Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

Submission to the

Department of Justice

and

Constitutional Development

on the

Draft Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill

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1. Introduction

The Southern African Catholic Bishops' Conference welcomes the opportunity to comment on this legislation. It is extremely difficult to find the correct balance between the need, on the one hand, to respect children's rights to dignity and privacy and, on the other, the need to safeguard them from the consequences of premature sexual activity and experimentation. These consequences can be both physical, such as pregnancy or the spread of sexually transmitted diseases, and psychological and emotional, impacting on feelings of self-worth or resulting in inappropriate or negative behaviour in inter-personal relationships.

2. The need for amendments

The proposed amendments have come about as a result of the decision in the so-called Teddy Bear Clinic case (CCT 12/13 [2013] ZACC (3 October 2013)), in which the Constitutional Court struck down, inter alia, sections 15 and 16 of Act 32 of 2007.

In paragraph 97 of the judgement Justice Khampepe writes: *"In any event, I am highly doubtful that the introduction of criminal prohibitions could ever be shown to be a constitutionally sound means of preventing the occurrence of such risks as teenage pregnancy."*

She goes on to find, in paragraph 101, that *"sections 15 and 16 are unconstitutional insofar as they impose criminal liability on adolescents for engaging in consensual sexual conduct."*

2.1. Proposed amendments to ss 15 and 16

While these amendments purport to remedy the defects identified by the Con Court, we respectfully question whether they do. The new wording continues to impose criminal liability, albeit more restrictively. The introduction of the close-in-age defence in the proposed s 15(1)(b) goes only part of the way to decriminalising adolescent consensual sexual conduct. If the two people concerned ('A' and 'B') are both adolescents and within two years of age of each other, there will be no offence and thus no criminal liability. However, if the age gap is more than two

years, there will be an offence and a possible prosecution ('A' could be 15 and 'B' 12, both still children/adolescents). This clearly goes against the Court's judgement.

Over and above this, it appears that the proposed amendments to ss 15 and 16 proceed from the basis that 'A' will always be the older party. 'B' is the one who gives consent. However, this need not be so. It would be unusual, but not impossible, that an older child could give consent at the suggestion of a younger one. This would result in a possible prosecution of a 12 year old for an act carried out with the consent of a 16 year old. Once again, this does not comply with the Court's judgement. (See, in this regard, paragraph 78 of the judgement.)

As for the fact that the amendments grant a discretion to the Director of Public Prosecutions to decide whether or not to institute a prosecution, this does not rescue the sections from unconstitutionality. As the court noted in paragraph 76, *"[i]n principle, and as this Court has made plain, the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions. If the discretion to prosecute exists, the prospect of an adolescent being arraigned under the impugned provisions is ever-present. For the reasons set out above, any such prosecution will invariably infringe the best-interests principle, as well as the affected adolescent's rights to privacy and human dignity."*

Accordingly, we suggest that the draft amendments to ss 15 and 16 fail to give proper effect to the stipulations of the Court.

2.2. Proposed amendment to s 51

The Con Court clearly ordered that all criminal records pertaining to children who have been sentenced, or placed in diversion programmes, as a result of conviction under ss 15 or 16, should be expunged; and that any entries of such children's names in the Register for Sex Offenders should be removed – see paragraph 112 of the judgement and item 4 of the Court's order.

The proposed s 51(2A) seems to place the onus for removal of details on the Register on the child, contrary to the Court's order. Furthermore, s 51(2A)(b) gives the Registrar a discretion whether or not to remove these details, subject to certain conditions. No such discretion was contemplated in the Court's order.

It is also objectionable that the person applying for removal of his or her details from the Register should have to supply a clinical report and an affidavit (s51(2A)(a)(i) and (ii) respectively) and should have to do so at his or her own expense. Once again, this flies in the face of the Court's determination in paragraph 112. A child who was unconstitutionally convicted of contravening s15 or s16, and whose name was subsequently unconstitutionally placed in the Register, in clear violation of his or her privacy rights, should not have to justify the removal of that name, and should not have to pay the costs associated therewith. We suggest that the proposed amendment to s51 of the principal Act undermines the Court's order and fails to follow its reasoning.

3. Conclusion

We look forward to commenting further when these provisions are tabled in Parliament.

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