9 October 2020

Parliamentary Portfolio Committee
on Justice and Correctional Services
Attention: V Ramaano
Email: Gbvbills@parliament.gov.za

Dear Sir

THE EMBRACE PROJECT NPC'S WRITTEN SUBMISSION ON THE CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT AMENDMENT BILL [B16-2020]

1. The Embrace Project welcomes this opportunity to make submissions to the Parliamentary Portfolio Committee on Justice and Correctional Services ("the Portfolio Committee") on the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill [B16-2020] ("the Amendment Bill").

2. The Embrace Project is a registered non-profit company which aims to "creatively combat" gender based violence. We provide an online platform for the sale of artwork donated by various South African artists and creatives who collaborate with our organisation. The proceeds of the art sales are paid out to selected grass-roots organisations already combating gender based violence in their own communities. These organisations are the beneficiaries of The Embrace Project. We also create awareness around gender based violence (its prevalence and causes) through our social media presence, while simultaneously working at changing the narrative around violence and disempowerment. Participating in the current legislative process is one such method.

3. We record our interest in making verbal representations should we be called upon by the Portfolio Committee to do so.

Purpose

4. The purpose the Amendment Bill is to increase the ambit of the Criminal Law (Sexual Offences and Related Matters) Amendment Act no 32 of 2007 ("the Act") by creating a new offence of sexual intimidation, extending the scope of the offence of incest and extending the reporting duty of persons who suspect a sexual offence has been committed against a child. Furthermore, the Amendment Bill broadens the scope of the National Register for Sex Offenders to include the particulars of all sex offenders, and it increases the length of time that an offender's particulars are required to remain on the register.

5. We commend the Portfolio Committee on this progressive piece of legislation.

Legislative suggestions

6. We note the use of the word "of" in section 17(4) of the Act instead of the word "or". We recommend that this typographical error be corrected.

7. In section 21 of the Act, the words "with or" are missing from the offence of compelling or causing a child to witness a sexual offence, sexual act or self-masturbation. The provision should read "with or without the consent of B".

Substantive comments

8. We recognise and commend the Portfolio Committee's inclusion of "sexual intimidation" as an offence proposed as section 14A of the Act, contained in clause 4 of the Amendment Bill.

9. We note that at section 1(2) of the Act there is an attempt to explain, as opposed to define, the meaning of "consent". We also note the circumstances under which such consent is not considered to be voluntarily given, in section 1(3) of the Act. We further note the Act's recognition of circumstances where an abuse of power or authority would inhibit a victim from indicating his/her unwillingness or resistance (at section 1(3)(b)) to participate in a sexual act. However, we recommend that consent be properly and separately defined in the Act. We recognise the contention in having to define consent, but stress the importance of doing so in order to avoid ambiguity in respect of a defence of consent being raised – both among the parties and the judiciary who adjudicate on sexual offences. Furthermore, we recommend that "coercive circumstances", under which consent may never be considered voluntarily given, also be defined in the Act. "Coercive circumstances", as alluded to in

section 1(3) of the Act, must provide for the power differentials that exist between the victim and the perpetrator – which has the effect of cancelling out even express consent given by the victim. "Coercive circumstances" are a violation of an individual's sexual autonomy and therefore affects the victim's ability to freely agree or voluntarily participate in a sexual act.[1] The South African Law Reform Commission ("SALRC") understood coercion to constitute more than just physical force or a threat thereof. It included "various other forms of exercise of power over another person: emotional, psychological, economical, social or organisational power," which would cancel out consent.[2] This progressive reform was included in the SALRC's discussion paper[3] on sexual offences but was unfortunately left out of the Act. We recommend that this be revisited.

10. We note that section 11 of the Act criminalises the purchase of sexual services so that not only the sale thereof, in terms of Section 20 of the Sexual Offences Act no 23 of 1957, is criminalised. We also note that prosecutions in respect of the commission of the offence in section 11 (which are committed predominantly by the male clients of sex workers) are minimal, whereas the prosecution and arbitrary arrest of sex workers (who are predominantly women) are much more frequent. Sex workers are discriminated against and stigmatised not only in society, but in every sphere of the public service (law enforcement and the health care sector). This reinforces gender inequality in a country where gender based violence is rife. Given that sex workers are particularly vulnerable to sexual offences, they do not have recourse to the criminal justice system where some members of the South African Police Services believe that a sex worker cannot be raped.[4] Sex workers are entitled to the same protections as every other citizen yet they become invisible to the law because of the nature and unlawfulness of their trade. If a total decriminalisation of the sex work industry is unpalatable to the Portfolio Committee, we recommend that the sale of sex (in terms of section 20 of the Sexual Offences Act) either becomes decriminalised or legalised; but that the purchase of sex (in terms of section 11 of the Act) remains criminalised. In that way, demand for sex work will remain prohibited, while sex workers themselves will no longer be subjected to prosecution or arbitrary arrest. This should assist in the removal of the social stigma around sex work and allow for the full enjoyment of sex

[1] *Kunarac*, ICTY. T. Chr., 22 February 2001 at para 457.
[2] SALRC Project 107(1999) Discussion Paper 85.
[3] *Supra*.
[4] South African Law Reform Commission Report, Project 107, *Sexual Offences: Adult Prostitution*, June 2015 at page 248.

workers' rights as a people of the Republic. Of course, the discrimination faced by sex workers will only be properly removed through the dedicated and regular sensitisation training of the relevant institutions (such as the South African Police Services).

11. We note that the Act criminalises the production, possession and supply of child pornography and pornography involving the mentally disabled in sections 18, 20, 24 and 26 of the Act. However, the Act does not consider all angles of the consumption of such pornography – where a consumer is not in possession as required by the Act for criminal liability. Most pornography users either subscribe or sign on to online pornography sites. There is currently no recourse against child pornography viewers or viewers of pornography involving the mentally disabled who are not in physical possession of the criminalised material. It is important to note that demand fuels supply. If the legislature is effectively to combat the child pornography industry and the pornography industry involving the mentally disabled, it is viewer demand that must be snuffed out. Just as the Domestic Violence Amendment Bill [B20-2020] makes provision for the production of information by electronic communications service providers in the proposed section 5B, so too should the Amendment Bill require that electronic communications service providers produce information on the identity and location of a viewer of child pornography or pornography involving the mentally disabled. This information should be made available to the South Africa Police Services and/or the National Prosecuting Authority when a *prima facie* case of viewing of child pornography or pornography involving the mentally disabled is made out. Comments left by viewers on pornography sites where the participant/s is/are clearly underage or mentally disabled, as well as the use of particular search words by pornography viewers, would be of assistance in establishing both a *prima facie* case and criminal liability in such instances.

12. In keeping with the theme of the use of technology to perpetrate sexual offences, we recommend that the Amendment Bill recognise and provide for cyber harassment, cyber sexual harassment, cyber sexual intimidation and cyber sexual exploitation. That is predominantly the medium through which such sexual offences are now perpetrated.

13. We note that the Act makes provision for the offence of the sexual exploitation of children and the mentally disabled in sections 17 and 23. We recommend that the category of vulnerable persons to which sexual exploitation applies be extended to include migrants, refugees and asylum seekers.

14. We commend the Portfolio Committee for the inclusion of the definition of "person who is vulnerable" in section 40 of the Act, contained in clause 5(c) of the Amendment Bill. However, we recommend that the words "under the age of 25 years" be deleted from paragraph (b) of the definition. A female, at any age, is vulnerable to the physical domination of a male perpetrator. In any event, paragraph (b) is contradicted by the inclusion of persons who are 60 years of age or older in the definition of vulnerable persons at paragraph (e). Paragraph (d) of the definition contains the phrase "persons with physical, intellectual or mental disabilities" in both the rider of that paragraph and at the end of it. The fact that the phrase appears twice in the same paragraph must be an error. Furthermore, we recommend that the additional conditions created by subparagraphs (d)(i), (d)(ii) and (d)(iii) of the definition be removed and that "persons with physical, intellectual or mental disabilities" suffices as a category of vulnerable persons without additional qualification. Most importantly, we recommend that migrants, refugees, asylum seekers and sex workers be included in the definition as additional categories of vulnerable persons.

15. We commend the Portfolio Committee's expansion of the National Register for Sex Offenders ("the Register") to include the particulars of all sex offenders, as well as increasing the length of time that an offender's name is required to remain on the Register. That said, paragraph 2.1(c)(iv) of the memorandum on the objectives of the Amendment Bill states that an object of the Amendment Bill is to provide for certain particulars of persons who have been convicted of sexual offences to be made publicly available, yet the amendment to section 44 of the Act in clause 9 of the Amendment Bill, or any amendment for that matter, does not provide for that. We therefore recommend that the Register be made publically available on the website of the Department of Justice and Correctional Services. For purposes of the public register we suggest that only the particulars described in sections 49(b)(i) and 49(b)(iv) of the Act be made available on the website, and accompanied by a mandatory recent photograph of the offender. The last known area in which the offender resided should also be included in the particulars (the precise address, for purposes of the public register should not be included). The remainder of a sex offender's particulars contained in section 49 may be obtained through the application of a certificate as already provided for by the Act. The public register should remain up to date in terms of section 50(8)(a) of the Act.

16. Should the aforementioned recommendation, which would assist the Portfolio Committee in attaining one of the objects of the Amendment Bill, be considered, section 52 of the Act,

which criminally sanctions the releasing of information pertaining to the Register, will necessarily be required to be deleted. If not the whole of section 52, then at least sections 52(3) and 52(4) of the Act.

17. We note that, although the cautionary rule that was once applicable to victims of sexual offences was abolished by section 60 of the Act, a cautionary approach is still applied by the criminal justice system in respect of such victims. According to a 2016/17 crime survey, only 35.5% of sexual offences are reported to the South African Police Services.[5] Of the 35.5% of sexual offences reported, between 40%-60% of them are withdrawn by either the South African Police Services or the National Prosecuting Authority, predominantly on the basis that the charges are 'false'.[6] There is a widely held view by police personnel that women lie about rape to, for example, blackmail their ex-lovers into paying maintenance.[7] A 2017 report revealed that only 8.6% of reported cases see a successful conviction.[8] This cautionary approach to victims can only be effectively eradicated through sensitisation training, which is already provided for in section 66 of the Act. Provision is made for both the National Prosecuting Authority (in section 66(2)(b)) and the South African Police Services (in section 66(1)(b)) to undergo such training. The fact that the Act provides for sensitisation training but that the criminal justice system continues to perpetrate secondary victimisation means that these provisions are either not being implemented at all, or are not being implemented properly. It also means that the monitoring mechanisms provided for in section 65 of the Act are ineffective. We request that the Portfolio Committee look in to the reasons for the provisions' ineffectiveness and amend the Act accordingly.

General comments

18. We recommend that the Amendment Bill provide for preventative measures in respect of sexual offences. A part of these measures should include a rehabilitation programme for sex offenders that is evidence-based, so as to prevent sex offenders from perpetrating the same crimes in future. Correctional services facilities should not exist purely for punitive purposes, but for rehabilitative purposes as well. Because correctional services facilities have some of the most violent environments, coupled with an abuse of power by

[5] 2016/2017 Victims of Crime Survey in Fourth Respondent's Submission at para 35.2.3 in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16.
[6] 2000 report by the Information Analysis Centre in L Artz and D Smythe, 'Should we consent: Rape Law Reform in South Africa' Juta 2008 at pg 200.
[7] L Artz and D Smythe, 'Should we consent: Rape Law Reform in South Africa' Juta 2008.
[8] South African Medical Research Council, 'Rape Justice in South Africa' 2017 report.

correctional services authorities, they are not conducive for releasing rehabilitated offenders back into society subsequent to the serving of a prison sentence. The system therefore requires an overhaul.

19. We note that, in November 2019, a Kwa-Zulu Natal magistrate, Kholeka Bodlani, sentenced a father who was convicted of having raped his 11 year old daughter to a wholly suspended 5 year sentence because he was a good father. In September 2018 the Western Cape High Court's Judge Binns-Ward found, in mitigation in the sentencing of a rape accused, who had repeatedly raped a child under the age of 16 (being statutory rape at the very least), that the accused had a history of prior *consensual* intercourse with the victim who was 13 years old; there was no actual violence used other than *forced* sexual intercourse; and that the accused stopped his assault when the victim started bleeding.[9] For these reasons the learned judge held, in dissent, that the accused's sentence should be reduced. Such findings and sentences should not exist at the highest level of our criminal justice system in this day and age. We therefore recommend that the Amendment Bill provide for compulsory and regular sensitisation training, and effective accountability mechanisms, for the judiciary and not only the National Prosecuting Authority and the South African Police Services.

20. In addition to sensitisation training, a public education campaign is required to dispel myths about sexual offences, as well as educate the public on the issue of consent. The Amendment Bill should provide for the development of specialised curricula, by the Departments of Basic and Higher Education, aimed at eradicating harmful practices, beliefs, attitudes and stereotypes among children, which perpetuate gender based violence and violence in general. The curricula should address consent, bodily autonomy, 'safe sex' and appropriate inter-sex conduct. This could form part of the Life Skills and Life Orientation curricula at school. Educators teaching these curricula would also require specialised training.

21. Lastly, we recommend that the Portfolio Committee consider reforming the law of evidence applicable to sexual offences victims. We recommend that the Portfolio Committee look to the International Criminal Court ("ICC") for their Rules of Procedure and Evidence for victims of sexual violence. Rule 72 requires that, when being tried before the ICC for sexual violence, any evidence put forward by the accused may not be adduced during the trial without warning. In terms of the ICC Rules, notice must first be given to the Court. The

[9] *Zamla v S* (A207/2016) [2018] ZAWCHC 130 (25 September 2018) at paras 1 to 44.

notice must describe the substance of the evidence and its relevance. To determine whether or not this evidence will be admissible, the Court must hear the views of the prosecution, the defence, the witness/es and the victim in a closed hearing. From there the Court is required to weigh up the degree of the probative value of the evidence against the prejudice it may cause. If the evidence is found to be admissible, the Court states on record its reasons for deciding so. Only then may such evidence be adduced by the accused at trial.

Conclusion

22. The Act is already a particularly progressive piece of legislation. All it requires is effective implementation. We commend the Portfolio Committee on the additions that it has made to the Act, and we hope that our recommendations will assist the Portfolio Committee in bringing about the effective implementation of the Act, and the objectives of the Amendment Bill.

23. Should you have any queries, please do not hesitate to contact us.

Yours faithfully

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