should be made to include details of the child accused in the NRSO.

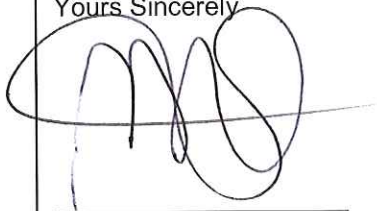
Various options can be explored as to how this evidence must be obtained and presented to the court; this would have to be at the state's expense. This process would commence after conviction, but evidence may be drawn from the judicial findings in the trial. The accused would have the opportunity to lead evidence to oppose the application. The court could *mero moto* call for evidence or make an order based in its findings (judgement); the accused and state would have an opportunity to address the court and lead evidence before the order is made. A total exclusion of the particulars of all convicted children of a sexual offence against children or people with disabilities would not be appropriate as there may be cases that warrant the details of an accused to be in the NRSO where the accused is a future danger to those vulnerable groups.

3. The NPA's views in amendments affecting their operations e.g. amendments to sections 15 and 16

The effect of the amendments would reduce the number of cases presented to the NPA for decision. As detailed above, most of these cases are *Nolle Prosequi*, in the best interests of the child.

The NPA welcomes the delegation of the decision to institute a prosecution to the DPP and the further delegation should s/he wish to do so in sections 2 and 3 of the Bill. The factors to consider may be addressed in the NPA directives in terms of section 66(2)(a)(i).

Yours Sincerely



MR MXOLISI NXASANA

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

DATE: 19/3/2015