

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

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## Submission

*Submitted to*

The Director-General  
**Department of Justice and Constitutional Development**  
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*Prepared by*

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**30.10.2014**

## INTRODUCTION

The Gender, Health and Justice Research Unit at the University of Cape Town is an interdisciplinary research unit that unites scholars, NGOs and practitioners in pursuit of the elimination of violence against women and children in Southern Africa.

The GHJRU would like to thank the Department of Justice and Constitutional Development for the opportunity to comment on the Proposed Draft Bill that aims to remedy shortcomings in the Criminal Law (Sexual and Related Matters) Amendment Act, 32 of 2007 highlighted in the judgment delivered in the matter of the *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another (CCT 12/13) [2013] ZACC 35* (hereafter the ‘Teddy Bear Clinic Case’).

The submission set out herein is intended to compliment that of the Centre for Child Law (University of Pretoria) et al (hereafter CCL), to which the GHJRU is also a signatory.

Where we have recommended changes to the Proposed Amendment Bill, we have followed indicated these as follows:

- [ ] Words in bold type in square brackets indicate omissions from the Proposed Amendment Bill.
- Words underlined with a solid line indicate insertions into the Proposed Amendment Bill.

## THE AMBIT OF THIS SUBMISSION

This submission focuses on three areas of the Proposed Draft Criminal Law (Sexual Offences and Related Matters) Amendment (Amendment) Bill (hereafter ‘the Proposed Amendment Bill’) that was issued for comment by interested parties by 30 October 2014. These areas are:

1. Section 15(1)(b) relating to the age gap between children involved in acts of consensual sexual penetration with certain children.
2. Section 16(1)(b) relating to the age gap between children involved in acts of consensual sexual violation with certain children.
3. Section 50(2) relating to the National Register for Sexual Offenders.

Given that the substance of our concern in respect of sections 15(1)(b) and 16(1)(b) are the same, we deal with these under one heading below.

### **SECTIONS 15(1)(b) and 16(1)(b): THE TWO-YEAR AGE GAP LIABILITY EXCLUSION**

We note that the Proposed Amendment Bill has taken the two year age gap defence provided for by Section 56 of the Act in respect of acts of sexual violation of a child aged 12-15 years old, and incorporated a provision that limits the criminal liability of persons engaging in the proscribed conduct where both parties are children into both sections 15 and 16 of the Proposed Amendment Bill. The Unit welcomes the proposal that criminal liability be limited in cases where both parties are

children in this age group. We also welcome the fact that the Proposed Amendment Bill extends this limitation of liability to acts of sexual penetration as defined under the Act.

However, in our opinion, the proposed amendments fall short of fulfilling the mandate of the court in the Teddy Bear Clinic Case in ensuring the decriminalisation of consensual sexual conduct between adolescents in that:

- The retention of the two-year age gap means that *some* adolescents are still at risk of prosecution under the amended law. For example, these would include:
  - Children for whom there are more than two years age difference, such as a 12 and 15 year old.
  - Children who engage in sexual activity with a child in the age group 12-15, but who themselves fall out of this age range – for example where one party is 15 years old and the other 17 years old.

We argue that the two-year age gap proposed by the Bill in sections 15(1)(b) and 16(1)(b) (and contained in the original Act) is arbitrary, and does not take into account the large variations in maturity and development that can be evident in two children who are of the same chronological age. Conversely, the existence of a 3-5 year difference in age in and of itself is not indicative of differences in maturity or decision-making ability. In each of these instances, a determination of a child's ability to consent should rely on an individual assessment rather than the blanket application of an age determination.

Moreover, a two year age gap fails to take sufficient account of the social and educational realities of South African classrooms and communities where frequently children who are more than two years disparate in age are to be found learning and interacting in the same school, social and physical environments. For example, it is not uncommon for a seventeen and a fourteen year old to be in the same grade, sharing a desk in a classroom. Within this context, the development of social, romantic and/or sexual relationships that surpass the two year age difference are neither surprising nor inherently pernicious.

In addition, imposing a two-year age gap does not necessarily fulfil the goal of protecting less mature children from those who are older, more experienced, and more persuasive. Finally, prosecuting children who fall outside of this age gap runs the risk of falling short of the 'best interests of the child' standard.

Furthermore, our reading of the Teddy Bear Clinic case holds that the Court supported the view that the decriminalisation of consensual sexual conduct for teenagers between the ages of 12 and 15 years old was necessary to avoid the stigma associated with the investigation and possible prosecution of teens in this group, to recognise the agency of children in making decisions about themselves (and their sexuality) and to avoid the infringement of their rights as contained in the Constitution.

## **Recommendation**

We argue that the Court's intention can only be achieved if consensual sexual activity for children (including those in the age group of 12 to 15 years) is decriminalised completely. To this end, we recommend that the Proposed Amendment Bill be revised as follows:

### **Acts of consensual sexual penetration with certain children (statutory rape)**

15. (1) A person (“A”) who commits an act of sexual penetration with a child (“B”), is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child unless both A and B are children between the age of 12 and 15 years old at the time of the offence.

### **Acts of consensual sexual violation with certain children (statutory sexual assault)**

16. (1) A person (“A”) who commits an act of sexual violation with a child (“B”), is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child, unless both A and B are children between the age of 12 and 15 years old at the time of the offence.

In addition, in support of the position taken by the Centre for Child Law et al, we recommend the retention of the two year defence contained in section 56(2)(b). However, in light of our arguments set out above relating to the social context of children who may be peers, but not two years or less close in age, and who are not covered by the revisions to sections 15 and 16 set out above (i.e. are not both in the age group of 12-15 years), and whose behaviour is not pernicious per se, we recommend adding a clause (Section 56(2)(c)) that extends this defence as follows:

#### **Section 56(2):**

(2) Whenever an accused person is charged with an offence under section 15 or 16 –

(a) **[section 15 or 16,]** it is, subject to subsection (3), a valid defence to such a charge to contend that the child contemplated in those sections deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older; or

(b) **[section 16,]** it is a valid defence to such a charge to contend that **[both the accused persons were children]** the accused person was either 16 or 17 years of age at the time of the alleged commission of the offence and the age difference between [them] such accused person and the child contemplated in those sections was not more than two years at the time of the alleged commission of the offence.

(c) that the National Director of Public Prosecutions, in deciding whether to prosecute a case where the accused person was either 16 or 17 years of age at the time of the alleged commission of the offence, and the age difference between such accused person and the child contemplated in those sections was more than two years, must not automatically exclude consideration of an defence analogous to that provided in section (b) above.

### **SECTION 50(2): THE NATIONAL REGISTER FOR SEXUAL OFFENDERS**

The Proposed Amendment Bill provides presiding officers with ‘a discretion in order to decide in individual cases whether the particulars of children should be included in the National Register for

Sex Offenders or not' and 'to introduce a procedure in terms of which certain persons may apply for the removal of their particulars from the National Register for Sex Offenders'.

The Proposed Amendment Bill proposes that Section 50 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

- (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 paragraph (c), 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, in the case of any person other than a person referred to in paragraph (c)(i), explain the contents and implications of such an order, including section 45, to the person in question.

(c) Before making an order in terms of paragraph (a), the court must—

- (i) inform a person, who was under the age of 18 years at the time of the commission of the offence, of the court's power to make an order in terms of paragraph (a);
- (ii) receive and consider an assessment report compiled by a psychologist or psychiatrist duly registered or deemed to be registered in terms of the Health Professions Act, 1974 (Act No. 56 of 1974), or a social worker registered in terms of the Social Service Professions Act, 1978 (Act No. 110 of 1978), dealing with the likelihood whether or not the person will commit another sexual offence against a child or a person who is mentally disabled, as the case may be; and
- (iii) afford the person referred to in subparagraph (i) an opportunity to make representations why such an order should not be made,

where after the court may direct that the particulars of such a person not be included in the Register.

It also provides for the substitution for subsection (4) of the following subsection:

- (4) Where a court, for whatever reason, fails to make an order under subsection (2)(a), in respect of any person other than a person referred to in paragraph (c)(i), the prosecuting authority or any person must immediately or at any other time bring this omission to the attention of the court and the court must make such order/

While the amendment allows for a more measured approach with the consideration of an assessment report by a registered mental health professional, as well as an opportunity for representations to be made for why an order for the registration of an offender accused of a sexual offence should not be made, it is the opinion of these authors that **the registration of a child accused and convicted of a sexual offence is not in the best interests of these children**. We provide reasons for this below.

### **The Intention(s) of Sexual Offender Registers (SORs)**

International registers for sexual offenders fall into five broad categories:

- (i) registers that create certain employment restrictions for sexual offenders, for instance, working with children or within children's institutions (similar to South Africa's Criminal Law [Sexual Offences] and Related Matters Amendment Act of 2007);
- (ii) registers that impose specific post-sentence conditions or restrictions on sexual offenders such as no contact with children or victims directly victimised by the perpetrator, the location of housing that offenders occupy, or prohibitions in relation to living in proximity to a school or day care centre (similar to the types of conditions linked to parole);
- (iii) registers that require sexual offenders to notify authorities of their change of address, change of employment, arrest or conviction of any other offence as well as to report at regular intervals to police authorities (similar to general conditions linked to probation);
- (iv) registers that inform the public of the release of sexual offenders (notification registers); and
- (v) registers that permit the routine monitoring of sexual offenders (ranging from random to regulated monitoring).

SORs also vary in terms of:

- (i) the extent to which SORs may require participation in court-mandated sexual offenders' rehabilitation programmes;
- (ii) the length of time that convicted sexual offenders are registered;
- (iii) the conditions under which de-registration may occur, if at all;
- (iv) whether the registries are made public or are maintained private by the relevant authorities; and
- (v) the consequences of failing to comply with the conditions of the SOR.

While legislatures, policing and judicial authorities have rationalised SORs as mechanisms that reinforce protection of the community against sexual perpetration, research on SORs

overwhelmingly demonstrates that SORs have little to no effect in the prevention of sexual offences. In fact, in our review of empirical and clinical literature on SORs and related mechanisms to assess young sexual offenders, there were very few empirical studies that suggested that SORs have the desired impact of prevention or reducing recidivism. In fact, there is strong evidence that SORs have little to no deterrent effects or reduce recidivism and that the majority of juveniles who are arrested for a sexual offence never commit a sex crime again.

The lifetime registration of children or young offenders on SORs has been considered tantamount to ‘cruel and unusual punishment’ for the reason that they violate fundamental principles that require sentencing practices to distinguish between adult and child offenders<sup>1</sup>. While studies on juvenile sexual offending focus on different dimensions of offending – for instance, the nature/profile of offences, assessment and treatment of offenders, recidivism, personality and clinical profiles of offenders and comparability with juvenile non-sexual offenders or adult offenders – the literature unfailingly reinforces one position: young sexual offenders are different from adult sexual offenders. The current law does not take into account the differences in the nature of, and motivations for, offending, factors that precipitate offending behaviour, neurobiological and social development differences between children and adults, nor the rehabilitative potential of young sexual offenders.

Socio-legal scholarship on the use of SORs has raised similar themes regarding child and adolescent sexual offenders as above, for instance:

- The availability of and right to procedural safeguards to protect child offenders, including: informed judicial discretion, consideration of specific circumstances, assessment of risk and privacy. Obvious arguments against registering young sexual offenders on SORs have included that SORs violate the protective principles of the International Covenant on Civil and Political Rights (ICCPR) which prohibits arbitrary interference with a child’s privacy as well as the Convention on the Rights of the Child (CRC). Articles 16(1), 16(2) and 40 of the UNCRC are of relevance here. However, in some jurisdictions, the “privacy” argument has failed on the basis that conviction is (a) already a matter of public record or (b) adjudication of matters relating to the child are already confidential.
- That SORs, and other legal ‘interventions’ for young sexual offenders, require proper assessment measures not just ‘assessments’ per se. Where individual assessment of children is not part of the registration and maintenance of the registration process, “risk” and “continued” risk, an essential element of adjudicating young sexual offender for forensic and legal interventions and treatment, cannot be assessed<sup>2</sup>.
- That SORs violate the principle of individual sentencing.

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<sup>1</sup> Carpenter, C. L. (2013). Against Juvenile Sex Offender Registration. Available at: the Social Science Research Network (SSRN): <http://dx.doi.org/10.2139/ssrn.2319139>.

<sup>2</sup> See for example Hoge, R.D. (2012). Forensic Assessments of Juveniles Practice and Legal Considerations. *Criminal Justice and Behavior* 39(9), p. 1255-1270; Hempel, I., Buck, N., Cima, M., & van Marle, H. (2011). Review of Risk Assessment Instruments for Juvenile Sex Offenders: What is Next? *International Journal of Offender Therapy and Comparative Criminology*, 57(2), p. 208-228; Worling, J.R., & Langton, C.M. (2012). Assessment and Treatment of Adolescents Who Sexually Offend: Clinical Issues and Implications for Secure Settings. *Criminal Justice and Behavior* 39(6), p. 814-841.

- That SORs hinder the potential for reform (by removing opportunities). They are often more punitive in nature than rehabilitative and may deter children who commit sex offenses from later becoming productive members of society<sup>3</sup>.

### Adult versus Child Sexual Offenders

The literature on child sexual offenders reinforces the notion that adolescent cognitive functions are different than those of adults, for instance, juvenile sex offenders are less likely to use extreme forms of sexual aggression against their victims and are more compulsive (or less calculated) than adult offenders<sup>4</sup>. It also emphasises that very few juvenile offenders exhibit the same long-term tendencies to commit sexual offences as chronic adult offenders<sup>5</sup> and that juvenile sex offenders are more responsive to treatment than adult offenders due to their continuing psychological development<sup>6</sup>. Research has also powerfully illustrated the difference between childhood and adulthood (sexually) offending behaviours, in particular, the critical motivational, neurological, psychological and behavioural differences between young sexual offenders and adult sexual offenders, including the likelihood of children re-offending in adulthood. Research is also beginning to highlight the distinction between developmentally normative sexual behaviours and sexual offending, something that the substantive criminal law does not always take into account.

It has also been argued that registration requirements impose restrictions on young offenders that inhibit their ability to embrace a reformed life and is detrimental to young sexual offenders. Recalling that separate juvenile or 'child justice' systems were universally created and are predicated on the principles of rehabilitation and reintegration rather than punishment, the registration of young offenders seems counter-intuitive to these intentions. Not only does automatic registration onto a Registry conflict with the principles of youth justice and rehabilitation<sup>7</sup>, there is no connection – in most jurisdictions – between the prevailing laws and scientific knowledge about young sexual offenders<sup>8</sup>. By direct example, South Africa's Child Justice Act demonstrates a clear and undisputable recognition that juvenile and adult offenders should be treated differently in the criminal justice system. Automatically registering all convicted sex offenders regardless of whether they are

<sup>3</sup> Grover, A (2013). Delinquency and Punishment: The Impact of State v. Williams on Juvenile Sex Offender Registration in Ohio. *University of Cincinnati Law Review* 81(1), p. 291-311; 32; Justice Policy Institute (2008). Registering Harm: How Sex Offense Registries Fail Youth and Communities 5 (2008). Available at [http://www.justicepolicy.org/images/upload/08-11\\_RPT\\_WalshActRegisteringHarm\\_JJ-PS.pdf](http://www.justicepolicy.org/images/upload/08-11_RPT_WalshActRegisteringHarm_JJ-PS.pdf).

<sup>4</sup> See for Cauffman, E. and Steinberg, L. (2000). (Im)Maturity of Judgement in Adolescence: Why Adolescents May Be Less Culpable Than Adults. *Behavioural Sciences and the Law* 18(6), p. 741-760; Finkelhor, D., Ormrod, R., & Chaffin, M. (2009). Juveniles Who Commit Sex Offenses against Minors. *Juvenile Justice Bulletin*, December 2009, p. 1-12. US Department of Justice: Office of Juvenile Justice and Delinquency Prevention.

<sup>5</sup> See Lussier, P. and Blokland, A. (2013). The Adolescence-Adulthood Transition and Robins's Continuity Paradox: Criminal Career Patterns of Juvenile and Adult Sex Offenders in a Prospective Longitudinal Birth Cohort Study. *Journal of Criminal Justice*, 42(2), 153-163; Reingle, J. (2012). Evaluating the Continuity Between Juvenile and Adult Sex Offending: A Review of the Literature. *Journal of Crime and Justice* 35 (3), p. 427-434; Ronis, S., and Borduin, C. (2007). Individual, Family, Peer and Academic Characteristics of Male Juvenile Sex Offenders. *Journal of Abnormal Childhood Psychology* 35(2), p.153-163.

<sup>6</sup> See Grover, A (2013). Delinquency and Punishment: The Impact of State v. Williams on Juvenile Sex Offender Registration in Ohio. *University of Cincinnati Law Review* 81(1), p. 291-311; Letourneau, E.J., and Miner, M.H. (2005). Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo. *Sexual Abuse: A Journal of Research and Treatment* 17(3), p. 293-312; Reitzel, L. & Carbonell, J. (2006). The Effectiveness of Sex Offender Treatment for Juveniles as Measured by Recidivism: A Meta-Analysis. *Sexual Abuse: A Journal for Research and Treatment* 18(4), p. 401-421.

<sup>7</sup> See the UNCRC 1989, the Child Justice Act Child 75 of 2008 and child justice frameworks around the world.

<sup>8</sup> Vess, J., Day, A., Powell, M. and Graffam, J. (2013). International sex offender registration laws: research and evaluation issues based on a review of current scientific literature. *Police Policy and Practice* 14(3), p. 205-218.

juveniles or adults deliberately contradicts this principle and, as Letourneau et al. (2010) have argued, “is antithetical to the philosophy of [a system] which strives to balance community safety with the rehabilitative needs and rehabilitative potential of juveniles” (p.566). Carpenter (2013) even suggests that “mandatory lifetime registration applied to children in the same manner as adult offenders is cruel and unusual punishment because it violates fundamental principles that require sentencing practices to distinguish between adult and child offenders” (p. i-ii).

## Recommendation

In light of this evidence, and considering that South Africa currently does not use standardised instruments for young sexual offenders (and their risk of future offending or rehabilitation potential), it is recommended that section 50 excludes the automatic order for the registration of children under the age of 18, unless there are extremely compelling circumstances to demonstrate that a child is an exceptionally “high risk” offender.

In essence, we specifically recommend that the onus in these cases should be on the state to demonstrate why the young offender *should* be on the Register, as opposed to the child’s representative (at the child’s expense) presenting reasons for why the child *should not* be on the Register.

In cases where offences are serious, but fall short of the exceptionally “high risk” category, we recommend that the court may require participation in a court-mandated sexual offender’s rehabilitation programme as part of the sentence.

In light of the above, we endorse the additional provision proposed by the Centre for Child Law et al as follows:

Section 50(2):

(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.