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**SUBMISSIONS OF LEGAL AID SOUTH AFRICA ON THE CRIMINAL LAW
(SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT
AMENDMENT BILL 16 OF 2014**

March 2015

INTRODUCTION

Legal Aid South Africa has been invited to make submissions concerning the abovementioned Bill which is currently being debated in Parliament. We have been specifically requested to also address the question of legal assistance for children placed on the register of sexual offenders.

The Bill was introduced as a consequence of two judgments of the Constitutional Court. In *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (1) SACR 327 (CC) (“the Teddy Bear case”) it was held that the provisions of the principal Act relating to the criminal liability of children under the age of 16 in respect of consensual sexual conduct were unconstitutional for unjustifiably intruding on children’s rights to human dignity and privacy and were incompatible with the best interests of children. The applicable sections were declared invalid, but such declaration was suspended for 18 months to allow Parliament to correct the defects.

In *National Director of Public Prosecutions and Others* 2014 (2) SACR 1 (CC) (“the J case”) section 50(2)(a) of the principal Act provided that the name of a child sex offender had to be entered in the register of sexual offenders. This was declared to be inconsistent with the constitution and invalid to the extent that it unjustifiably limits the right of child sexual offenders to have their best interests considered of paramount importance. This declaration was also suspended for 18 months to give Parliament an opportunity to correct the defects. We wish to point out that in this case Legal Aid South Africa was the applicant’s attorney of record and that one of our senior litigators was counsel for the applicant.

In the light thereof, we will consider the Bill on a clause by clause basis. Where necessary, we will also comment on policy implications for Legal Aid South Africa.

CLAUSE 1

This clause merely clarifies the definition of “child” and we have no objection thereto.

CLAUSE 2

This clause brings about amendments to section 15 of the Principal Act consequent on the judgment in the Teddy Bear case. We have no objection to this clause. It conforms to the judgment of the Constitutional Court and is in the best interests of the child. The effect of this clause will be to reduce the number of children who are prosecuted for this offence and will therefore lessen the demand for legal aid to be provided to these child accused.

CLAUSE 3

This clause brings about amendments to section 16 of the Principal Act consequent on the judgment in the Teddy Bear case. We have no objection to this clause. It conforms to the judgment of the Constitutional Court and is in the best interests of the child. The effect of this clause will be to reduce the number of children who are prosecuted for this offence and will therefore lessen the demand for legal aid to be provided to these child accused.

CLAUSE 4

This clause brings about amendments to section 46 of the Principal Act consequent on the judgment in the J case. We have no objection to this clause. It conforms to the judgment of the Constitutional Court and is in the best interests of the child. There are no implications for Legal Aid SA with regards to the provision of legal aid.

CLAUSE 5

This clause brings about amendments to section 47 of the Principal Act consequent on the judgment in the J case. We have no objection to this clause. It conforms to the judgment of the Constitutional Court and is on the best interests of the child. There are no implications for Legal Aid SA with regards to the provision of legal aid.

CLAUSE 6

This clause brings about amendments to section 48 of the Principal Act consequent on the judgment in the J case. We have no objection to this clause. It conforms to the judgment of the Constitutional Court and is on the best interests of the child. There are no implications for Legal Aid SA with regards to the provision of legal aid.

CLAUSE 7

This clause brings about amendments to section 50 of the Principal Act consequent on the judgment in the J case. We have no objection to this clause. It conforms to the judgment of the Constitutional Court and is on the best interests of the child.

Insofar as policy is concerned, Legal Aid SA is currently required to provide representation to children in terms of sections 82 and 83 of the Child Justice Act 75 of 2008 where they are unrepresented. Therefore, such legal representative would be

able to address the court on behalf of the child on the provisions of this clause. Legal Aid SA will therefore require no additional capacity as a result of the imposition of this clause. Our practitioners are also sufficiently skilled to be able to address the court in this regard.

CLAUSE 8

This clause amends section 51 of the Principal Act so as to make it possible for a person who was a child at the time of the commission of the offence to apply to have his/her name removed from the register of sexual offenders. We have no objection to this clause. It conforms to the judgment of the Constitutional Court and is on the best interests of the child.

Insofar as policy is concerned, Legal Aid SA generally does not provide legal representation to persons who are not detained, arrested or sentenced. However, there are a limited number of exceptions to this general rule where legal representation is provided to a person who is not an accused or detained person in criminal trial, such as a section 204 witness. We will however consider a revision of our policy to provide legal assistance to persons who are envisaged to be affected by this proposed amendment.

CLAUSE 9

The provisions of this clause are necessary as the defence referred to in section 56 (2) (b) of the Principal Act will now be incorporated in Section 16 (see clause 3). We have no objection to the amendment of section 56(2).

CLAUSE 10

This clause makes it possible for the Minister to make Regulations regarding the procedure to be followed in terms of clause 8. This is obviously essential. We have no objection to this clause.

CONCLUSION

The comments of Legal Aid South Africa are submitted herewith.

LEGAL AID SOUTH AFRICA