



Commission for Gender Equality
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**COMMENTS ON THE CRIMINAL LAW (SEXUAL OFFENCES
AND RELATED MATTERS) AMENDMENT BILL [B 18 -2014]**

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1. INTRODUCTORY REMARKS

The Commission for Gender Equality (CGE) is a Chapter 9 Institution and in terms of Section 11 of its empowering legislation obliged to evaluate legislation and make recommendations to the relevant legislature. This responsibility is exercised with the primary aim of promoting, protecting and developing gender equality in South Africa. Under the circumstances the CGE welcomes this opportunity to comment on the Criminal Law (Sexual Offences and Related Matters) Amendment Bill [B 18-2014].

2. GENERAL COMMENTS

The CGE takes cognisance of the fact that the objectives of The Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B 18-2014] are to:

I. Ensure that children of certain ages are not held criminally liable for engaging in consensual sexual acts with each other.

II. To provide discretion to presiding officers to decide whether or not particulars of children should be included in the National Register for Sex Offenders in each individual case.



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- III. To provide a procedure in which certain persons may apply for the removal of their particulars from the National Register for Sex Offenders in each individual case.
- IV. Further, to provide for matters connected therewith.

The above sets of objectives are to be achieved in a way that is mindful of the values of a democratic society that is founded on the promotion of human rights, as entrenched in the Constitution. Particularly those that recognise and protect the child's best interest in a manner which also promotes the interests of society. This is no easy task given the rich cultural diversity which exists in South Africa. Therefore, the CGE is mindful of this responsibility and seeks to ensure that a balance is reached between the two competing interests, namely that which is in the best interest of the child and that which is the best interest of society. Accordingly, in this submission comments are made which seek to ensure that the interests and well-being of the child will not be eroded by the interests of society. In the case of the CGE the interest that we seek to protect is the promotion, protection, development and attainment of gender equality. In this regard the CGE seeks to ensure that the proposed amendment will not prejudice the right of women and more especially the girl child.



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REMARKS BY THE CGE

The CGE believes that Section 28(2) of the Constitution provides a benchmark on the approach to be taken in matters affecting children who must be regarded as any person under the age of 18 years. In terms of Section 28(2) of the Constitution : “ A child’s best interests are of paramount importance in every matter concerning the child”

Accordingly, the CGE believes that the Bill [B 18-2014] must be supported because sexual activity between adolescents should not be criminalised for the following reasons :

(i) Teenagers require support and guidance when dealing with issues related to their physical and emotional development.

(ii) Although teenagers should not be encouraged to engage with sex, this practice must not be denied and cannot be eradicated but has to be managed in a manner that invokes responsibility within all adolescents towards their personal and physical development.

(iii) Legislation which criminalises consensual sexual activity between teenagers is more likely to cause harm to children because it places them in conflict with the law. This inevitably results in emotional trauma, stigmatisation and barriers to teenagers seeking health care services or emotional support from parents, teachers and religious leaders.



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COMMENTS

2.

DEFINITION OF "CHILD"

The Bill aims to amend section 1 of the Act by omitting the reference to an adolescent person namely, "a person who is 12 years or older but under the age of 16" from the definition of "child".

The CGE welcomes this proposed amendment in the spirit of the principle of legality. This is a principle which promotes and encourages law that is not only clear and precise, but also one which is certain. By amending this definition, provision is made for a uniform "category" for all persons under the age of 18 years. This will ensure that all children will be treated equally. Such an approach is in keeping with the spirit and purport of the Constitution as articulated in the equality clause.

Furthermore, it would be in the interest of society to minimize the criminal liability of children, as it is clear that children stand a better chance of being rehabilitated in comparison with adults, who find themselves imposed with criminal liability. One should also take cognisance of the reality that children do engage in sexual acts even though they are advised by parents and are required in terms of social norms not to do so. It would therefore be in the interests of society to avoid, where necessary, the imposition of criminal sanctions in such a manner where our definition of "child" will create an opportunity for differential treatment of children who are

between children.

issue of whether we must criminalise consensual sexual acts
 aforementioned is in essence the main concern and relates to the
 complained about is worthy of criminal liability or not. The
 individual case in order to decide whether or not the behaviour
 balance to grant presiding officers the freedom to deal with each
 of "child" that identifies one age group and as a check and
 In terms of the above, it would be rational to adopt a definition

behaviour (teenage sex).

legal convictions do not regard the conduct as criminal
 exists in South Africa based on our moral convictions when our
 to subject children to the harsh criminal justice system that
 reasonable and justifiable. Therefore, it is untenable to be quick
 democracy which requires us to act in a manner which is
 regard South African society has embraced a constitutional
 society may not condone in terms of its existing norms. In this
 other prohibited conduct that lead to sexual encounters which
 of development are pre-disposed to engage in relationships and
 sometimes overwhelming and children by virtue of their stage
 regard one must appreciate that sexual urges are natural,
 appreciate the harmful consequences of their conduct. In this
 slightly older but also vulnerable or still without the capacity to





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Under the circumstances the CGE supports an approach where children must be regarded as one category of individuals, which is, any person falling under the age of 18 years. Within such a category we welcome the notion of three additional categories within which children are likely to be placed in respect of their capacity to appreciate the nature of their conduct which should include, the *infans*, *impubes* and *pubes*. The aforementioned consideration is a differentiation that must be applied by the presiding officer in each individual case and not one that is preconceived.

Against the above background the CGE welcomes the proposed amendment to the definition of "child".

3. CLAUSE 2

SECTION 15 OF ACT 32 OF 2007

The proposed amendment in Clause 2 which seeks to decriminalise all sexual intercourse between children aged between 12 to 16 years but imposes limitations on sexual activity between children aged between 16 years and 17 years is unconstitutional, because it discriminates against children on the basis of age. Such an approach is prohibited in terms of Section 9(3) of the Constitution.

In terms of the proposed amendments there is a likelihood that all instances of sexual intercourse between a girl of 13 and a boy of 16 (or vice versa) will be regarded as a sexual offence.

Accordingly, the CGE does not support the proposed amendments to Section 15 of Act 32 of 2007 in its current form and recommends an approach where consensual sexual intercourse by children is decriminalised in general.

4. CLAUSE 3

SECTION 16 OF ACT 32

The proposed amendment is aimed directly at the statutory sexual assault, requiring also the difference of a two year gap between the adolescent in deciding whether or not criminal liability is a sanction that needs to be applied. The Constitution of the Republic of South Africa requires that any criminal liability to be imposed must be as a matter of last resort in matters dealing with the child. The Constitution in terms of Section 9(3) does not permit discrimination against children on the basis of their age. Therefore, once again one finds that the amendment proposed in Clause 3 is in conflict with the equality clause of the Constitution. Furthermore, even where two children aged 13 and 16 years consent to sexual intercourse their conduct is likely to constitute the crime of statutory sexual assault despite the proposed amendment. Under the circumstances the CGE does not support the proposed amendment herein in its current form and recommends an amendment which decriminalises consensual sexual activity of children in general.





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CLAUSE 4, 5 and 6

AMENDMENT OF SECTION 46, 47 and 48 OF ACT 32 OF

2007

The proposed amendments in all three Sections enumerated above seeks to amend sections 46, 47 and 48 of the Act, so as to provide clarity to the extent of the obligation in respect of a person whose particulars appear or are likely to appear in the Register to disclose such circumstances where it is relevant to the best interest of the child.

This stance is supported in line with the objectives of the CGE, due to the fact that it promotes a level of transparency that will ensure all those whose particulars are included or are to be included in the Register can be assessed in a manner that will not be prejudicial to them but also avoids a potential risk factor that must be guarded against in relation to dealing with specific circumstances. These specific circumstances could be a case where a primary school educator has been convicted of a sexual offence against a child and due to an administrative error this information was recorded in the Register. The School Governing Body (SGB) may appoint the educator concerned in good faith and two difficulties could arise. Firstly, the educator concerned could commit the offence again and secondly, in the event that the SGB discovers the error and seeks to take appropriate action then the educator concerned may challenge



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the SGB in terms of his right to privacy for example (his or her conviction was not recorded in the Register at the relevant time).

Under the circumstances the CGE supports the proposed amendments as proposed in Clauses 46, 47 and 48 which competes against the right of a convicted person to disclose his or her conviction for example and the best interest of the child, as there is no doubt that the best interest of the child trumps the right of person who has been convicted. In any event a person is generally, convicted in open court and such convictions are therefore, in the public domain since inception. Accordingly, the CGE commends such robust legislative developments by which are intended to protect our children.

CLAUSE 7

AMENDMENT OF SECTION 50(2) OF ACT 32 OF 2007

This amendment introduces the inclusion of a new paragraph (c) which is supported in as far as it enables a child who was convicted of a sexual offence against another child or a person who is mentally challenged an opportunity to address the court in order to ensure that they are not included in the Register.

This is aligned with the following human right guarantees :
freedom of expression, along with the right to a fair trial which is impartial and free of any prejudice.



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CLAUSE 8

AMENDMENT OF SECTION 51 OF ACT 32 OF 2007

The proposed process for the removal of one's particulars from the Register is one that allows for a judicial procedure to be initiated in the court *a quo*. Firstly, this is a judicial procedure and secondly the test for removal is on the basis of good cause. In respect of the test of *good cause* which requires amongst others, good conduct and rehabilitation, these are attributes that any society should seek to endorse. The CGE believes that the proposed amendment is not only in the best interest of society, but also in the best interest of the individual seeking restoration in a justice system that promotes natural justice. Accordingly, the CGE supports the proposal in Clause 8.

CLAUSE 10

AMENDMENT OF SECTION 67 ACT 32 OF 2007

The proposed amendment is a procedure that is both necessary and a normal practice. Accordingly, the CGE supports the proposed amendment in its current form.

CONCLUSION

The most important issue in this proposed amendment to the Criminal Law (Sexual Offences and Related Matters) amendment Bill is to bring sexual offences in line with the best interests of the child as set out in the Constitution.



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This initiative is necessary and required in terms of the common law developments that have taken place. The aforementioned supports the fact that the purpose of the proposed amendment is to cure a defect in the statutory provisions relating to sexual offences with reference to children. In this regard the issue was a directive by the highest court in the land to protect the best interest of the child by decriminalising consensual conduct of a sexual nature, between children. The rationale for the constitutional court's approach is that the punishment of normal sexual development will inflict severe harm on children in the form of immediate disgrace and future prejudice in their career as well as emotional development. It is also untenable in a modern constitutional democracy such as South Africa, which has embraced a progressive bill of rights, to roll back its gains by invading the intimacy and privacy of adolescents, in a manner that violates and assaults their right to dignity, privacy, psychological well being and future development. Such an approach cannot be condoned because it is impermissible to treat children in such a way that their actions lead to stigmatisation and degradation to an extent where they will become dysfunctional in society even before they have an opportunity to begin taking their place in society.

Furthermore, the approach in the Principal Act namely Act 32 of 2007 and to some extent the proposed amendments in Bill B 18-2014 are faulted in that an opportunity is created for discrimination against children. This is impermissible in terms of



the equality clause of the Constitution. It seems that the issue of legality is thrown out of the window in this instance because once a child is regarded as a person under the age of 18 years then one must be slow to disregard or limit the best interest of all persons who are under the age of 18 years because this will be a social injustice. In essence this is the issue that was raised by the Constitutional Court and the CGE supports the reasoning of the aforementioned court.

Accordingly, the aim of any legislation concerning the child, should create a frame work that seeks to protect the best interests of the child by making an attempt to preserve their right to dignity, freedom, security and privacy. Therefore, this proposed legislation is supported and the CGE wishes the Portfolio Committee on Justice and Corrections as well as the Department of Justice and Corrections the very best in their noble endeavours.

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